

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

**CRIMINAL APPEAL NO.398 OF 2017
WITH
INTERIM APPLICATION NO.559 OF 2020**

Rupesh Parshuram Fulare,
Age : 29 years,
R/o. Ghosale, Taluka Roha,
District Raigad.
(at present lodged in Amravati Central Prison)...Appellant
V/s.

The State of Maharashtra,
(Notice to be served upon A.P.P.,
High Court, Appellate Side, Mumbai) ...Respondent

**WITH
CRIMINAL APPEAL NO.1061 OF 2017
WITH
INTERIM APPLICATION NO. 247 OF 2020**

Maya @ Mahendra Mukund Kamble,
Age : 20 years, Occupation: Student,
R/at: Virzoli, Taluka Roha, District Raigad,
(at present lodged in Roha Police Station,
Raigad) ...Appellant
V/s.

The State of Maharashtra,
(at present instance of Roha Police Station,
Raigad) ...Respondent

Mr. Kunal D. Ambulkar, Advocate for the Appellant in Appeal No.398 of 2017.

Mr. Gaurav Parkar, Advocate for the Appellant in Appeal No.1061 of 2017.

Ms. Devyani Kulkarni, Advocate for Respondent No.2 in both Appeals.

Mr. S. V. Gavand, APP for the Respondent – State.

CORAM	: PRAKASH D. NAIK, J.
DATE OF RESERVING JUDGMENT	: 21st APRIL, 2022
DATE OF REVISED HEARING	: 8th JUNE, 2023
DATE OF PRONOUNCING JUDGMENT	: 19th JUNE, 2023

JUDGMENT:

1. These Appeals are preferred under Section 374 of the Code of Criminal Procedure, 1973 (for short 'Cr.PC.') challenging the judgment and order dated 29th March 2017 passed by learned Additional Sessions Judge, Special Court, Mangaon, District Raigad in Special POCSO Case No.40 of 2015. The Appellant in Criminal Appeal No.398 of 2017 is convicted for the offence punishable under Section 376(f)(i)(n) of the Indian Penal Code, 1860 had sentenced to suffer rigorous imprisonment for 10 years and fine of Rs.2,000/-. He is also convicted for offence under Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and sentenced to suffer imprisonment for 7 years and to pay fine of Rs.2,000/-. He is further convicted under Section 5(l) read with Section 6 of the POCSO Act and sentenced to suffer imprisonment for 10 years and fine of Rs.2,000/-. The Appellant in Criminal Appeal No.1061

of 2017 is convicted under Section 376(f)(i) of the Indian Penal Code, 1860 and sentenced to suffer imprisonment for 10 years. He is also convicted for offence under Section 3(a) read with Section 4 of the POCSO Act and sentenced to suffer imprisonment for 7 years. Substantive sentence of imprisonment was directed to run concurrently.

2. The prosecution case is as under:-

- (i). The victim girl resides with her parents at Virzoli, Taluka Roha. She was 15 years old during the relevant period of incident. Accused Nos.1, 3 and 4 resides at Virzoli. Accused No.2 resides at village Ghosale. Accused No.1 was serving in Mumbai. Accused No.1 used to come to Virzoli on the occasion of festivals and during holidays.
- (ii). Accused No.1 approached the victim girl and asked her whether she will come along with him. He told her that he will give money. Accused No.1 took the girl in his new house. He committed penetrative sexual assault upon her. He gave Rs.20/- to her. He again committed sexual intercourse with her on two days.
- (iii). Work of construction of the house of Raju Dhumal was in

progress at Virzoli. Accused No.2 was doing the work of mason at construction work. Victim girl was also doing work at new construction. Accused No.2 took the victim on his motorcycle to a forest area namely 'Kharna'. Accused No.2 asked the victim girl about sexual intercourse by giving Rs.100/-. He committed rape on victim girl in forest area and gave her Rs.100/- and left her at Virzoli. After few days, Accused No.2 again took the victim girl in a area namely Shetadi at village Uchel and committed sexual intercourse. Accused No.2 had committed such acts on four occasions and on each occasion, he gave Rs.100/- to the victim girl.

- (iv). Work of construction of the house of Nitin Kamble was in progress at village Virzoli. Accused No.3 was doing the work as Mason at the construction site of Nitin Kamble. Accused No.3 met the victim girl and asked her if he comes to meet her during night she will sleep with him. He also told her that he would pay money to her. Accused No.3 entered the room of house of victim girl, where she had slept and committed sexual intercourse

with her. He gave her Rs.20/-. He committed such act on two occasions.

- (v). Accused No.4 asked the victim girl whether, she would accompany him. He took the victim girl to his old house and committed sexual intercourse with her.
- (vi). The victim girl was pregnant. The father of victim girl suspected about her pregnancy. The victim did not disclose the name of any accused to her father. Meetings were called in the village four times. In the said meetings, the victim girl disclosed the name of Accused No.2. However, no decision was taken. The victim girl went to Roha Police Station along with her father and lodged the F.I.R. On 5th September 2015, the victim was carrying pregnancy of 8 months.
- (vii). F.I.R. was registered vide C.R. No.152 of 2015 with Roha Police Station. The victim girl was sent for medical examination at Civil Hospital, Raigad-Alibaug. During investigation the victim girl delivered the child. The victim delivered a male child. DNA test was conducted. The statement of victim girl was recorded under Section

164 of the Cr.P.C. On completing investigation, charge-sheet was filed.

3. The prosecution examined PW1-victim girl, PW2-Dr. Ashwini Premnath Patil, PW3-Jaywant Kashinath Shinde, PW4-Shantaram Rama More, PW5-Riya Rajesh Jadhav, PW6-Dr. Ramesh Mohanrao Karad, PW7-Sarita Rameshrao Jaywant, PW8-Sharad Ganpat Nakti and PW9-PSI, Balkrishna Kashinath Salvi. The documentary evidence mainly consists of F.I.R. at Exhibit-30, spot panchanama at Exhibit-45, spot incidents at Exhibit-47 and 51, seizure memo at Exhibit-52, medical examination report at Exhibit-56, 57 and 59. Letters issued to medical officers at Exhibit-60. Birth extract and school leaving certificate of victim at Exhibit 70 and 71, statement of victim girl under Section 164 of the CRPC at Exhibit 80 and DNA test reports at Exhibit-81 to 83.

4. The trial court recorded the evidence of witnesses and the statement of accused under Section 313 of the CRPC. On analysing the evidence, the accused were convicted. The Appellants were original Accused Nos.2 and 4. The appellants were convicted and sentenced to suffer imprisonment and fine as stated above. The Accused No.1 is convicted for the offence under Section 376(f)(i)

(n) of IPC and sentenced to imprisonment for ten years and to pay fine of Rs.2,000/-. He is also convicted for the offence punishable under Section 3(a) read with Section 4 of POCSO Act and sentenced to suffer imprisonment of seven years and fine of Rs.2,000/-. He is further convicted for the offence punishable under Section 5(j)(ii)(l)(p) read with Section 6 of the POCSO Act and sentenced to suffer imprisonment for ten years and to pay fine of Rs.2,000/-. Accused No.3 is convicted for the offence punishable Section 376 (f)(i)(n) of IPC and sentenced to suffer imprisonment of ten years and to pay fine of Rs.2,000/-. He is also convicted for the offence punishable under Section 3(a) read with Section 4 of POCSO Act and sentenced to suffer imprisonment for seven years and to pay fine of Rs.2,000/-. He is further convicted for the offence punishable under Section 5(l) read with Section 6 of POCSO Act and sentenced to suffer imprisonment for ten years and to pay fine of Rs.2,000/-.

5. Learned Advocate Mr. Parkar appearing for the Appellant in Criminal Appeal No.1061 of 2017 submitted as under:-

- (i). The Appellant is falsely implicated in the case. The evidence adduced by the prosecution suffer from serious

discrepancies;

- (ii). There is delay in lodging F.I.R. The F.I.R. has been lodged after the period of about 8 months from the date of incident.
- (iii). The DNA report exonerates the Appellant. It is incriminating against Accused No.1.
- (iv). The prosecution has not adduced cogent evidence to prove the age of the victim. Birth certificate was not proved. It is not established that victim girl was minor at the time of alleged incidents.
- (v). There is no corroborative evidence to establish that the Appellants have subjected the victim girl to sexual assault.
- (vi). The prosecution is solely relying upon the version of the victim girl. She went on improving her version. No reliance can be placed on her evidence to convict the Appellant.
- (vii). Meetings were held in the village and several boys of the village were asked to remain present in the meeting. The victim had not disclosed the name of the Appellant. She

gave different versions on different occasions.

(viii). On the basis of the evidence adduced by the prosecution, the trial Court should not have convicted the evidence.

(ix). The victim girl had deposed that she was in love with Accused No.1. She did not have any grudge against him. She did not disclose the name of Accused No.1 to anybody, which indicates that she wanted to protect him and implicate others.

(x). The trial court failed to take into consideration the improvements, omissions and contradiction from the evidence of PW1.

(xi). The victim girl initially disclosed the name of Accused No.2 alleging that he had subjected her to sexual assault as he was from the other village and did not disclose the names of the other accused who were from her village. The conduct of complainant is suspicious and lacks credibility. PW3 produced the card about the treatment given by primary health center to the victim girl. The entry in the card revealed that treatment was given to the victim on 14th July 2015 to 11th August 2015. Thus, her

family members were aware about the pregnancy of the victim. On 14th July 2015 and 11th August 2015, even prior to that she was examined by the Doctor. However, the F.I.R. was lodged on 5th September 2015. There is inordinate and unexplained delay in lodging the F.I.R.

(xii) The trial Court has ignored the Radiologist report.

6. Learned Advocate Mr. Parkar has relied upon the following decisions:-

- (i). Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors. reported in (AIR 1982 SC 1297).
- (ii). Ravinder Singh Gorkhi Vs. State of UP, reported in ((2006) 5 SCC 584).
- (iii). Rajesh Sardiwal Vs. State of Maharashtra, reported in (2015 SCC Online Bom 6367).
- (iv). Kaini Rajan Vs. The State of Kerala in Criminal Appeal No.1467 of 2013 dated 19th September 2013.
- (v). Ajitkumar Kumarsingh Bhagora Vs. State of Gujarat, reported in Criminal Appeal No.1110 and 845 of 2017.
- (vi). Lall Bahadur Kami Vs. The State of Sikkim, reported in (2018 All MR (Cri) 21).
- (vii). Ranjit Rajbanshi Vs. The State of West Bengal & Ors., in C.R.A No.458 of 2018 dated 17th September 2021.

(viii). Deepak vs. The State of Maharashtra, reported in (2017 All MR (cri) 2058).

(ix). Ravi Anandrao Gulpude Vs. The State of Maharashtra, reported in (2017 All MR (cri) 1509).

7. Mr. Ambulkar appearing for the Appellant in Criminal Appeal No.398 of 2017 reiterated the submissions advanced by learned Advocate Mr. Parkar. It is submitted that the Appellant has been falsely implicated in this case. The evidence of victim girl does not inspire confidence. Her evidence which is not corroborated by any other evidence cannot be relied upon to convict the Appellant. The DNA report exonerates the Appellant. The victim has kept on changing version. There is inordinate delay in lodging FIR. The prosecution has failed to prove that victim is minor. Meetings were called in village. Initially the victim did not disclose names of accused. Subsequently she implicated Appellant and thereafter FIR was lodged against four persons. The DNA report exonerated Appellants, conviction cannot be based on shaky evidence of victim girl. Radiologist report creates doubt about claim of prosecution regarding age of victim girl.

8. Learned APP submitted that the victim was minor at the time of incident. Prosecution has established that the Appellants have

subjected the victim to sexual assault. The victim hails from poor family. The accused induced the victim for physical relationship by offering money. The victim was repeatedly subjected to the sexual assault. The age of the victim has been proved. There was no serious challenge to the age of the victim. The victim had referred to her age in the evidence. There was no cross-examination by the defense to discard her version. Although, the DNA report opines that Accused No.1 is the biological father of the child born to the victim, the evidence on record establishes that the other accused have also sexually assaulted the victim. The trial court has taken into consideration, presumption under Sections 29 and 30 of the POCSO Act. There is no reason for the victim to falsely implicate the Appellants. The testimony of the victim girl is sufficient to convict the accused. The evidence of victim inspires confidence. The offence is of serious nature. The accused had subjected the victim girl to sexual assault by taking disadvantage of situation. She was repeatedly sexually assaulted. The documents relating to the age of the victim were proved and it is established that she was minor at the time of incident.

9. Learned Advocate appearing for Respondent No.2 victim,

submitted that the evidence of victim is reliable. She did not know the consequences of the Act. She was minor. Birth certificate of victim is proved. Discrepancies in evidence are minor in nature. Meetings were held in the village. The victim has named the accused and attributed specific role to them having sexually assaulted her.

10. Ms.Kulkarni has relied upon the following decisions:-

- (i). Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors. (2004) 4 SCC 158.
- (ii). State of Himachal Pradesh Vs. Sanjay Kumar alias Sunny, (2017) 2 SCC 51.

11. PW1 is the victim girl. She gave her age at the time of recording her evidence as 16 years. The trial Court had put up some questions to the victim girl and considering the answers given by her, the Court was satisfied that the witness knows the sanctity of giving evidence on oath. She stated that though she studied up to 7 Standard, she can't read, write and sign. She cannot give her date of birth. She resides at village Virzoli alongwith father and other family members. Two months prior to birth of her child, her mother had expired when she was about three years old. She had gone to Dr. Ashwini. Doctor told her that

she is pregnant. She knows the villagers of Virzoli. She knows accused Nos.1, 2, 3 and 4. Accused No.2 resides in village Ghosale. Accused No.1, 3 and 4 are from village Virzoli. Photographs of the accused pasted on the attest form were shown to her. She identified the photographs of Accused Nos.1 to 4 by their names correctly. She stated that Accused Nos.1, subjected her to sexual intercourse and gave her Rs.20/-. Accused No.1 repeated the act after one or two days. She was doing labour work where accused No.2 was working as Mason. Accused No.2 took her to forest area and committed sexual intercourse. He gave her Rs.100/-. Accused No.2 took her at village Uchel four times and committed similar act. He gave her Rs.100/- each time. Accused No.3 visited her work and committed sexual intercourse. He gave her Rs.20/-. He again committed similar act and gave her Rs.20/-. Accused No.4 took her to his old house and committed sexual intercourse. The first incident of rape is committed by Accused No.1 and then other accused committed sexual assault. She did not disclose incidents immediately to anyone. When she was pregnant, meeting was called at village Virzoli at the instance of her father. Initially, she did not disclose name of any accused to her father. She disclosed name of Accused No.2 first. The accused

had threatened her and due to fear, she did not disclose names of accused. Accused No.2 reside at Ghosale. Therefore, she disclosed the name of Accused No.2 only and did not disclose names of other accused. The relatives of three accused also reside at Virzoli. Meeting was held. She attended meeting. In the meeting, Accused No.1 refused to marry her. She lodged F.I.R. against Accused Nos.1 to 4 at Roha Police Station. She was taken for medical examination. She delivered child. She was not aware about the conveyances of intercourse. Financial condition of family is poor. Her father is agricultural labourer. For eating food, she took money from accused. The accused were known to her before incident, therefore, she was having trust on them.

12. In the cross-examination, she stated that Accused No.1 was known to her since her childhood. Accused No.1 used to talk with her outside her house. Behind back of her aunts, she used to talk with Accused No.1. Whenever Accused No.1 was returning to Virzoli, he used to meet her outside her house. They used to like each other. He was not interested in getting married to her. Before lodging F.I.R., she did not disclose about her pregnancy from Accused No.1 to her family members. Till lodging F.I.R., she was

not having any grudge against Accused No.1. At the time of lodging F.I.R., there were other female members. At that time, they told her that the paternity of the child can be ascertained, therefore, she disclosed the name of Accused No.1 at that time. Now she is not ready to marry with Accused No.1. Ashwini Tai did not ask her from whom she became pregnant. Till the meeting of villagers at Virzoli, she did not disclose the name of any accused to her family. After returning from Ashwini Tai, she did not go to other hospital. Meeting of villagers was called at village Virzoli. The family members of Accused No.1 did not attend the meeting of the villagers. Accused No.1 also did not attend meeting. Prior to the meeting of the villagers, she did not inform Accused No.1 about her pregnancy. She did not inform her friends and family members about the name of the accused after returning from Ashwini Tai. Accused Nos.3, 4 and their family members did not attend the meeting of villagers. There are about 40 houses in village. There are houses between house of victim and accused. Accused No.1 took her for the first at night time. She did not refuse to accompany him. Second time she went with Accused No.1 during night. When Accused No.2 asked her to accompany him, she did not resist or refuse to accompany him. Second time

also she did not resist. Meeting was held at village Virzoli and she had attended that meeting. She denied that in the meeting there was discussion about 25 boys and 5 boys were called at the meeting. In the meeting, she told the members about four incidents committed by Accused No.2 with her. She did not tell the members full details of the four incidents committed by Accused No.2. She did not state before the Police at the time of lodging F.I.R. the details of four incidents committed by Accused No.2 with her which she stated in the cross-examination. In the meeting villagers asked her from whom she became pregnant and she told villagers that she was pregnant from Accused No.1. Till lodging F.I.R., she did not disclose to anybody about the incidents committed by Accused No.3. There were no friendly relations with Accused No.4, prior to the incident. Till lodging of F.I.R., she did not disclose the incident committed by Accused No.4 with her. She did not refuse to accompany Accused No.4. She did not lodge complaint after incidents. In the meeting held at village Virzoli, she told the name of Accused No.1. She denied that her father was insisting Accused No.1 to perform marriage with her. She had gone to Roha Police Station to lodge F.I.R. against Accused No.1. As per say of her father, police prepared complaint. As per the

F.I.R., she stated before the JMFC, Roha. She went to the Police Station along with her father and maternal uncle. They told the Police to record her complaint. Contents of F.I.R. were not read over to her. The tenor of cross-examination indicate that accused are admiring most of the circumstances. There is no cross-examination about the age of the victim. Although, the victim had not given date of birth, the victim had given her age at the time of deposition. The evidence of victim depicts her innocence and gives indication of speaking truth. The defence has not come out with effective cross-examination attributing any motive to the victim girl to falsely implicate the Appellants.

13. PW2-Ashwini Patil is medical practitioner at Virzoli, Taluka Roha. She has deposed that there is primary health sub-center at village Virzoli. She knows the victim girl, she is her patient. She came to know that victim girl has health problem. The staff of primary health center met her and told that the victim girl is insisting for her examination by her. She examined the victim girl. The result was positive about pregnancy of victim girl. Police recorded her statement on 9th September 2015. 6 to 7 months prior to 9th September 2015, the victim had approached her. She

did not ask victim from whom she became pregnant. The victim also did not disclose her about it. In September, the victim girl delivered the child.

14. PW3-Jayawant Shinde is attached to primary health sub-center as health attendant. He used to give first aid treatment to the villagers of Virzoli. He knows the victim girl. Dr. Ashwin Patil was requested to carry the urine test of the victim girl. Dr. Patil carried the urine test of the victim girl and the result was positive. Victim was pregnant. In August 2015, he came to know about the pregnancy of victim girl. He did not inform about it to her family members. There is entry in the record of the primary health sub-center about the pregnancy of the victim girl. He produced the card maintained by the health sub-center about the treatment given to the victim girl. As per the entries in the card, there is no medical follow up of the victim in the month of September 2015 and October 2015. There is no entry in the card about the date of delivery and place of delivery of the victim girl. Entries are effected in the card after enquiry with the victim girl. The name of the husband of the victim girl is not mentioned.

15. PW4-Shantaram Rama More, is the father of the victim girl.

He stated that the victim girl is educated till 7th Standard but she cannot read and write. She had left the school. Meeting was held in the village, since the victim was pregnant. He enquired with the victim girl about the pregnancy. She told him about the name of Accused No.2. Meeting was held at village and Accused No.2 was called in the meeting. He attended the meeting. He denied sexual relations with the victim girl. He was advised to approach police station. He went to Roha Police Station alongwith victim girl. She lodged the F.I.R. He was outside police station. Lady officer was present at the time of recording the F.I.R. After lodging F.I.R., he came to know that the victim girl gave names of accused. Except Accused No.3, all are from village Virzoli. Victim was taken to hospital. In the cross-examination, it is stated that in both the meetings, except the name of Accused No.3, the victim girl did not give details of incidents with Accused No.2. Till lodging F.I.R., the victim girl did not disclose him the names of other three accused and details of incidents with Accused No.2. They had gone to Roha Police Station for lodging F.I.R. against Accused No.2. Police told him the names of other accused involved in the crime. Victim girl did not disclose him the details about incidents between her and the other three accused. The villagers of Virzoli never told him

that the victim girl was moving along with the accused. At the time of meeting of villagers, Accused No.2 and his relatives were present. No cross-examination was effected on the age of victim girl. This witness had no motive to falsely implicate accused.

16. PW5-Riya Rajesh Jadhav is a Police Constable. She was attached to Roha Police Station. According to her, victim came to the Police Station on 5th September 2015 and lodged the F.I.R. It was recorded in question and answer form. The victim girl lodged the FIR against accused Nos. 1 to 4. She produced the victim girl before the medical officer of Civil Hospital, Raigad. PSI Salve investigated the crime. The father of victim girl and some persons were with her when she came to Roha Police Station to lodge the F.I.R. It did not happen that victim girl had come to Roha Police Station, initially for lodging F.I.R. against Accused No.1. She had come to lodge F.I.R. against Accused No.2. At the time of recording F.I.R., victim did not explain the delay of lodging the F.I.R. The victim girl did not state the exact date and time of the incidents.

17. PW6-Dr. Ramesh Karad was serving as Gynecologist. He was attached to Civil Hospital, Alibagh. He examined the victim girl on 6th September 2015. She was pregnant. She narrated the

history of sexual relations with four persons. The age of the victim was 16 to 17 years. For ascertaining her age, she was examined by radiology. Sonography was conducted. As per the report of Radiologist, the age of the victim girl is between 14 to 18 years. As per Sonography, the victim was carrying eight months pregnancy. In the cross-examination, he stated that 14 days prior to last menstruation period, there must be a sexual intercourse with the victim. The victim girl was not knowing her last M.C. period. For pregnancy of victim girl, the intercourse might have taken place by the end of January 2015 to beginning of February 2015. After M.C. period, if there is intercourse in between 14 days or 28 days, there is chance of pregnancy. After the date of the pregnancy of a female, there can be intercourse during further period of two months. The said intercourse no way affect pregnancy.

18. PW-7-Sarita Rameshrao Javanjal is working as Counsellor. On 5th September 2015, she was called at Roha Police Station. Victim was present at the Police Station. F.I.R. was lodged by the victim. The victim was pregnant. The victim girl narrated the entire incident. The F.I.R. contains whatever the victim girl

narrated about the incident and whatever answers given by her to the questions put to her. At the time of recording FIR of victim girl, her near relatives were not present. The victim girl narrated the entire incident.

19. PW8-Sharad Ganpat Nakti, is the villager. He stated that the father of victim made a grievance before them about pregnancy. Meeting was called at the village. The victim girl disclosed name of accused No.2. She told that Accused-Rupesh had taken her 2 to 3 times. Accused present at the meeting and he denied the allegations. The father of victim girl was advised to take legal action. Complaint was lodged. He knows the accused were residents of Vizroli. Three days prior to lodging of F.I.R., a meeting was held at village Virzoli. About 100 villagers attended the meeting. Prior to the meeting, the victim girl did not disclose the name of any boy. In the joint meeting of villagers about 25 young boys were present. Rupesh Machivale and Nathuram Fulare are residents of village Ghosale. They were present at the meeting. It is not true that in the said meeting the victim girl pointed to Rupesh Machivale and Nathuram Fulare. In the said meeting accused No.2 denied the allegations against him and therefore the

question of proposal by father of victim girl about marriage or compensation did not arise. In the meeting of villagers, the victim did not disclose names of Accused No.1, 3 and 4. After the meeting, victim went to Roha Police Station to lodge FIR against Accused No.2.

20. PW9-Balkrishna Kashinath Salve was attached to Roha Police Station as PSI. He stated that he sent the victim girl for medical examination. He conducted investigation. He arrested accused. He recorded statements of witnesses. He issued letter to officer of Grampanchayat for producing birth extract of victim girl (Exh.-69). Grampanchayat Virzoli issued birth extract of the victim girl (Exh.70). He also collected School Leaving Certificate of the victim girl from her school (Exh.-71). During investigation, the victim delivered a child. He issued a letter to medical officer for taking samples of victim girl and her child for DNA test. He issued letter for recording statement of the victim under Section 164 of the Cr.P.C. He received a DNA report. On the date of lodging FIR, victim was pregnant for 8 months. Statement of victim girl was recorded under Section 164 of Cr.P.C. (Exh.-80). He received C.A. reports. He identified photographs of accused Nos. 1 to 4 pasted

on the charge-sheet. In the cross-examination he stated that the victim girl had come to Roha Police Station for lodging FIR, along with her father. He was present in the hospital when the medical officer took samples for DNA Test. It is pertinent to note that though this witness had produced the birth extract and school leaving certificate of victim girl which were exhibited in evidence, there was no cross-examination on the authenticity of these documents.

21. The case of the prosecution is that the victim was minor. She was pregnant. The meeting of the villagers was held. She disclosed the name of Accused No.2. The said accused denied his involvement. The victim and her father went to the Police Station. The victim disclosed names of four persons. She gave instances of sexual assault committed by them. Medical examination was conducted. DNA report was sought and collected. The said report incriminates Accused No.1 being the biological father of the child. The defense of Accused Nos.2, 3 and 4 is that they are exonerated from being responsible for the pregnancy of the victim girl. They have been falsely implicated in this case. The victim has improvised her version.

22. The DNA report gives an opinion that Accused No.1 is connected with the paternity of the child born to the victim girl. The victim girl did not inform about the acts committed by the accused persons. Once it was detected that she was pregnant, meetings were held in village and she disclosed the name of Accused No.2 as the person with whom she had physical relationship. The other three accused are from the same village, where the victim resides and the Accused No.2 is from another village. According to victim girl, this is the reason for disclosing name of accused No.2 at initial stage. In the meeting of the villagers, Accused No.2 had denied his involvement in the crime. The father of victim girl was advised to take legal action. The victim and her father went to the Police Station and lodged the F.I.R. This does not appear to be the case of prompting, tutoring or instigating the victim to implicate all the four persons in the crime. When the victim went to the Police Station along with her father, apparently, it is the independent version of victim girl that all the accused had subjected her to penetrative sexual assault. There is nothing on record to indicate that the victim had grudge against the appellants to falsely implicate them. From the cross-examination of the victim it appears that she was acquainted with

Accused No.1, however, according to her, Accused No.2 had subjected her to sexual assault on four occasions. Accused Nos.3 and 4 also committed similar act of penetrative sexual assault.

23. The victim is innocent. Although, she had studied up to 7th Standard, she cannot read, write or sign. She has stated that she did not understand the consequences of sexual intercourse. Her mother had passed away when she was three years old. Apparently she was looked after by her father and relative. The father of the victim girl is working as agricultural labour. The accused had offered her money. The victim was constrained to take money offered by accused. The incident had occurred in the village. The victim apparently has kept with herself, what has happened with her. It is only when the pregnancy was revealed, her father requested villagers to hold meeting. Victim was reluctant to disclose the incidents. She somehow disclosed name of accused No.2. It is not expected that the victim who was minor, would provide narration of repeated sexual assault by four persons in the meeting of villagers. She took the opportunity to reveal the truth before the lady police constable, who recorded her complaint. The delay in lodging FIR or non-disclosure of names of all the accused

would not be fatal to the prosecution case. While recording her statement, none of the family members were present with her. There was no reason for the victim girl to imagine and involve the Appellants in the crime. During the investigation, she had pointed out the spot of the incident. The age, the background and the manner in which she had deposed in the Court does not create any doubt about her credibility. If the evidence of the victim inspires confidence, it has to be accepted. The trial court has analysed the evidence of all the witnesses and arrived at the findings of conviction.

24. It is submitted by the Appellants that the prosecution has not proved the age of the victim girl. It is not established that she was minor. Victim girl has disclosed her age at the time of deposition as 16 years. There is no effective cross-examination of victim girl, father of victim girl or the investigating officer. The Appellants has stressed upon the evidence of Doctor, wherein reference is made to the Radiology test and it was stated that the age of the victim was 14 to 18 years. It is pertinent to note that the investigating officer during the investigation had collected the extract of the birth registered and the School Leaving Certificate which disclosed the

date of birth of the victim as 03/12/1999. These documents are exhibited in evidence. There is no reason to discard these documents. The authenticity of these documents is not challenged through cross-examination. The evidence of the investigating officer and the contents of the documents could not be distributed in any manner by the defence.

25. Dr. Karad has admitted in his cross-examination that 14 days prior to last menstruation period there must be a sexual intercourse with the victim. While examining the victim he asked her about her last M.C. period. The victim girl was not knowing her last M. C. Period. For pregnancy of the victim girl the intercourse might have taken place by the end of January 2015 or at the beginning to February 2015. It has further come in his cross-examination that after M.C. period, if there is intercourse in between 14 days or 28th days there is chance of pregnancy. Once a female became pregnant and if there are sexual intercourse after pregnancy, the said sexual intercourse does not occur. After the date of pregnancy of a female there can be intercourse during the further period of 4 months. But, said intercourse no way affect the pregnancy. The above facts brought on record through the cross-

examination of Dr. Karad are supporting the prosecution case. Medical Officer collected the sample of blood of the victim girl as well as he collected the sample of blood of new born child of the victim girl and sent the same to C.A., Mumbai for analysis. Medical officer, Roha collected the blood of all four accused and sent the same to C.A., Mumbai, for D.N.A. Test. Even if DNA report incriminates accused No.1 on paternity of child, the appellants cannot be absolved of charge of penetrative sexual assault.

26. The prosecution has examined P.S.I. Balkrishna Kashinath Salve, who is Investigating Officer at Exh.67. Investigating Officer B.K. Salve has sent the victim girl for medical examination to the Medical Officer, Civil Hospital Alibaug-Raigad with Lady Police Constable B.No. 167. On the next day he arrested accused no.1, 3 & 4. Before arresting accused no.1, 3 & 4, he sent them to the Medical Officer, Roha for their medical examination as per letter Exh.68. Investigating Officer Salve visited the spot of incident and drawn the spot panchanama Exh.41. The victim girl and her father shown the spots of incidents to him. As per the letter dated 11.09.2015 Exh.46, issued by Investigating Officer Salve, Revenue Authorities have prepared maps of spots of incidents, which are at

Exh.47 to Exh.51. It has further come in the evidence of Investigating Officer Salve that he issued a letter Exh.69 to the officer of Grampanchayat Virzoli for producing the birth extract Exh.70 of victim girl. Investigating Officer also collected School Leaving Certificate Exh.71 of the victim girl from her school. On 13.09.2015 Investigating Officer issued a letter to Medical Officer Roha for collecting the samples of blood of accused no.1, 3 & 4. Office copy of said letter is at Exh.72. On 14.09.2015 Investigating Officer Salve sent the samples of accused no.1, 3 & 4 to C.A. Mumbai for analysis as per office copy of letter Exh. 73. Investigating Officer Salve issued a letter to the office of C.A. Mumbai for giving the kits for collecting the samples for D.N.A. Tests. Office copy of said letter is at Exh. 74. For regular medical examination of accused no.1, 3 & 4, Investigating Officer Salve issued a letter Exh.75 to Medical Officer Roha.

27. On 02.11.2015 PW-9 arrested accused no.2 Rupesh Parshuram Fulare and on 04.11.2015 he issued a letter Exh.84 to Medical Officer Roha for medical examination and taking samples of accused no.2 Rupesh Fulare. On 05.11.2015 Investigating Officer Salve sent the sample of accused no.2 Rupesh Fulare to

C.A. Mumbai for analysis as per office copy of letter Exh.85, which bears the endorsement of the office of C.A. Mumbai. After arresting accused no.2 Rupesh Fulare Investigating Officer Salve seized the motorcycle at his instance as per panchanama Exh.52. Muddemal receipt in respect of seizure of said motorcycle is at Exh.86. Thus, in the present case, Medical Officer collected the sample of blood of accused as well as collected the samples of blood of the victim girl and her new born child. The D.N.A. Test Report is at Exh.81. As per the D.N.A. Test Report Exh.81, for all the 15 different genetic systems analyzed with the PCR Umesh Hanuman Jamkar in F.S.L.M.L.Case No. DNA-1368/15 matched the obligate parental alleles present in baby of victim girl similarly victim girl matched the obligate maternal alleles present in baby of victim girl at all loci. As per the D.N.A. Analysts opinion, result of analysis is that Umesh Hanuman Jamkar is F.S.L.M.L.Case No. DNA-1368/15 and victim girl are concluded to be the biological parents of baby of victim girl. As per the said D.N.A. Report Exh81, the accused Mahendra Nukund Kamble, accused Nikhil Gajanan Thakur and accused Rupesh Parshuram Fulare are excluded to be the biological father of baby of victim girl. As per the said D.N.A. Report Exh.81, the analysis started on 22.09.2015 and analysis

completed on 11.04.2016. Referring to the D.N.A. Test Report Exh.81 Public Prosecutor Shri. P. S. Patil for the State submitted that D.N.A. Test Report Exh.81 is conclusive proof and as per D.N.A. Test Report Exh.81 the accused no.1 Umesh Hanuman Jamkar is the biological father of the son, born to victim girl. He further submitted that as per section 293 of Cr.P.C., the D.N.A. Test Reports Exh. 81 to Exh.83 can be read in evidence and the said D.N.A. Test Report Exh.81 may be used as evidence in this trial. In a matter where paternity of a child is in issue before the Court the use of D.N.A. Test is an extremely delicate and sensitive aspect. However, when the modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The D.N.A. Test is the accurate test. In the present case, as per the D.N.A. report Exh.81, the accused no.1 is the biological father of the male child born to the victim girl. Thus, the result of D.N.A. Test is said to be scientifically accurate. In the present case, there is no reason to discard the D.N.A. Test report Exh.81. The D.N.A. Test report in respect of accused nos.2, 3 & 4 is negative. As per the D.N.A. Test report Exh.81, accused nos.2, 3 & 4 are excluded to be the biological father of baby of victim girl. However, the defence

has brought on record through the cross-examination of P.W.6 Dr. Karad that for pregnancy of the victim girl the intercourse might have taken place by the end of January 2015 or at the beginning to February 2015. Dr. Karad has also given opinion that after the date of pregnancy of a female there can be intercourse during the further period of 4 months. But, said intercourse no way affect the pregnancy. Thus once female became pregnant and if there are sexual intercourse after pregnancy, the said intercourse no way affects the pregnancy. Though D.N.A. Report Exh.81 excluded the accused nos.2, 3 & 4, the version of victim girl that the accused nos. 2, 3 & 4 committed sexual intercourse with her, cannot be discarded. Even after the pregnancy, there can be sexual intercourse.

28. The trial Court has observed that, as per the birth extract of the victim girl Exh. 70 and as per her School Leaving Certificate Exh.71, the date of birth of the victim girl is 03.12.1999. It has come in the evidence of Dr. Karad that for pregnancy of the victim girl the intercourse might have taken place by the end of January 2015 or at the beginning to February 2015. Considering the date of birth of victim girl i.e. 03.12.1999, in the month of January 2015

or February 2015 when the victim girl became pregnant, her age was 14 years and 1 or 2 months. Referring to the date of birth of victim girl i.e. 03.12.1999 vide Birth Extract Exh.70 and referring to the opinion given by Dr. Karad that for pregnancy of the victim girl the intercourse might have taken place by the end of January 2015 or at the beginning to February 2015. During relevant time of incidents of intercourse by accused with the victim girl, the age of the victim girl was 14 years and 2 months only. Therefore, the defence of the accused, which appears to be explicit through the cross-examination of the victim girl that she was having consent for intercourse and she voluntarily went with the accused nos. 1 to 4, cannot be accepted. Thus, in the present case, the victim girl was 14 years and 2 months old and she delivered a child before she completed 16 years. There is no reason to deviate from the findings of trial Court.

29. Section 29 of the The Protection of Children From Sexual Offences Act, 2012 provides for presumption as to certain offences. Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such

person has committed, or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. There is no reason to disbelieve the victim girl. Similarly section 30 of POCSO Act relates to presumption of culpable mental stage. As per the said provision, in any prosecution for any offence under which the act which requires a culpable mental state on the part of the accused, the special Court shall presume the existence of such mental stage but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. For the purpose of this section, a fact is said to be proved only when the special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. The defense hence failed to rebutt the presumptions.

30. The of victim girl (PW.1), medical evidence on record, it is established that sexual intercourse was committed with the victim girl. The evidence of victim girl is cogent and reliable. Looking to the evidence of victim girl it is established that the accused committed sexual intercourse with the victim girl. The victim girl was below 16 years of age during the relevant period of incident

and her consent was of no consequence and was immaterial. Thus, in the present case, the evidence of victim girl is corroborated by P.W.2 Dr. Ashwini Patil, P.W.3 Jaywant Shinde. Her evidence is further corroborated by P.W.5 L.P.C. Riya Jadhav. The version of victim girl is fully corroborated by P.W.6 Dr. Ramesh Karad, D.N.A. Test Report Exh.81 and medical papers Exh. 56 to Exh.59. The prosecution has proved the case beyond reasonable doubt.

31. In the case of Ravindra Singh Gorkhe Vs. State of UP, the Apex Court has dealt with the issue relating to relevancy of entry in public record/registered and conditions to be fulfilled before the documents are held to be admissible. In the case of **Ravi Anandrao Gurpude Vs. The State of Maharashtra** (supra), this Court has laid down the guidelines for considering the evidence relating to the age. In the case of **Jayamala Vs. Home Secretary, Government of Jammu and Kashmir** (supra), the Court relied upon the radiology report to hold that detenu was minor. In the case of **Rajesh Sardiwal Vs. State of Maharashtra** (supra), this Court dealt with scope of Section 294 of Cr.PC. In the case of **Kaini Rajan Vs. State of Kerala** (supra) it was held that in rape case, the version of victim commands great respect and

acceptability but if there are some circumstances which last some doubt in mind of the Court about veracity of victims evidence, then it is not safe to rely on uncorroborated version of victim of rape. In the case of **Ajit Kumar Bhagora Vs. State of Gujarat** (supra), the Gujarat High Court observed that, the case is doubtful. DNA test exonerates both accused. Accused cannot be convicted. In the **Lall Bahadur Kami Vs. The State of Sikkim** (supra) the Court was dealing with appeal against acquittal. It was held that age of victim was not proved. The High Court of Calcutta in the case of **Ranjit Rajbanshi Vs. State of West Bengal** has the court found serious discrepancies in evidence of witness and that prosecution failed to raise presumption under Section 29 of POCSO Act. All these decisions are not applicable to the facts of the present case.

32. In the case of State of **Himachal Pradesh Vs. Sanjay Kumar alias Sunny** (supra), it was held that the testimony of the victim in the cases of sexual offences is vital and unless there are compelling reasons which necessitated looking for corroboration of a statement. The Court should find no difficulty to act on testimony of victim of a sexual assault alone to victim the accused. Seeking corroboration to a statement before relying upon the same as a

rule would amount to adding insult to injury. In the case of **State of Rajasthan Vs. Omprakash** (2002) 5 SCC 745, it was observed that the conviction can be based on sole testimony of the prosecutrix. In the case of **Sunil Vs. State of Madhya Pradesh** (2017) 4 SCC 393, it was observed that non-holding of DNA test, a failure to prove the DNA test report or DNA test result favouring accused, conviction is still be possible based on remaining evidence. In the case of **Ganesan Vs. State** (2020) 10 SC 573, the Supreme Court has held that whether testimony of victim is found reliable and trust worthy, conviction can be based on her sole testimony. In the case of **Dashrath Johare Vs. State of Maharashtra** (2021) ALL MR (Cri.) 3598, it is held that though DNA report exonerated the accused. There is sufficient evidence on record to hold that he has committed the offence.

33. Considering the aforesaid circumstances, I am of the considered opinion that there is sufficient evidence against the Appellants. The Appeals are devoid of merits and deserves to be dismissed.

ORDER

(i). Criminal Appeal No.398 of 2017 and Criminal Appeal No.

1061 of 2017 are dismissed.

(ii) Interim Application No.559 of 2020 and Interim Application No. 247 of 2020 are disposed off.

(PRAKASH D. NAIK, J.)