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

CRIMINAL APPEAL NO.422 OF 2024

Mahadev Datta Shinde,
Age-25 years, Occu-Agri,
R/o. Jajala, Tq. Bhoom,
Dist. Osmanabad

...APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station Ambi,
Tq. Bhoom, Dist. Osmanabad

2. X. Y. Z.

...RESPONDENTS

Mr. Ganesh J. Kore, Advocate for the appellant
Mr. U. S. Badakh, APP for the respondents/State
Mr. R. D. Sanap, Advocate for the respondent No. 2

CORAM : RAJNISH R. VYAS, J.

DATE : 13th FEBRUARY, 2026

JUDGMENT :

1. This appeal takes an exception to the judgment and order passed by the Special Judge, Bhoom dated 04-04-2023 in Special Case (POCSO) No. 24/2020 by which the applicant was convicted for commission of offences punishable under Sections 363, 366, 376, 376(2)(n) of the Indian Penal Code [for short 'the IPC'] and Sections 4,6,8 and 12 of the Protection of Children From Sexual Offences Act, 2012 [for short 'the Act of 2012']. The applicant is directed to suffer rigorous imprisonment for 20 years for the

commission of offences punishable under Section 6 of the Act of 2012 and to pay a fine of Rs. 50,000/-. Further, he was directed to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 1000/- for the commission of offences punishable under Section 363 of the IPC. He was also directed to undergo rigorous imprisonment for 5 years and to pay a fine of Rs. 5000/- for the commission of offences punishable under Section 366 of the IPC. All the sentences were ordered to run concurrently.

2. In short, it is the case of the prosecution that on 26-08-2020 at about 05.30 am, the accused kidnapped the victim, the minor daughter of the complainant, and also induced her to marry and took her to a different town, where she was subjected to repeated forcible sexual intercourse. As the victim was of scheduled caste and the accused was not of this schedule caste, the accused was also tried for commission of offences punishable under Sections 3(2)(va), 3(2)(v), 3(1)(w)(i), 3(1)(w)(ii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act (for short 'the Atrocities Act').

3. It is against this background that the victim's father lodged the first information report, and criminal proceedings were set in motion. During the investigation, the accused was arrested on 04-09-2020. The accused and the victim were subjected to medical

examination, and it was found that the victim was carrying a pregnancy which was aborted. The blood samples of the accused, the victim, and the fetus were collected and forwarded to the laboratory. Clothes of the accused and the victim were seized, and a spot panchanama was drawn. After completion of the investigation, charge-sheet No.60/2020 dated 23-10-2020 was filed against the sole accused/appellant.

4. The charge was framed against the appellant under Sections 363, 366-A, 376 of the IPC as well as Sections 4, 8, 12 of the Act of 2012 and Sections 3(2)(v), 3(2)(va), 3(1)(w)(i) & 3(1)(w)(ii) of the Atrocities Act on 17-08-2021 below Exh.11. It is pertinent to mention here that vide order dated 16-01-2023, charge under Section 376(2)(n) of Indian Penal Code and Section 6 of the Protection of Children From Sexual Offences Act, were added. The accused did not plead guilty to the charge and consequently, the prosecution had examined total 16 witnesses as follows:

Sr. No.	PW	Name	Nature of Evidence
1	PW-1	Victim	Victim
2	PW-2	Father of victim	Informant (father of victim)
3	PW-3	Uncle of victim	Brother of Informant
4	PW-4	Parmeshwar Pawar	Panch witness on memorandum panchanama
5	PW-5	Mininath Hanmant Hogle	Spot panch

6	PW-6	Dharmaraj Sable	Headmaster of school
7	PW-7	Dr. Ashwini Gore	Medical Officer
8	PW-8	Manish Bhosle	Accused and Victim stayed in a room adjoining to her house
9	PW-9	Dr. Gampu Barate	Medical Officer
10	PW-10	Nitin Gundale	Police Naik (carrier of DNA sample)
11	PW-11	Gajanan Mule	DNA Kit carrier
12	PW-12	Baliraj Sontakke	Police Constable
13	PW-13	Dr. Sonali Vilasrao Patil	Gynecologist
14	PW-14	Vishal Kambe	Investigating Officer
15	PW-15	Prajakta Khairnar	Chemical Analyzer
16	PW-16	Sharad Waghule	Police Inspector Ambi

5. The prosecution has also relied upon the documentary evidence, including the Pravesh Nirgam Utara, exh.50, Medical Legal Examination Report Of Sexual Violence Exh. 52, Exh. 53, age estimation report, and other documents.

6. After appreciation of evidence available on record, the trial court found the appellant to be guilty of the offences for which he was charged and thereafter, following the mandate of Section 235 of the Cr. P. C. was heard on the point of sentence. The accused was then convicted and sentenced as stated above.

7. Learned advocate Mr. Kore, appearing for the appellant has challenged the case of the prosecution on the following grounds.

(1) age of the victim is not proved (2) there is a delay in lodging the first information report (3) offence of kidnapping is not made out (4)

procedure for collection of DNA sample was not followed, and therefore, opinion of the expert cannot be relied upon.(5)There is absolutely no record to show that it was a victim who was subjected to medical examination.(6)Offence of rape defined under Section 375 of the IPC is not proved.(7)There are several material omissions and contradictions in the testimony of the witnesses examined by the prosecution.

8. He, thus, prayed for the allowing the appeal and the acquittal of the accused.

9. Per contra, learned APP has argued the following points: (1) testimony of the victim is cogent and reliable, (2) medical evidence supports the case advanced by the prosecution, (3) collection of the DNA sample and chain of custody is proved, and therefore, the opinion given by the Laboratory cannot be doubted. (4)Not only the offence of kidnapping, but also the offence of rape and aggravated penetrative sexual assault is proved.

10. Mr Sanap, learned advocate for the victim, has argued the following points: (1) testimony of the victim cannot be ignored as there is a ring of truth in it, (2) the trial court has taken into

consideration various pieces of evidence and thereafter awarded the conviction. (3)The prosecution has proved the victim's age.

11. In the aforesaid background, I have perused the record and have given thoughtful consideration to the arguments advanced by the respective counsels.

12. Since the accused is charged for the commission of an offence under the provisions of the Act of 2012, it will have to be seen whether the prosecution has proved that on the date of the commission of the offence, the victim was a child as defined under Section 2(d) of the Act of 2012. Said section defines; *a child means any person below the age of eighteen years.*

13. In this regard testimony of victim/PW-1, PW-2-father of the victim, PW-6-Headmaster, so also, testimony of Medical Officer-PW-7 who has proved ossification test, will have to be taken into consideration. PW-1-victim in her testimony has stated her date of birth as 24-06-2006. She has deposed that she had taken admission in 1st standard at the Zilla Parishad Primary School.

14. In the cross-examination, a suggestion was given to her that at the time of the incident, she had completed 18 years of age, which she denies.

15. PW-2, father of the victim, in his testimony has not stated the date of birth, nor in his examination-in-chief did he state that the victim was a minor at the time of the incident. During cross-examination, a suggestion was made to this witness that, at the time of the incident, victim was about 18 years of age, which he denied.

16. PW-6-Dharmaraj is the Headmaster of the Zilla Parishad. He deposed that he was occupying the post of Headmaster from 05-06-2016. At the time of deposition, when the court summoned him, he brought the original General Register with him, which contains information about the students who have taken admission. Information includes students' date of birth, as noted in an affidavit filed by the parents and a list supplied by the Anganwadi Sevika to the school. He volunteered that some parents also present Aadhaar cards and on that basis entry of birth in the General Register is taken. He deposed that at Sr. No. 1291 of Register No. 3, there is an entry of the victim's date of birth, i.e. 24-06-2006, and that the victim had taken admission in the school in 1st std. on 15-06-2012. He stated that the extract from the school register was provided to the Investigating Officer, who produced and proved it.

17. In the cross-examination, PW-6 has admitted that the name of the mother of the victim at Sr. No. 1291 of Register No. 3 is

mentioned as 'M'. He admitted that he did not bring the documents given at the time of his school admission. He further admitted that when the victim was admitted to the school, he was not working with the Zilla Parishad School. His testimony was challenged by cross-examination to convince the court that PW-6 has no personal knowledge of the entry. Exh. 50 is the extract from the register that shows the victim's full name, her caste, place of birth, date of birth, the standard in which she is receiving education, and the name of her mother. The name of the victim's mother is mentioned in column No. 3 as 'S', whereas several other documents on record, more particularly Exh. 52 and Exh. 53, show the name of the mother of the victim as 'M'. It is not even the case of the prosecution that 'M' and 'S' are the name of same person.

18. The Hon'ble Apex Court in the case of *P. Yuvaprakash Vs State reported in 2024(17)SCC 684* in the following paragraphs 16 to 20 has observed as under:

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the [POCSO Act](#), the courts have to take recourse to the steps indicated in [Section 94](#) of the JJ Act. The three documents in order of which the [Juvenile Justice Act](#) requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in [Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors.](#),³ this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with [Section 94](#) of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i),

(ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

16. Speaking about provisions of the [Juvenile Justice Act](#), especially the various options in [Section 94 \(2\)](#) of the JJ Act, this court held in [Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors](#)⁴ that:

“Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the 2021 (12) SCR 502 [2019] 9 SCR 735 concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of

medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In [Abuzar Hossain @ Gulam Hossain v State of West Bengal](#)⁵, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.

18. Reverting to the facts of this case, the headmaster of M's School, CW- 1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M's name. He deposed that she had studied in the school for one year, i.e., 2009-10 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7th standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoalipalayam Panchayat School, answered the summons [2012] 9 SCR 224 served by the court and deposed that 'M' had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth, Thiru Prakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. It is clear from the above narrative that none of the documents produced during the trial answered the

description of “the date of birth certificate from the school” or “the matriculation or equivalent certificate” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim’s age was below 18 years as per [Section 94\(2\)\(iii\)](#) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “that the age of the said girl would be more than 18 years and less than 20 years”. In the cross-examination, she admitted that M’s age could be taken as 19 years. However, the High Court rejected this evidence, saying that “when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor”. This finding is, in this court’s considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with [Section 94](#) of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim’s bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.

20. In this case, the appellant was charged, inter alia, for the offence under [Section 6](#) of the POCSO Act. The offence under [Section 6](#) depends on the proof that a “sexual assault” took place. That term is defined by [Section 7](#), which reads as follows:

“Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child

touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.” The offence under [Section 6](#), at the relevant time, was defined as follows:

"Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

[Section 3](#) defines penetrative sexual assault, as follows:

“3. Penetrative Sexual Assault. - A person is said to commit "penetrative sexual assault" if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b).....

(c).....

(d).....” [Section 2\(a\)](#) of the POCSO Act provides that 'aggravated penetrative sexual assault' has the same meaning as assigned to it in [Section 5](#).

Therefore, [Section 5](#), which defines 'aggravated penetrative sexual assault' is relevant. [Section 5 \(1\)](#) reads as follows:

“5. Aggravated Penetrative Sexual Assault. -

(a)

(1)whoever commits penetrative sexual assault on the child more than once or repeatedly; or” [Section 4](#), at the relevant time, read as follows:

“(1) 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.” The expression “assault” is defined in [Section 351](#) IPC as “Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.” The expression “criminal force” is defined by [Section 350](#) IPC as follows:

“Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.”

19. Thus, it is crystal clear that the prosecution produced none of the documents mentioned in the aforesaid judgment. Further, neither the father has deposed about the victim's date of birth, nor has the Headmaster provided a foundation for taking entry in the extract of the school register. So far as the ossification report is concerned, none has been produced on record, but the prosecution attempted to prove the child's age by examining PW-7.

20. PW-7 is Doctor Ashwini, who had clinically examined the victim. She has deposed that the forensic medical examination report of the age of the victim was shown to her and said she issued the report based on the report submitted by the Radiologist. She stated

that the contents of the said estimation age report were correct and that the said document was proved. Exh.53 is a Forensic Medical Examination Report of Age Estimation dated 05-09-2020. The opinion regarding the victim's age was that the victim was between 14 and 16 years old, with a margin . It is necessary to mention here that the foundation of this report was the report of the Radiologist. In cross-examination, this witness stated that to ascertain a person's age, ossification tests and dental tests are conducted. In the present case, the dental test of the victim girl was not performed during the age-determination test.

21. If the testimony of the aforesaid witness is perused, it would reveal that the victim is the only one who has stated her date of birth.

22. At this juncture, it is necessary to mention here that date of birth uttered/given by the victim would be hearsay evidence. The prosecution neither brought on record the birth certificate nor the version of the father that the victim was a minor, nor the foundation on which the date of birth was recorded in the extract of the admission register. As the Radiologist's report is not on record, even the foundation of the PW-7's opinion will carry no weight.

23. In that view of the matter, I conclude that the age of the victim is not proved by the prosecution. Consequently, the accused should not have been convicted of committing an offence under the Act of 2012.

24. Coming to the conviction of the accused under the provisions of Sections 363, 366, 376 and 376(2)(n) of the IPC, it is necessary to go through the relevant provisions.

25. Section 363 of the IPC prescribed punishment for kidnapping. Kidnapping is defined under Section 359 *it is of two kinds; kidnapping from India and kidnapping from lawful guardianship.*

26. Section 361 of the IPC speaks about the Kidnapping from lawful guardian which says that *whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.* In this case, the prosecution has admittedly not proved the victim's age; it cannot, therefore, be said

that the victim was below 18 years, and even the conviction of the appellant under Section 363 of the IPC is not made out.

27. The accused is also convicted for the commission of an offence punishable under Section 366 of the IPC, which speaks about *kidnapping, abducting or inducing a woman to compel her marriage, etc.* In this regard, it is necessary to go through the testimony of the victim/PW-1. PW-1, in her examination-in-chief, has stated that she was born on 24-06-2006 and thereafter took admission in the 1st std.

28. PW-1 has deposed that the accused was residing in the village Jejala, and on 26-08-2020, from the morning itself, the accused was talking on the phone and sending messages. The accused was sending a message to the victim, asking her to come out of the house, and he was sitting outside the victim's house on a motorcycle. He then asked the victim to sit on the motorcycle and forcibly sat her down, and then proceeded to Pandharpur. She stated that as it was raining, they stopped in a dilapidated shed.

29. If the testimony of the aforesaid witness is seen, it would be crystal clear that when the messages were sent or the victim was called out of the house, neither any inducement nor compulsion was made. According to the victim, she was asked to sit in the vehicle

forcibly. She was thereafter taken to Pandharpur, except that there is nothing in the testimony of the victim, so as to attract the ingredients of the offence under Section 366 of the IPC.

30. Provision of Section 366 of IPC states that *whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable.*

31. No such evidence is brought on record by the prosecution regarding inducement or intention to compel to perform the marriage, or force or seduce to have illicit intercourse. Therefore, it cannot be said that the prosecution has proved the offence punishable under Section 366 of the IPC.

32. Thus, the contention of the counsel for the appellant that the prosecution did not prove either case under Sections 363 and 366 of the IPC, so also, the conviction under the Act of 2012 is correct and proper.

33. This takes me to the conviction of the accused under the provision of Section 376, 376(2)(n) of the IPC. Section 376 prescribed punishment for rape. Section 375 of the IPC defines rape. It states that *A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person;*

34. Thus, an essential requirement for proving commission of an offence punishable under Section 375 of the IPC is penetration of the penis into the vagina to any extent, and it must be against the will or consent of the victim.

35. Section 376 (2)(n) punishes a person who commits rape repeatedly on the same woman. The punishment prescribed is not less than 10 years, but may extend to life imprisonment.

36. In this regard, the testimony of PW-1 will again have to be looked into. PW-1 has stated that the accused used to reside in the village 'Jejala' and that, on 26-08-2020, since morning, he had been talking on the phone and sending messages. The accused sent the messages to the victim, calling upon her to come out of the house. At the relevant time, he was sitting on the motorcycle. The accused asked the victim to sit on the motorcycle, forcibly sat her and drove the vehicle till Pandharpur.

37. PW-1 deposed that at that time, it was raining and therefore, they took shelter under one dilapidated shed, where the accused had forcibly sexual intercourse with her. The next morning, the owner of the shed came and enquired, and also took the accused's mobile phone, stating that he would inform the police. The victim was crying at that time. Then the victim and the accused went to the Talegaon Dabhadi village and stayed at the house of one "S.B.", where she was kept for 7-8 days. She deposed that when she was at Talegaon Dabhadi, accused on 4-5 occasions, kept physical relations with her and did not permit her to contact anybody. She deposed that thereafter, her cousin, maternal aunt and police officer came and took both of them to the police station.

38. PW-1 deposed that thereafter her medical examination was conducted at the Hospital at Osmanabad, where the doctor informed her that she was pregnant and an abortion was done. She stated that she then showed the spot of the incident to the police, and also deposed that the clothes of the victim were seized.

39. PW-1 was subjected to cross-examination, in which she admitted that in the year 2016, the accused had outraged her modesty, due to which she had lodged the complaint against the accused. In that case, her statement was recorded before the police. She admitted that the accused was acquitted in that case. She denied the suggestion that before her medical examination, she had informed the mother regarding her menstrual cycle. She further admitted that the police recorded her statement, and parents and relatives were present. Omissions were put to this witness regarding the accused sending messages on her mobile phone on the day of the incident. Also, the accused forcibly asked the victim to sit on the motorcycle, and accused the victim of not allowing them to contact anybody when they were at Talegaon Dabhadi.

40. At this stage, it is necessary to mention here that when the Investigating Officer was subjected to cross-examination, he was asked whether the victim had stated that the accused used force to sit

the victim on the motorcycle, as well as not allowing the victim to contact anybody, he replied in negative . It is, thus, crystal clear that omission is duly proved by the accused and therefore, said aspect cannot be taken into consideration.

41. In further cross-examination of the witness, various suggestions were given to her including the suggestion that the incident had not taken place, which were denied. To bring the motive for the false implication on record, it was suggested to this witness that, since she became pregnant before the marriage, a false case was filed against the accused.

42. PW-2 is the father of the victim, who had stated that in the night before the day of the incident, the mother of the victim had told PW-2 that the victim had not come, though she had gone for urination, and therefore, PW-2 started searching for the victim. He also visited the accused's house, but the accused was not present. Thereafter, the brother of the PW-2 informed that he had seen the victim and the accused on a motorcycle. PW-2 deposed that he then went to the police station to lodge the complaint. In his evidence, the complaint he submitted was marked as Exh. 34.

43. In the cross-examination, he admitted that in an earlier case that was filed against the accused, the accused was acquitted. He further stated that his brother had a mobile phone with him and that, to reach Pandharpur from the village 'Jejala', various villages had to be crossed. He denied various suggestions.

44. The medical examination of the victim was conducted by PW-7, Dr Ashwini. She stated that on 05-09-2020, the victim girl was brought to Civil Hospital, Osmanabad, by a lady constable, Mrs Bhosale, and it was found that the hymen of the victim girl was ruptured. The pregnancy test of the victim was positive, and the age of the fetus was 6 weeks, and ultrasonography was performed on her. She deposed that the age of the victim was 14 years and 2 months. She had taken the radiologist's opinion. According to which, the age of the victim was 14 to 16 years. She proved the Medical-Legal Examination Report below, Exh. 52.

45. At this juncture, it is necessary to mention here that perusal of Exh. 52 shows a "ruptured hymen".

46. Coming to the cross-examination of PW-7, she has stated that the information which was filled in column No. 14 of Exh. 52 was based on information supplied by the victim. Perusal of column

No. 14, the last menstrual period of the victim girl occurred on 12-08-2020. She also admitted column No.14 and the victim girl was not sexually assaulted during the pregnancy. She volunteered that the survivor was not pregnant at the time of the incident. Other suggestions regarding challenging the report determining the age of the prosecutrix under Exh. 53 were given, which were denied.

47. At this stage, it is necessary to take into consideration the arguments made by the learned advocate for the accused that the victim on the date of medical examination, i.e. 05-09-2020, was in a remand home and there is nothing on record to show who had brought the victim from the remand home for medical examination.

48. Detailed analysis of the evidence may not be required since it is not even the case of the accused in the cross-examination that it was not the victim but some other girl who the Medical Officer examined.

49. Contention of the learned advocate for the appellant that it was excepted from the prosecution to examine a lady constable, Mrs Bhosale, who had taken the victim for medical examination, and the evidence should have been produced on record. Suffice it to say that the question is whether, based on the material on record, the

accused can be convicted, or not. Just because Constable Bhosale is not examined does not mean the prosecution's case will change in any fundamental way. Even otherwise, in the peculiar facts and circumstances of the case, it cannot be said that Constable Bhosale was a star witness or relevant witness to the prosecution.

50. PW-8 is one Manisha Bhosale, who was examined by the prosecution, and has stated that on 31-08-2004 at about 04.00 am, her husband had received a phone call from the accused, who stated that he had come with his wife, and further asked about the address. Thereafter, within 5 to 10 minutes, the accused, along with his wife, approached PW-8, and when PW-8 asked for his name, he disclosed it as "S". Then, the accused and his wife were allowed to stay in the house, and they resided in adjoining rooms for two days. On 03-09-2020, the husband of PW-8 received a phone call from village Jejala, during which he was informed that the accused and the victim had run away. PW-8 and her husband then allowed the accused and her wife to stay in the house so they would not run away. On 04-09-2020, the police came and took both of them into custody. She identified the accused in the court. PW-8 was subjected to cross-examination, who stated that her husband was working as a Clerk with an Advocate, and that, 23 years ago, her husband had left the

village Jejala. It was suggested to her that she was giving false testimony.

51. Thus, the testimony of PW-8 clearly shows that the accused and the victim had stayed at Talegaon Dabhadi for two days. The victim's testimony also supports the said stand. Further testimony of the victim regarding the accused subjecting her to forcible sexual intercourse repeatedly is also supported by the evidence of PW-7.

52. There is absolutely nothing on record to conclude that the accused was falsely implicated in the offence. The manner in which the defence of false implication is taken, that since the victim became pregnant before marriage, a false case was lodged against the accused, is a weak defence. Further, during the enquiry into the accused's case, he was questioned under Section 313 of the Cr. P. C., and in answer to question No. 107, he stated that in 2016, he was acquitted in a case filed by the victim, and therefore, to implicate him again, a false case was filed against him. He stated that a false case was filed against him.

53. At this juncture, it is necessary to mention here that the earlier incident, according to the accused, had taken place in the year 2016. In contrast, the present crime in question was registered in

August, 2020. It is very difficult to believe that to implicate the accused, a false case would be filed at the instance of the parents by asking a daughter to narrate the incident in which the accused committed forcible sexual intercourse.

54. Thus, I conclude that based on the evidence of the aforesaid witnesses examined by the prosecution, the prosecution has proved that the accused without consent and against the will of victim has committed rape on the victim and further he had committed rape repeatedly on the same woman, which logically follows that his conviction under Section 376 and 376(2)(n) is also proper.

55. Coming to the evidence of the DNA report, the opinion given by the Regional Forensic Laboratory below Exh. 86 states that the victim and the accused are concluded to be biological parents of the retained products of conception of the victim.

56. Learned advocate for the appellant submitted that the opinion of the Regional Forensic Laboratory is just an opinion and will have to be tested in the light of other material also.

57. He further submitted that the opinion cannot be relied upon unless and until the chain of custody, proper handling of

samples, and proper preservation of the samples are proved by the prosecution. He contended that none of it was proved by the prosecution and therefore, Exh. 86 can also not be relied upon.

58. Learned advocate for the appellant then invited my attention to the testimony of the various witnesses, including the PW-7 to PW-14. PW-7 is the Medical Officer, Dr Ashwini, who stated that she had clinically examined the victim on 05-09-2020, and since the victim was carrying a pregnancy, an ultrasound was advised. From the report, she could notice that the age of the fetus was 6 weeks. She then examined the victim medically.

59. The deposition of the said witness shows that the victim at the relevant time was pregnant.

60. PW-9 Dr Gampu was attached to the Primary Health Centre, Village Ambi, as a Chief Medical Officer. On 08-09-2020, he received a letter from the Sub-Divisional Police Officer requesting the collection of DNA samples from the accused and the victim. The police have brought the accused and the victim girl to the Primary Health Centre, where the blood samples were taken, sealed and handed over to the Ambi Police. As the seal was unavailable, the Ambi Police seal was used to seal the bottles containing the blood

samples. Thereafter, he was also shown the letter issued to the Forensic Science Laboratory, Aurangabad, and the letter to that effect was produced on record below Exh. 56.

61. In the cross-examination, this witness stated that he had not given any letter to the said police station to procure the seal. He admitted that when any article is handed over to the police station from the Primary Health Centre, a letter to that effect is issued, and an acknowledgment of the handover of the said article is also received. He stated that he does not know when the police forwarded the accused's blood samples to the laboratory. He further admitted that the officer attached to the Forensic Laboratory had never made any correspondence about the blood samples of the victim and the accused. This witness proved the fact that the blood samples of the victim girl were taken for a DNA sample.

62. PW-10, the Police Naik Attached to the Ambi Police Station, stated that on 09-09-2020, he received a written order from the Sub-Divisional Police Officer to deposit the sealed DNA samples and sealed envelope with the Forensic Laboratory, Aurangabad, and a letter to that effect was also given. On that day, he deposited the DNA samples and the sealed envelope with the Forensic Laboratory and provided the acknowledgment to the Investigating Officer. He

stated that his statement was recorded on 10-09-2020 by the Sub-Divisional Police Officer.

63. In cross-examination, this witness has stated that he has not brought the order issued by the Sub-Divisional Police Officer to him. He admitted that whenever correspondence is made, a higher officer's acknowledgment is obtained. A suggestion was made to him that on 09-09-2020, he had not deposited the DNA samples and the sealed envelope. Thus, this witness states that the DNA samples of the accused and the victim were deposited with the Laboratory, Aurangabad, on 09-09-2020. The date 09-09-2020 is crucial.

64. PW-15 Prajakta was working as an Assistant Chemical Analyst with the Forensic Laboratory, Nashik. She stated that on 07-09-2020, she received a letter from the Sub-Divisional Police Officer requesting the DNA kit, and accordingly, she provided two DNA kits to Head Constable Mule. She stated that the Forensic Laboratory received the blood samples of the victim and the accused, Aurangabad, for DNA analysis on 10-09-2020 and samples for the DNA of the fetus on 29-09-2020. She stated that she had conducted the DNA examination and opined that the victim and the accused are the biological parents of the fetus. She proved the same below Exh. 36.

65. In cross-examination, she admitted that the DNA kit was not available at the hospital and was called from the Forensic Laboratory. She admitted that blood samples for DNA analysis must be preserved at a specific temperature, and that non-compliance with this requirement affects the results. She volunteered that if the samples spoiled, she would not be able to obtain the DNA profile. She further admitted that, for DNA examination, blood samples must be placed in a DNA kit only. She admitted that the blood samples received by the Forensic Laboratory, Aurangabad, on 10-09-2020, were in two different kits. In concluding the paragraph of her testimony, she admitted that the samples of the fetus that were received were not in a DNA kit.

66. Testimony of the aforesaid witnesses shows that DNA samples are required to be preserved properly. But, ultimately, it was answered that samples taken from the fetus were not in a DNA kit, which clearly shows that the opinion given that the victim and the accused are biological parents cannot be relied upon.

67. Be that as it may, even if the DNA report is ignored, in light of the discussion made (supra), it is clear that the prosecution has proved the guilt of the accused under Sections 376, 376(2)(n) of the IPC. Since no separate fine amount was awarded for commission

of offences under Sections 376, 376(2)(n) of the IPC, fine amount is directed to be paid as under.

68. Hence, the following order is passed:

ORDER

a] The judgment in Special Case (POCSO) No. 24/2020 passed by the Special Judge, Bhoom, dated 04-04-2023, convicting the accused for the commission of offences punishable under Sections 363, 366 of the IPC as well as Sections 4,6,8 and 12 of the Act of 2012 is set aside.

b] The accused is acquitted for the commission of offences punishable under Sections 363, 366 of the Indian Penal Code and Sections 4, 6, 8 and 12 of Protection of Children From Sexual Offences Act of 2012. Fine amount, if deposited, be refunded to the accused.

c] The appellant is directed to suffer 10 years rigorous imprisonment and to pay a fine of Rs. 25,000/-. In default of payment, the appellant shall suffer simple

imprisonment for a term of six months, for the commission of offences punishable under Section 376 of Indian Penal Code .

d] The appellant is directed to suffer 10 years rigorous imprisonment and to pay a fine of Rs. 20,000/-. In default of payment, the appellant shall suffer simple imprisonment for a term of six months for the commission of offences punishable under Section 376 (2)(n) of the Indian Penal Code .

e] All the sentences shall run concurrently.

f] The appeal is partly allowed.

69. At this stage, it is required to be stated that Mr R. D. Sanap, learned advocate (appointed) for the victim without seeking any adjournment, has argued the case and has invited my attention to the various judgments. His fees are quantified at Rs. 12,000/-.

[RAJNISH R. VYAS, J.]