



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

CRIMINAL APPEAL NO. 215 OF 2024

Bharat Bhudha Koli,
Age. 35 years, Occ. Labour,
R/o. Indira Nagar, Shingave,
Tq. Shirpur, Dist. Dhule.

...Appellant

Versus

1. The State of Maharashtra

2. XYZ

Through its Guardian, XYZ.

...Respondents

...

Advocate for Appellant : Ms. Rutuja Jakhade

APP for Respondent No. 1 : Ms. U.S. Bhosale

Advocate for Respondent No. 2 : Ms. Sumedha C. Thombre

...

CORAM : RAJNISH R. VYAS, J.

DATE : 10TH MARCH, 2026

ORAL JUDGMENT :

1. Challenge in the present appeal is to the judgment passed in Special Case No. 85/2019 by the Special Judge (POCSO), Additional Sessions Judge, Dhule, convicting the appellant for commission of offences punishable under Section 376 (l) of the Indian Penal Code (hereinafter would be referred to as 'the IPC' for the sake of brevity), so also Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter would be referred to as 'the Act of 2012' for the sake of brevity).

2. The accused was then directed to suffer imprisonment for ten years and pay a fine of Rs. 35,000/-. In default of payment, the accused was directed to suffer rigorous imprisonment of six months. In view of Section 42 of the Act of 2012, no separate sentence was awarded for the commission of an offence punishable under Section 376 (l) of the IPC.

3. Heard learned counsel Ms Rutuja Jakhade, for the appellant/accused, Ms Bhosale, learned APP for the State and Ms Thombre, appointed counsel for the victim.

4. In short, it is the case of prosecution that the victim of the crime is mentally challenged, and on the day of the incident, when the grandmother returned to the house, she noticed the door of the house was closed, and one of the footwear items was outside the house. As the door was locked, she opened it, at which time, the grandmother of the victim saw the victim in a naked condition, who covered her body with a bed sheet, whereas the accused was zipping his pants. Due to shouts raised by the grandmother, people gathered, caught hold of the appellant and then beat him.

5. This incident triggered the registration of a lodging of a first information report bearing no. 117/2019 dated 11.05.2019, with the

respondent no. 1 / Police Station. The accused was arrested on 11.05.2019 at 17:56 hours. The informant was Sakhubai/grandmother of the victim. As the victim was having a mental disability, during the cross-examination, she was not only referred for medical examination but also to the psychologist and to the medical officer to conduct the IQ test. The seizure panchnama of the accused's and the victim's clothes was prepared, and the spot panchnama was also drawn. The witnesses' statements were recorded, and the clothes were forwarded for chemical analysis. After completion of the investigation, the chargesheet was filed.

6. As the *prima facie* case was found against the accused, a charge was framed against him below Exhibit 12 on 31.03.2022, for the commission of offence punishable under Section 6 of the Act of 2012, and Section 376 (i), 376 (l) of the IPC. The accused did not plead guilty to the charge, which resulted in the examination of nine witnesses at the instance of the prosecution. The details of the witnesses are as follows:

Rank	Name	Nature of Evidence
P.W. 1	Victim's maternal uncle	Witness.
P.W. 2	Victim	Victim.
P.w. 3	Dnyaneshwar Bhagwan Patil	Panch witness.
P.W.4	Madhukar Baburao Chaudhari	Panch witness.
P.W. 5	Dr. Anmol Jaywant Jain	Medical Officer.
P.W. 6	Aasha Tulshiram Saindane	Panch witness.
P.W. 7	Navita Dilip Ghuge	Investigation officer.

P.W.8	Dr. Jivan Atmaram Pawar	Psychologist.
P.W. 9	Dr. Vinod Magan Bhamre	Clinical psychologist.

7. A total of 24 documents were relied upon by the prosecution, including the report of the IQ test at P-69/PW8 and the OPD papers at P-70/PW8. In the medical examination, the report of the victim and the accused were exhibits P-48/PW5 and P-49/PW5, respectively.

8. After recording of evidence, the accused was questioned under section 313 of the Code of Criminal Procedure on 06.01.2024, in which his defence was of false implication and total denial. The accused, while answering question no. 140, has come to the case that the grandmother of the victim was indebted to the tune of Rs. 18,000/-, and on that account, there was a quarrel between the accused and the grandmother of the victim before the incident. Then the victim's grandmother called the accused to take money, and at that time, she was at home and had not gone anywhere. It was his defence that she had gathered a crowd and had beaten him, due to which he sustained injuries. He further stated that had he been involved in the commission of the offence, he would not have stayed at the spot of the incident; he would have run away.

9. I have heard respective counsels. Learned counsel for the appellant has vehemently argued that the victim's age is not proved and that her testimony fails to inspire any confidence. There are contradictions between the victim's testimony and that of the other witnesses. She further contended that there was nothing on record to conclude that the victim was mentally disabled, since even PW 9, who had conducted the IQ test, had stated that the victim was having moderate intelligence.

10. She thus submitted that her contention under clause (1) of Sub-Section (2) of Section 376 conviction of the accused was illegal. She further contended that the failure to examine independent witnesses also goes to the root of the matter. To point out the falsity of the case of the prosecution, she submitted that the doubt regarding the name of the victim, whether her name was 'Ku' or 'Ga', is not removed by the prosecution. It is the case that since the ladies' footwear was found outside the victim's house, it shows that the present appellant was not at the scene of the incident.

11. Per Contra learned APP Ms Bhosle, contended that by examining P.W. 3 and by producing the birth certificate on record, which was not seriously challenged by the defence, the prosecution has proved

the age of the victim. According to her, the prosecution has rightly proved the testimony of PW 8 and PW 9 that the victim was mentally disabled. Lastly, she contended that it is proven beyond a reasonable doubt that the accused has committed rape on the victim.

12. Learned appointed counsel has also supported the arguments advanced by the learned APP and has added that the findings given by the trial court are just and proper and based on a proper appreciation of the evidence. She, therefore, contended that there is absolutely no merit in the case and, therefore, the appeal is liable to be dismissed.

13. The conviction is under the provisions of the Act of 2012; it will have to be seen whether the victim was a minor at the time of the incident or not.

14. The child is defined under Section 2 (1) (d) of the Act of 2012, which means a person is below the age of 18 years. In this regard, it is necessary to mention here that the prosecution examined neither the mother nor the father of the victim. Maternal uncle of the victim, who was examined as PW 1, had deposed the date of birth of the victim as 10.11.2006.

15. In cross-examination, it was specifically asked whether he had disclosed the victim's date of birth to the police at the time of recording the statement, to which he stated that he did not disclose the same. Thus, in that view of the matter, it will have to be seen whether prosecution by testimony of other witnesses had proved that the victim was a minor at the time of the commission of the crime or not. The victim of the crime was examined as PW 2, who, in answer to the question, stated that she was 12 years old at the time of recording her evidence, i.e., on 25.08.2023. The incident occurred on 11.05.2019.

16. So far as cross-examination of the victim is concerned, it is nowhere stated that she was 12 years old at the time of the incident. At this juncture, it is necessary to mention here that the paper on which the name of the victim was typed, was kept in a sealed cover, which was opened at the time of the hearing. The said paper lists the victim's name as 'Ga' and her age as 12 years. Even in Exhibit 56, which is the copy of the first information report, the name of the victim is shown as 'Ga @ Kh'.

17. When the accused was questioned under Section 313 of Cr.P.C., question no. 5 was put to him that it has come to the evidence of

PW1 that the victim's date of birth is 10.11.2006, to which he answered as 'I do not know'.

18. At this stage, it is necessary to mention here that the birth certificate of the girl by the name 'Ga' was produced on record, according to the case of prosecution, which is of the victim and was marked as exhibit 36/C. The said document was not proved by any of the witnesses at the examination, but was executed as a public document. The question is thus whether this public document can be relied upon in determining whether the victim was a minor. In this regard, the following observation of the Hon'ble Apex Court in the case of **Alamelu and another Versus State represented by the Inspector of Police**, decided by the Hon'ble Apex Court on 18.01.2011 in Criminal Appeal No. 1053/2009 with connected Criminal Appeals. In the said judgment, the Hon'ble Apex Court has taken into consideration the law laid down in the case of **Birad Mal Singhvi Versus Anand Purohit, 1988 (Supp) SCC 604**, is worth to reproducing, more particularly, paragraph nos. 38 to 44, which are as follows :

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5.

Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under [Section 311](#) Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-

examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of [Birad Mal Singhvi Vs. Anand Purohit1](#), observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....

..... Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the

date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

The same proposition of law is reiterated by this Court in the case of [Narbada Devi Gupta Vs. Birendra Kumar Jaiswal](#)², where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

41. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC 745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of [Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.](#)³, In the aforesaid judgment, it is observed as follows:-

".....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

42. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

43. We may further notice that even with reference to [Section 35](#) of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of [Ravinder Singh Gorkhi Vs. State of U.P.](#)⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his

behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of [Section 35](#) of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under [Article 21](#) of the Constitution, as [in that case](#) the accused may unjustly be convicted."

44. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor."

19. It is thus crystal clear that the prosecution has not proved that at the time of the commission of the offence, the victim was a minor. In that view of the matter, since the date of birth of the victim is not proved, I conclude that the proceedings/ingredients under the Act of 2012 are not proved by the prosecution.

20. The question is whether the ingredients of offences under section 376 2 (l) of the IPC are proved or not. Section 376 of the IPC prescribes punishment for rape, whereas Sub Section 2 (l) deals with the commission of rape on a woman suffering from mental or physical disability.

21. Rape is defined under Section 375 of the IPC, which means penetrating the penis to any extent into the vagina of a woman.... Thus, the two questions that fall for consideration are whether there was penetration of the penis into the vagina of the victim and whether the victim was mentally disabled. In this regard, the question regarding mental disability will have to be answered first. To prove that the victim was mentally disabled, the prosecution has taken the help of the testimony of PW 5, PW 8 and PW 9.

22. PW 5 / Dr Amol Jain, in his deposition, had stated that one Dr Kalpesh Wagh had examined the victim on 12.05.2019, since the concerned police station had requested him by issuing a letter. He deposed that Dr Kalpesh Wagh died during the COVID-19 pandemic, and the medical report of the victim dated 12.05.2019, was in the handwriting of Dr Kalpesh Wagh. He then stated that Dr Wagh had given the certificate of medical examination of the victim, as shown in exhibit

P-48/PW 5. He deposed that, before the examination of the victim, the consent of the grandmother was obtained.

23. In cross-examination, he admitted that in column no. 17, the general behaviour of the victim was mentioned as normal, and in column no. 31, the intelligence was mentioned as normal.

24. Thus, it is the case of the defence that the victim was a girl of normal understanding, and even her intelligence was normal.

25. PW 8 is one Jivan Pawar, who, as a Psychiatrist, had stated that the victim was brought to him for psychiatric evaluation and initially, on 13.05.2019, the psychiatric evaluation was made by Dr Pawar, Senior Resident, who was working with him. The victim was accompanied by her grandmother. He stated that it was Dr Pawar who advised a few tests and sought the opinion of the senior, i.e., PW 8. The victim was then kept under observation for intellectual disability clinically, and an IQ test, which was conducted, which is as follows:

“3. In her mental status examination victim was sitting comfortable on chair. She has increased reaction time to the question. In between she was repeating the same history that Bharat removed her clothes. Further she was non cooperative. She was able to say her name,

village name, but could not tell the name of Taluka. She was restless. Her affect was silly, intelligence was poor. She had delayed walking, delayed speech, but she had normal hospital delivery. Her I.Q. test was done. It was 35 to 40, which falls under moderate intellectual disability. So she was diagnosed as intellectual disability as moderate with alleged history of sexual assault. In the OPD papers I have mentioned the impression of clinical diagnosis and also mentioned about the result of I.Q. test. Report now shown to me is in my handwriting. It is issued by me. It bears my signature. Contents are true and correct. It is marked as Exh.P-68/PW8.”

26. Thus, the aforesaid testimony clearly shows that the IQ test revealed the victim fell into a category between 35 and 40, and accordingly, she was diagnosed as having an intellectual disability. He then proved the certificate below, Exhibit P-68/PW8, in which it is categorically mentioned that intellectual disability is moderate with an alleged history of sexual assault.

27. This witness was subjected to the cross-examination in which the defence tried to bring on record that there is a difference between the deaf and dumb and those of less intelligence. A deaf person cannot hear or speak, and a less intelligent person has poor intelligence. This

particular defence was taken by the defence in the cross examination of PW 8. PW 8 had stated that when he enquired from the mother of the victim, she stated that the victim was sent to a deaf and dumb school in a particular village.

28. In cross-examination, a question was asked whether the victim was communicating properly, to which PW 8 answered that she was. Further, an attempt was made to disbelieve the testimony of PW 8 and the documentary evidence, on the ground that the OPD papers were not in the proper format of the hospital, as admitted by PW 8. At this stage, it is necessary to mention that the court put a question to this witness regarding whether the OPD papers are required in the proper format of the hospital, to which PW8 replied in the negative.

29. PW 9 is the Clinical Psychologist, who was examined by the prosecution and had stated that he holds the qualifications and experience to treat mentally disabled persons and on 25.09.2019, Dr Vijay Pawar, Psychiatric of the concerned hospital, referred the victim. He then conducted the “Binet Kamat I.Q.” test, and during the said test, certain questions were asked to the victim, and the report was prepared. The said report, which was prepared, was proved by this witness below, exhibit

69. Exhibit 69 shows the test results as 35 to 40 falls under the category of moderate for mentally challenged.

30. PW 9 was subjected to cross-examination, in which the attempt was made to assail his testimony on the ground that the report below exhibit P-69/PW 8 was issued at the instance of Dr Vijay Pawar, and he did not obtain the consent of the victim's mother. In cross-examination, PW 9 admitted that the victim was not responding well to his questions, but that she was acting as per his instructions. PW 9 volunteered that when the victim was asked to close the door or bring an article, she was doing the same. The victim was not answering his questions immediately, and it was necessary to repeat the questions two to three times. He further admitted that the victim was not 100% mentally challenged. A court question was put to him in the following manner :

“Court Question :- Which are the four categories of mentally challenged persons ?

Answer :- There are four categories of mentally challenged persons. Those are (i) mild, (ii) moderate, (iii) sever and (iv) profound. Person having I.Q. between 50 to 69 comes under mild category, person having I.Q. between 35 to 49 comes under moderate, I.Q. between 20 to 34 comes under severe category and I.Q. below 20 comes under profound category.”

31. Thus, the testimony of all the witnesses discussed above would clearly reveal that the victim had mental disability, more particularly, her case fell in the moderate category.

32. Learned counsel for the appellant submitted that since the case of the victim fell under the moderate category, it cannot be said that the ingredients of the offences under Section 376(2)(1) of the IPC are attracted. According to her, what needs to be looked into is whether the victim is intelligent. She submits that since she has moderate disability, it does not mean that she is mentally disabled, and even according to PW 8 and PW 9, the victim was acting as per their instructions, and when asked to close the door or to bring some articles, she was doing the same. In this regard, it is necessary to discuss the law laid down by the Hon'ble Apex Court in the case of **Chamanlal Versus State of Himachal Pradesh, reported in (2020) 17 SCC 69**, more particularly paragraph nos. 18, 19 and 20, which reads as under :

“18. So far as the merit of the appeal is concerned, on re-appreciation of the entire evidence on record, more particularly the deposition of doctors examined as PW11 – Dr. Ramesh Kumar and PW22 – Dr. Rama Malhotra, the High Court has specifically found that the IQ of the victim was 62 which was based on the history and mental state examination of the victim. The High Court has also come to the conclusion that the victim was not in a

position to understand the good and bad aspect of the sexual assault. Merely because the victim was in a position to do some household works cannot discard the medical evidence that the victim had mild mental retardation and she was not in a position to understand the good and bad aspect of sexual assault. It appears that the accused had taken disadvantage of the mental illness of the victim. It is required to be appreciated coupled with the fact that the accused is found to be the biological father of the baby child delivered by the victim. Despite the above, in his 313 statement the case of the accused was of a total denial. It was never the case of the accused that it was a case of consent. Therefore, considering the evidence on record, more particularly the deposition of PW11 and PW22 and even the deposition of the other prosecution witnesses, the High Court has rightly observed that case would fall under Section 375 IPC and has rightly convicted the accused for the offence under Section 376 IPC.

19. *Even as per clause fifthly of Section 375 IPC, “a man is said to commit rape”, if with her consent when, at the time of giving such consent, by reason of unsoundness of mind, is unable to understand the nature and consequences of that to which she gives consent. As observed hereinabove, even it is not the case on behalf of the accused that it was a case of consent. On evidence, it has been established and proved that the victim was mentally retarded and her IQ was 62 and she was not in a position to understand the good and bad aspect of sexual assault. The accused has taken disadvantage of the mental sickness and low IQ of the victim.*

20. *Now so far as the submission on behalf of the accused that there are contradictions in the statement of PW11 – Dr. Ramesh*

Kumar and PW22 – Dr. Rama Malhotra that she was not knowing ‘Hindi’ and that she was only knowing ‘Phari’ and therefore in view of such contradictions the benefit of doubt must go in favour of the accused is concerned, the aforesaid aspect has been explained by PW22 in her cross-examination. In the cross-examination, PW22- Dr. Rama Malhotra has specifically stated that the language is not material in the tests because these are independent of language. From the medical evidence, it emerges that IQ 62 falls in the category of ‘mild mental retardation’. It has also emerged that the mental status and IQ are determined on the basis of the injuries and activities. IQ of a person can be known on the basis of the questions, activities and the history of a patient. Therefore, even if there might be some contradictions with respect to language known by the victim, in that case also, it cannot be said to be the major contradictions to disbelieve the entire medical evidence on the mental status of the victim. Therefore, the High Court is justified in reversing the order of acquittal and convicting the accused for the offences under Sections 376 & 506 IPC.”

33. It is thus crystal clear that what is required to be seen is not whether the victim performs the regular jobs, but the question relates to the mental capacity. As the court is not an expert in deciding the IQ, just because the victim was having moderate disability, it would not mean that it would take away the case of the prosecution from Section 376(2) (l) of the IPC. It would be the fact that the victim was mentally disabled, rather than the percentage of mental disability, that would be relevant.

34. This takes me to the first question, whether the victim was subjected to sexual intercourse. It is further necessary to mention here that since the prosecution has proved that the victim was mentally disabled, there could be no question of consent for having sexual intercourse. In this regard, it is necessary to consider the testimony of PW 2, the victim, who was the star witness.

35. PW 2 was asked several questions by the trial court to conclude whether the victim had the capacity / intelligence to depose in the court. After putting the preliminary questions, the court satisfied itself that the witness/victim is in a position to give rational answers. Thereafter, since the victim was unable to understand the court procedure, an oath was not administered to her. In examination-in-chief, more particularly from question no. 24, she had narrated the incident. The gist of her testimony would reveal that she had stated that on the day of the incident, she was washing the clothes, at which time, the accused came, removed her clothes and inserted his private part in her private part. The question no. 27, is relevant, which is reproduced as under :

“Que:27 What happened thereafter :

Ans: He inserted his private part in my private part. (The witness also pointed out her private part with gestures.)”

36. She then stated that she got swelling. In cross-examination, the defence attempted to argue that the incident had not taken place and that the grandmother was not, in fact, the person who witnessed it. Since in answer to the question no. 41, the victim had admitted that her grandmother went to the field at about 4:00 a.m. and returned home at about 4:30 p.m.

37. Perusal of cross-examination would reveal that the victim has categorically denied the suggestion that a false case was lodged against the accused, and she had deposed that before the Magistrate under pressure. Nothing fruitful was brought on record. The demeanour of this witness / PW 2 was observed by the court, and it was noted that the victim was frightened and crying. Therefore, a short break was given to the victim to make her comfortable, and it was also observed that the victim was in fear. The statement under Section 164 of Cr.P.C. was also shown to this witness, which she identified and which was marked at exhibit P-29.

38. The victim was then forwarded for the medical examination to PW 5. PW 5 had deposed that the victim was in fact examined by Dr Kalpesh Wagh, who was attached to the Sub District Hospital, and that

PW 5 had worked together with Dr Kalpesh Wagh. Dr Kalpesh Wagh died during the COVID-19 pandemic. The documents prepared by Dr Kalpesh Wagh were tried to be proved by the prosecution. PW 5, who was the doctor who had worked with Dr Kalpesh Wagh, then stated that Dr Kalpesh Wagh, after examination of the victim, had issued a certificate below exhibit P-48, and on examination, it was noted that there were no external bodily injuries on the person of the victim, nor any injuries on the private part.

39. In further examination, it had also stated that the medical examination of the accused was also conducted by Dr Kalpesh Wagh, and the report was prepared, which is below Exhibit P-49/PW 5. He identified the signature of Dr Kalpesh Wagh on it. It was stated that on examination of the accused, it was found that the accused had consumed alcohol, and his blood sample was collected and sent to the laboratory. The certificate of alcohol examination was then brought on record by the prosecution through the Regional Forensic Science Laboratory, which is exhibited below as P-51/PW 5. The medical examination of the accused, more particularly the injury certificate, was proved below exhibit P-52 / PW 5. At this stage, it is submitted that three injuries were found on the person of the accused, who was examined on 12.05.2019 :

“1) abrasion on right maxillary region 5 X 5 c.m. margin well defined, injury was fresh can be caused due to blunt object, nature of injury -simple.

2) blunt trauma over right side of the chest 5 X 5 c.m. not well defined, injury was fresh, can be caused due to blunt object, nature of injury- simple.

3) blunt trauma over frontal region, size not mentioned, not well defined, injury was fresh, can be caused due to blunt object, nature of injury – simple.”

40. He admitted that those injuries are possible if a person is caught by the crowd and beaten by the crowd. In cross-examination, this witness had admitted that he was not personally present when the medical examination was conducted. He admitted that in column no. 22 in exhibit P-48/PW 5, it is mention that victim was sensible during the whole time and that the offence was committed under influence of alcohol or other intoxicants and in column no. 11 it is mentioned that generative organs – development of genitals are well developed, so also in column 17 general behaviour of victim was mentioned as normal. The defence attempted in further cross-examination to elicit an admission that, in column no. 31, intelligence was recorded as normal and, consequently, the witness was not mentally disabled.

41. Since the court has already concluded that the victim was mentally disabled, and the aspect of the victim suffering from a mental disability has been discussed, it is not repeated.

42. The question that was required to be answered from the testimony of PW 2 and PW 5 was whether the offence of rape had been proved or not.

43. Learned counsel for the appellant has again argued that there is absolutely no injury to the person of the victim, nor to the private parts, which clearly shows that the offence of rape did not occur. She again submitted that the medical evidence, which is relied upon by the prosecution, in fact fails to support the prosecution's case, and that, since a doubt has been created, the benefit of it should be extended to the accused.

44. At this stage, it is necessary to mention here that the evidence the prosecutrix had categorically stated about the commission of the offence. PW 2/victim of the crime had deposed in her testimony that the accused had touched his private part to the private part of the victim. The definition of rape cannot be ignored; the act amounts to the commission of the offence of rape. The victim's testimony clearly shows

that the accused committed the act in question. Further, although corroboration is not a rule of law but a rule of prudence, it cannot be overlooked that the first information report was lodged within two hours of the commission of the crime. The accused was arrested on the spot and was also beaten by the public. The defence taken by the accused is that he took Rs. 18,000/- from the grandmother of the victim, and therefore, a false case was filed, is without any foundation. Giving details of the transaction that led to the recovery of the debt of Rs. 18,000/- would have allowed the court to decide the accused's defence on a preponderance of probabilities.

45. The prosecution has thus proved that the victim was mentally disabled and was subjected to sexual intercourse against her will, and therefore, the conviction is proper.

46. There are a few more witnesses, i.e. PW 1, who is the victim's maternal uncle. The victim's maternal uncle is not a witness to the incident, but he has deposed that on the date of the incident, he received a telephonic call from the victim's grandmother and, thereafter, rushed to the spot. He then deposed that the crowd was in front of his house since the victim was residing with him, along with the mother of PW 1. The accused was caught and kept in the vehicle. On being

questioned, from the mother of PW 1 / grandmother of the victim, it was disclosed that the accused was inside the house when the door was opened ; she saw that the accused was wearing his pants and the victim was undressed.

47. It is the contention of the learned counsel for the appellant that there was an opportunity to examine the grandmother of the victim, but she was not examined well within the time. She, therefore, contended that though the victim's grandmother had died during the course of the trial, an early examination of the grandmother of the victim at the instance of the prosecution would have thrown necessary light on the factual aspect of the case. This argument doesn't need further discussion because death is certain, while time is uncertain.

48. It is necessary to mention here that no incriminating material was found when the clothes were forwarded for chemical analysis. The report of the chemical analysis is on record, particularly at exhibits 80, 81, and 82. Exhibit 81 reveals that the accused's clothes were forwarded for chemical analysis. Exhibit 80 would describe the articles contained, as well as the results of the analysis. Article A1 is the pant of the victim, whereas Article A2 is the knicker and Article 3 is the top. As for Article B1, it is a full shirt. Article B2 is the full pant, and Article B3 is the

underwear of the accused. They are at exhibits 1 to 6, respectively. The analysis results show that no semen was detected in exhibits 1 to 6. No blood was detected on exhibits 1, 2, and 6, and the clothes at exhibits 3, 4, and 5 were stained with blood. On exhibit 3, blood was found to be human and was group 'B'.

49. Document below exhibit 81 shows that the blood group of the accused was of group 'B', and document below exhibit 82 shows that the blood group of the victim was found unsuitable for grouping. It is necessary to mention here that even according to the defence, the accused was beaten and, therefore, the possibility cannot be ruled out that the blood was found on the clothes of the accused.

50. The testimony of Investigating Officer/PW 7 is procedural nature, who has deposed that he had carried out the investigation, seized the articles, etc. The testimony further shows that he had not recorded Dr Digambar Patil's statement. He has admitted that at one place in the FIR, 'Patil' is written and, thereafter, it is rounded off and written as 'Koli', and it does not bear his signature. Thus, the defence has contended that the surname of the accused is still in doubt and, therefore, it cannot be said that it was the accused who committed the offence. She further stated that he had not recorded the statements of witnesses residing

adjacent to the spot of the incident, nor had he seized the bed sheet wrapped by the victim.

51. At this stage, it is necessary to mention that, so far as the non-examination of Digambar Patil is concerned, PW 8 had categorically stated that Digambar Patil was junior to him and was working with his hospital, and had deposed about the examination of the victim. Just because Mr Digambar Patil is not examined, it will not go to the root of the matter. So far as overwriting in the FIR regarding the surname is concerned, it is not even the defence's case that some other person committed the crime and that the applicant was falsely implicated in it. A typographical mistake or minor lapse would not be enough to overthrow the well-founded case of the prosecution. Non-examination of the persons residing adjacent to the spot of the incident would also be of little help to the defence, as the prosecution, while examining the relevant witnesses, has proved the case beyond a reasonable doubt. Even in the absence of other factors, it is a well-established legal principle that the quality of the evidence or witness, rather than its quantity, is the criterion to be considered.

52. In that view of the matter, I conclude that the prosecution has not proved an offence under the Protection of Children from Sexual

Offences Act, but has proved the offence under Section 376 (l) of the Indian Penal Code. Accordingly, the following order is passed :

ORDER

- i. The criminal appeal is partly allowed.
- ii. The judgment dated 30.01.2024, passed in Special Case No. 85 of 2019, by Special Judge (POCSO), Additional Sessions Judge, Dhule, convicting the appellant for the commission of an offence punishable under section 6 of the Protection of Children from Sexual Offences Act, is set aside.
- iii. The accused is acquitted under Section 6 of the Protection of Children from Sexual Offences Act.
- iv. So far as judgment convicting the appellant / accused for the commission of an offence punishable under Section 376 (l) is concerned, the same is maintained, so also the punishment.
- v. At this stage, it is necessary to mention here that learned appointed counsel has argued the case at length and she has pointed out various provisions. The High Court Legal Services Sub-Committee, Aurangabad, to quantify her fees.

(RAJNISH R. VYAS, J.)