

Presented on : 25-11-2016.
 Registered on : 25-11-2016.
 Decided on : 29-11-2018.
 Duration : 02Yrs.04Days .

IN THE COURT OF JUDGE, SPECIAL COURT AND
ADDITIONAL SESSIONS JUDGE, JALNA
(Before Dilip S. Ghumare)

Spl.Case (Child) No. 70/2016.

CNR No.MHJN01-003597-2016.

Exh.No. 139.

The State of Maharashtra ... **Prosecution.**
 through Police Station
Mantha, District- Jalna.

Versus

1. Vinayak s/o Khanderao Kamble, ... **Accused.**
 Age 23 years, R/o Gevrai,
 Taluka Mantha, Dist.Jalna.
2. Achyut s/o Bhagwan Kamble,
 Age 22 years, R/o Gevrai,
 Taluka Mantha, Dist. Jalna.
3. Vijay s/o Kisan Sirsath,
 Age 26 years, R/o Sadula
 Taluka Majalgaon, Dist. Beed
 at present Gevrai,
 Taluka Mantha, Dist. Jalna.
4. Kavita w/o Vijay Sirsath,
 Age 25 years, R/o Sadula
 Taluka Majalgaon, Dist. Beed
 at present Gevrai,
 Taluka Mantha, Dist. Jalna.

Offence : Under section 363, 366-A, 376 of the Indian Penal Code and u/s 3 punishable u/s 4 of the Protection of Children from Sexual Offences Act.

Smt. V.L.Mukim, APP for State.
 Smt. U.P. Kale (Wayal), Advocate for accused No.1,
 Shri D.R.Zol, Advocate for accused no.2,
 Shri H.T.Kakde, Advocate for accused no.3 & 4.

JUDGMENT

(Delivered on 29th November, 2018)

1] The accused No.1 Vinayak stands charged for the offence punishable under sections 363, 366-A, 376 of the Indian Penal Code and u/s 3 punishable u/s 4 of the Protection of Children from Sexual Offences Act. The accused Nos. 2 to 4 stands charged for the offence punishable u/s 363, r.w. 34 of the Indian Penal Code for having in furtherance of common intention with accused No.1 Vinayak, kidnapped the prosecutrix (PW.2) without consent of her parents.

2] The prosecution's case, in brief, is that the informant PW-1 Sanjay has three daughters and one son and they reside at village Gevrai of Mantha Tahsil, Dist. Jalna. His daughter-prosecutrix (PW.2) was studying in 10th class at the relevant time. She had left the home for her school on 18/06/2016 at about 11-00 a.m. But she did not return home till 6-30 pm on that day and so he received telephone call in that regard from his house. Therefore, he made inquiry with the friends of PW.2 prosecutrix, who told him that on that day she did not come to the school. The informant PW.1 Sanjay also

made inquiry with neighbours, whereupon he learnt that the accused No.1 Vinayak had kidnapped his daughter PW.2 prosecutrix and other accused persons helped him in commission of the said crime. So he lodged report Exh.49 with police on 19/06/2016. On the basis of the said report, the police registered crime against the accused for the offence punishable under Sections Secs.363, 366-A, 34 of the Indian Penal Code vide C.R No.59/2016.

3] The investigation of the crime was conducted by Police Sub Inspector C.M.Charbhare (PW.11). During the course of investigation, he visited informant PW.1's house and prepared its panchanama (Exh.44). Thereafter, informant PW.1 Sanjay brought the prosecutrix PW.2 at police station on 27/6/2016. He then recorded statement of prosecutrix and sent her for medical examination. He collected medical certificate of the prosecutrix. He seized clothes of the prosecutrix under seizure panchanama (Exh.87) After medical examination of prosecutrix he found that the accused had ravished the prosecutrix PW.2 and so offence u/s 376 IPC and sec. 3 & 4 of POCSO Act were added to the crime. Thereafter, the accused came to be arrested on 05/07/2016. The accused Vinayak was medically examined. On 05/07/2016 he seized clothes of accused No.1 Vinayak under seizure panchanama Exh.88. On 07/07/2016 he went to Nasik alongwith accused Vinayak and prepared panchanama (Exh.76) of place where he and the prosecutrix resided in limits of Malegaon Tq Sinnar. He also recorded statements of owner of the room in which the

accused No.1 Vinayak and prosecutrix were residing at Malegaon vicinity. He sent muddemal articles to FSL Aurangabad on 15/07/2016 vide letter (Exh.113). He collected school admission extract of prosecutrix (Exh.104). He got recorded statement of prosecutrix under Sec. 164 of Cr.PC before the Court. He collected C.A. reports (Exh.114 to 116). Ultimately after completion of investigation, I.O. PW.11 PSI Charbhare presented report under Sec. 173(2) of Cr.P.C. against all of the accused.

4] My learned predecessor Smt. S.S.Kosamkar framed the charge Exh.30 against the accused persons. The accused No.1 Vinayak was charged for the offence punishable 363,366-A, 376 of the Indian Penal Code and u/s 3 punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012. The accused Nos. 2 to 4 were charged for the offence punishable u/s 363 read with section 34 of I.P.C. The aforesaid charge was read over and explained to the accused persons. They pleaded not guilty and claimed to be tried. Upon completion of the prosecution evidence, the statement of the accused persons U/Sec. 313(1)(c) of Cr.P.C were recorded. The accused abjured their guilt. The defence of the accused is that of false implication in the crime.

5] The following points arise for determination and my findings are recorded against each thereon for the reasons stated herein below :

Points	Findings
1) Whether the prosecution proves that on aforesaid date, time and place accused Nos.2 to 4 in furtherance of intention with accused No.1 had kidnapped the prosecutrix aged 15 years, minor daughter of informant Sanjay Shankar Gondge below eighteen years, by taking or enticing her out of keeping of his lawful ... guardianship without his consent ?	NO
2) Whether the prosecution proves that on 18/06/2016, at about 11-00 am at Gevrai, Taluka Mantha, Dist. Jalna accused No.1 Vinayak kidnapped the prosecutrix aged 15 years, minor daughter of the informant Sanjay Shankar Gondge below eighteen years, by taking or enticing her out of keeping of his ... lawful guardianship without his consent ?	YES
3) Whether the prosecution proves that on aforesaid date, time and place accused No 1 Vinayak had kidnapped the prosecutrix with intent that she may be compelled to marry him in order that she may ... be seduced to illicit intercourse ?	YES.
4) Whether prosecution proves that accused No.1 Vinayak between 19/6/2016 and 25/6/2016 at Nasik,	

Taluka and Dist Nasik committed rape on the prosecutrix, aged 15 years, minor daughter of Sanjay ... YES.
Shankar Gondge ?

5) Whether prosecution proves that accused No.1 Vinayak on 19/6/2016 and 25/6/2016 at Nasik committed penetrative sexual assault with the prosecutrix aged ... YES.
15 years, minor daughter of Sanjay Shankar Gondge ?

6) What order ? ... As per final order.

: REASONS :

6] The prosecution in support of its case has examined in all eleven witnesses. They are the informant P.W.1 Sanjay Shankar Gondage, P.W.2 prosecutrix, Mother of prosecutrix PW.3 Anita Sanjay Gondge, Medical Officer PW.4 Dr. Kunal Choudhary, PW.5 Kashinath Kahru Sangle, Panch witness PW.6 Bharat Kashinath Sangle, Panch witness PW.7 Nitin Sheshrao Chinchole, Medical Officer PW.8 Dr. Dhanshri Kelkar, Headmistress of ZP school Gevrai PW.9 Rajani Nagorao Daphane, Carrier of muddemal to FSL Aurangabad PW.10 NPC Ramchandra Khalse and Investigating Officer PW.11 PSI C.M. Charbhare. The prosecution has also relied upon documentary evidence which includes medical reports and C.A. reports, besides panchanama and extract of school admission register, which would be referred at appropriate places.

Point No.1 :-

7] At this stage, it would be appropriate to straight away mention that the prosecution has miserably failed to substantiate any of the charges framed against accused no.2 to 4. This because the informant PW.1 Sanjay had nowhere testified about any active role of accused no.2 to 4 in commission of the crime, besides stating that the accused Nos. 2 to 4 had helped the accused No.1 Vinayak to take away his daughter to Nasik. So also, PW.2 prosecutrix has also not stated anything incriminating in her testimony against the accused No.3 Vijay and No.4 Kavita. She only has stated that the auto rickshaw in which the accused No.1 Vinayak belong to accused No.2 Achyut Kamble. The aforesaid act of accused No.2 Achyut Kamble could not be sufficient to conclude that he shared common intention to commit the offences with which he is charged. Thus, the evidence of the prosecution cannot be said to be of any worth the name to bring home the guilt of the accused Nos. 2 to 4 by aid of Sec. 34 of IPC for which they are charged in the present crime. Therefore, I hold that the prosecution has failed to bring home the guilt of the accused Nos. 2 to 4 for offence under Sec. 363 read with sec. 34 of IPC pitted against them in this criminal trial. Therefore, point No.1 is answered in the negative.

8] This takes me to consider the prosecution case against the accused no.1 Vinayak.

Point Nos. 2 to 5 :

9] Point Nos. 2 to 5 are dealt with simultaneously to avoid repetition of discussion of the evidence, which is common for them.

10] PW.2 prosecutrix was medically examined by P.W.8 Dr. D.A.Kelkar, who was attached to Women Hospital, Jalna as a Medical officer. She has deposed that she had medically examined PW.2 prosecutrix on 27/06/2016. She did not find any evidence of signs of violence indicating forcible sexual intercourse. She also did not find any marks of injuries on the person of PW.2 prosecutrix and on her private parts. However, her hymen was found ruptured and examination of her vagina was stated to be easy with one finger while painful with two fingers. Further, vaginal examination indicates that her Labia majora, Labia minor, Vestibula, clitoris and vagina were normal. PW.8 Dr. D.A.Kelkar has specifically stated that there were no injuries to the private parts and on the body of prosecutrix. Accordingly she issued medical examination report Exh.100 which was signed by her and same was proved and exhibited in her evidence.

11] The informant P.W.1 Sanjay is father of PW.2 prosecutrix. He testified that on the day of incident prosecutrix PW.2 left house at about 11-00 am for school, but did not return. In the evening at about 6-30 pm he received phone call from his house informing him that prosecutrix had not returned from the school. So he

went to the school which was found to be closed. Then he went to the house of prosecutrix's friends who told him that on that day woman had not reported to the school. Then he inquired about prosecutrix with her relatives and found that she was not at their house. Then from the discussion in the village he learnt that the accused No1 Vinayak had enticed away her with the help of other accused persons. Therefore, he went to the police station and lodged the report(Exh.49) against the accused persons.

12] The informant PW.1 Sanjay further testified that he met his daughter prosecutrix at Aurangabad on 26/06/2016 at the house of one Rajendra Dattaram Kharat who had told him that she is at his house. He then brought his daughter prosecutrix to his house and thereafter they went to Mantha police station where they recorded her statement. The informant PW.No.1 Sanjay also testified that his daughter had told him that she stayed with accused No.1 Vinayak at Nasik for seven days and during that period accused No.1 Vinayak had sexually assaulted her.

13] PW.2 prosecutrix has testified that in April 2016 the accused No1 Vinayak told her that he would marry and also told her that he would tell her when they would go away. She further testified that on 18/06/2016 the accused had asked her to come to Mantha and wait at Bus-stand where he would come. She further deposed that accordingly, she came to Mantha bus-stand on the pretext of going to

school where the accused came in auto rickshaw belong to accused No.2 Achyut and from there they both went to Nasik by bus. She further testified that they took one room at Nasik on rent and in that room they stayed as husband and wife for seven days period during which time he had established physical relations with her. She also further testified that on 25/06/2016 the father of the accused Vinayak came there and took them to his house at Nasik. On the next day Sarpanch of their village Gevrai by name Rajabhau Kharat came there and put to his house at Aurangabad. He then informed her father informant PW.1 Sanjay about her arrival at the house of Rajabhau Kharat. Thereupon her father alongwith her uncles came there and took her to Mantha police station where her statement came to be recorded. She also testified that police has seized their clothes and she was medically examined at Civil Hospital, Jalna.

14] The aforesaid evidence of the informant PW.1 Sanjay and PW.2 prosecutrix clearly establishes the fact that the accused No.1 Vinayak had induced PW.2 prosecutrix to leave her village Gevrai with intent that she would be seduced to have illicit intercourse with him. Further, their evidence coupled with medical evidence also establishes that the accused No.1 Vinayak had sexual intercourse with PW.2 prosecutrix and had committed penetrative sexual assault. This because, she has clearly stated that the accused had established physical relations with her and they lived in a room as husband and

wife. Even, the medical evidence corroborates the fact of penetrative sexual assault as her hymen was found to be ruptured.

15] At this stage, it may be stated that the medical officer PW.4 Dr. Kunal Choudhari had medically examined the accused no.1 Vinayak and found him capable of performing sexual intercourse and accordingly had issued medical certificate (Exh.62) in that regard. Ld. Adv. Smt. Wayal for the accused No.1 argued that medical officer had issued certificate (Exh.46) in which there was nothing on record to suggest that the accused Vinayak was capable of performing sexual intercourse. However, later to fill up the aforesaid lacuna another medical certificate(Exh.62) was procured from the Medical Officer and so same ought not to be taken into consideration. I do not find any force in her submission, because the said lacuna was created due to inaction on the part of the investigating officer as to produce on record best available evidence. It can be said to be oversight in the management of the prosecution. If proper evidence is not adduced or any relevant material was not produced on record due to inadvertence the Court has to be magnanimous in permitting such mistakes to be rectified. After all function of the Criminal Court is administration of justice and not to count errors committed by the parties. Therefore, the medical certificate(Exh.62) produced at the later stage of trial can be taken into account to draw inference that the accused is capable of performing sexual intercourse.

16] It may be stated here that learned Adv. Smt. Wayal for the accused No.1 Vinayak contended that there was no sexual intercourse between the accused No.1 and prosecutrix PW.2. She submitted that in paragraph No.10 of the cross examination the prosecutrix PW.2 had admitted that she had not come across with sexual intercourse with anybody. She submitted that this admission is corroborated by the medical evidence of PW.8 Dr. Kelkar who has given several admissions and had ultimately stated in her evidence that she had not noticed any signs of penile penetration.

17] By above submission, an fragile attempt was made by the Ld. Adv. Smt. Wayal for the accused No.1 Vinayak to persuade the Court that there was no case of penetration of penis in the vagina of the prosecutrix so as to justify the conviction of the accused under section 376 of the Indian Penal Code. In this regard heavy reliance was placed upon the opinion of the doctor on various hypothetical circumstances put to her in her cross examination. I need not dwell upon that aspect in deep because, where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's

opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. { [See Madan Gopal Kakad v. Naval Dubey & Anr.](#) [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.”

19] In light of the above settled canon of criminal jurisprudence, I have no hesitation in concluding that there is no merit in the contention raised on behalf of the accused No1 with regard to discrepancy in the medical and the ocular evidence. Further, it is argued that there is no direct evidence connecting the accused to the commission of the crime and that there was no penetration, therefore, the accused has not committed the offence punishable under [Section 376](#) IPC. As already noticed, the prosecution had examined nearly 11 witnesses and produced documentary evidence on record including Medical and school admission extract in support of its case. Firstly, there is no reason for the Court to disbelieve the statement of PW.2 prosecutrix that she accompanied the accused aafter leaving home on the pretext of attending school and that the accused incited her and lured her into sexual relationship promising to marry her by taking her to Nasik where he committed rape on her in the room rented by them for residing together as husband and wife.

20] In this context reference can profitably be made to the decision of His Lordship Justice A.M.Badar of the Bombay High Court in the case of ***Abhijit @ Babalu Avinash Kadam .vs.. State of***

Maharashtra Criminal Appeal No.239 of 2015

(Indiankanoon.org/doc/198033277) wherein it has been observed that from the definition of penetrative sexual assault by Sec. 3 of the POCSO Act, it is clear that even penetration of penis to a slightest extent into the vagina of a child is sufficient to constitute the offence of penetrative sexual assault. That being so the medical evidence depicting rupture of hymen and easy admission of one finger in vagina is sufficient to draw inference of penetration of penis to slight extent to bring the offence in the ambit of definition of Sec.3 of POCSO Act and Sec. 376 of I.P.C. Therefore, the absence of medical evidence showing significant changes in Labia Majora, Labia Minora and vagina and that the vagina was not capricious and did not admit two fingers which is observed in virgin girl is utterly devoid of merits.

21] No doubt, the prosecutrix has admitted in her cross examination that she had not come across with sexual intercourse with anybody. But, that itself does not makes her entire evidence lack of credibility. In this context, the learned APP Smt. Mukim for the state rightly submitted that in view of the aforesaid admission made by the prosecutrix her evidence does not becomes worthless because the admission was due to misleading question put by the Ld. Adv. Smt. Wayal for the accused. That apart this simple admission appears to have been ferreted out by Ld Adv Smt, Wayal for the accused No.1 not professionally but same is with practicing jugglery of words because, the witness first was asked whether she was married and then

she was put this embarrassing question whether she had sexual intercourse with anybody.

22] In this context I am tempted to note down the Ld APP Smt. Mukim who conducted the prosecution has not discharged her responsibility as she avoided putting those questions necessary to explain the matters referred to cross examination when law provides for an opportunity for re-examination. The very purpose of re-examination is to explain in the matter which have been brought down in the cross examination. Sec. 138 of Evidence Act outlines the amplitude of re-examination. Perhaps this must have happened as there is erroneous impression that that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in

accordance with the other provisions. (See ***Rammi @ Rameshwar ..vs.. State of MP, AIR 1999 Suprme Court 3544.***)

23] My Ld. predecessor ought to have exercise her powers under Sec. 165 of Indian Evidence Act by putting questions to the witness in order to obtain proper proof of the relevant facts and correct position of factual aspect of the sexual intercourse by the accused with the prosecutrix necessary for reaching the correct conclusion. There is nothing which inhibits the powers of the Courts to put question to the witness to elicit truth. The corollary of it is that if the Judge feels that witness has committed an error of slip, it is the duty of Judge to ascertain whether it was so, for to err is human and the chancing of erring is bound to accelerate under stress of nervousness due to examination of witness in charged atmosphere of the Court. Criminal justice is not to be founded on erroneous answers spread out by the witness during evidence collecting process. It is useful exercise for the trial Judge to remain active and alert so that errors can be minimized.

24] In the present case in hand my Ld Predecessor ought to have corrected an error slipped out of tongue of the prosecutrix who was a minor girl and so there is no justification to draw inference that the prosecutrix had not come across with sexual relation with anybody when in her earlier part of examination she had been specific that she

and the accused stayed in a rented room as a husband and wife for seven days and had established physical relation during that period.

25] Again reference can profitably be made to the decision of His Lordship Justice A.M.Badar of the Bombay High Court in the case of ***Abhijit @ Babalu Avinash Kadam .vs.. State of Maharashtra Cri. Appeal No.239 of 2015 (Indiankanoon.org/doc/198033277)*** wherein it has been held thus :-

“it is well settled that while deciding the case of sexual assaults on minor children the Court is bound to show a great responsibility and such case are required to be dealt with utmost sensitivity. The court is required to keep in mind broader probabilities of the prosecution case. Minor discrepancies and contradictions which are not fatal in nature cannot be used to jettison otherwise reliable prosecution case. Similarly, if evidence of the victim of the sexual assault is found reliable and trustworthy then there is no need to corroborate the same with other evidence.”

26] Ld. Ad. Smt. Wayal submitted that only rupture of hymen cannot be said to be proof of sexual intercourse. In this context she placed her reliance on the decision of His Lordship of the Bombay High Court in the case of ***Prashant Dault vs. State of Maharashtra 2018 ALL MR (Cri) 3909*** wherein it has been held that merely because the doctor examining prosecutrix opined that hymen of the prosecutrix is ruptured that itself cannot be said to be the conclusive proof of sexual intercourse. Ld. Adv. Smt. Wayal for accused No.1 Vinayak to buttress her above submission has placed her reliance on

the decision of Their Lordship of Apex Court in the case of ***State of Karnataka ..vs. F. Natraj, 2015 Legal Eagle 811*** wherein it has been held that the accused is entitled for benefit of doubt in case where the solitary evidence of prosecutrix in absence of any corroboration by medical evidence cannot be relied upon. The aforesaid case has no relevance because in that case the solitary evidence of prosecutrix was of not such quality which could be relied by the Court as there were gaps in the evidence of the prosecutrix and the medical officer's evidence made it highly improbable that sexual intercourse had taken place. So is not the present case and the fact that hymen was ruptured and the prosecutrix has clearly stated that the accused had kept sexual relations with him for those seven days period when they resided together can be relied upon to draw inference that the accused No.1 had raped the prosecutrix. More so when it is settled principle of law that, conviction of rape can be based on uncorroborated testimony of prosecutrix and even absence of injuries on the private parts of the prosecutrix will not falsify her case of rape. The Court at the same time has to bear in mind that question whether there was rape or not would ultimately depend on the facts and circumstances of each case (See. ***Radhu .v. State of U.P. (2015) 7 SCC 272.***)

27] Be that as it may, in view of above discussion, oral evidence of the informant PW.1 Sanjay and PW.2 prosecutrix coupled with corroborative medical evidence, it can be held that the contentions of the Ld. Adv. Smt. Wayal for the accused No.1 Vinayak

that he is falsely implicated in the crime and there was no sexual intercourse with prosecutrix is totally devoid of merits.

28] The crux of the matter is actually the second limb of contentions of Ld. Adv Smt. Wayal for the accused that considering the evidence on record by no stretch of imagination, it can be said that the accused had forcible sexual intercourse with PW.2 prosecutrix. She drew my attention to the medical evidence evincing forcible sexual intercourse due to absence of any injuries on the person of the prosecutrix PW.2.

29] Ld. Adv. Smt. Wayal for the accused No.1 also submitted that the evidence on record clearly shows that the prosecutrix was not induced to leave the lawful guardianship of her father. She drew my attention to the fact that the accused was not at village Gevarai or at village Mantha on 18/6/2016 or even prior to that. And even the I.O. PW.11 C.M.Charbhare had not found any witness who had been the prosecutrix and accused No.1 together either at village Gevrai or at Bus-stand at Mantha.

30] The fact that PW.2 prosecutrix had left her house on her own accord is clear from the evidence on record, since she must have clandestinely went alongwith accused no.1 Vinayak instead of proceeding to the school. Then they must have proceeded to Nasik as had been testified by the prosecutrix and upon reaching there resided together for considerable long period of seven days before they the

prosecutrix was brought to Aurangabad by one Rajabhau Kharat. No doubt, Ld. Adv. Smt. Wayal for the accused No.1 is right in submitting that the evidence of Rajabhau Kharat was vital to prove kidnapping and finding of the prosecutrix in the custody of the accused. But then that is remissness on the part of prosecution, but its benefit cannot be extended to the accused as it is settled principle of law that uncorroborated testimony of prosecutrix if it inspires confidence can be relied upon. This because, the grammar of law permits that the testimony of prosecutrix can be accepted without any corroboration without material particulars for she has to be placed on a higher pedestal than an injured witness.

31] That apart, PW.5 Kashinath Sangle has testified that the accused No.1 had brought one girl by name 'X' to stay along with him in his rented room and they lived together therefor five to six days. This evidence corroborates the testimony of prosecutrix that she was living in company of the accused at Malegaon Tq. Sinnar of Nasik District.

32] At this stage it would be appropriate to state that merely because PW.2 prosecutrix was a consenting party, the accused cannot absolve himself and go scot-free from the rigour of the offences with which he is charged under the provisions of IPC and POCSO Act. This because when a girl is below the age of 18 years her consent becomes immaterial. (See- ***C.Jineshlal Shah .vs. State of Bihar (2003(1) Supreme Court Cases 605)***)

33] In such factual matrix, of rival submission it is essential to determine whether PW.2 prosecutrix was below the age of eighteen years at the relevant time, when the accused had sexual intercourse with PW.2 Prosecutrix.

34] The prosecution has examined PW.9 R.N.Daphane, Headmistress of Z.P.School Gevrai. She had brought original school admission record of the prosecutrix who had taken admission in first standard in the school. In her evidence, the school admission extract (Exh.104) was proved and exhibited. The said certificate depicts birth of prosecutrix as 14/08/2001. The incident had occurred in June 2016 and as such at the relevant time she was a child being below the age of eighteen. The Ld. Adv. Smt. Wayal for the accused No.1 submitted that the school extract cannot be considered as conclusive proof of date of birth of a child in absence of the evidence of the person who entered the said date of birth supported by birth certificate issued by the competent authorities. Ld. Adv. Wayal for the accused also drew my attention to the certain admissions and contended that the entry relating to date of birth made in school register is of not much evidentiary value to prove the age of the person in absence of the material on which the age was recorded. She also submitted that the persons who had made the entries ought to have been examined by the prosecution to prove the genuineness of the entries made therein and therefore, the evidence of school headmistress PW.9 Daphane regarding date of birth based upon the admission register of the school

is not reliable document to prove the age of PW.2 prosecutrix. To buttress her she placed his reliance on the decision of *Satpalsing .vs. State of Haryana, 2010 Legal Eagle 520, Alla Menu ad another .vs.. State 2011 Legal Eagl 61.*

35] I do not find that these authorities cited by the Ld. Ad v. Wayal for the accused No.1 squarely cover the present case in hand, because the learned APP Smt.Mukim has rightly submitted that after the decision of Their Lordships of the Apex Court in *State of M.P. Vs. Anoop Singh Criminal Appeal No.442/2010* the birth certificate from school can be used for ascertaining the age of prosecutrix as per Rule 12(3)(b) of Juvenile Justice Act. In view of above decision of Their Lordships of the Apex Court in *Anoop Singh's* case, I do not find substance in submission of learned Adv. Smt. Wayal for the accused No.1, because the decisions of the Apex Court are Law of land under Article 141 of the Constitution of India. Needless to state that the learned APP Smt. Mukim for prosecution has rightly relied upon the decision of Their Lordship in the *Anoop Singh's case (cited supra)* wherein their Lordships have held that Rule 12 (3) of Juvenile Justice (Care and Protection of Children Rules) if applicable in determining the age of victim. The said decision provides that, the birth certificate from the school can be used for ascertaining the age of the prosecutirx as per Rule 12(3)(b) of the Juvenile Justice Act.

36] It would be relevant to reproduce para 12 and 13 of the said decision in *Anoop Singh's* case cited supra which runs as under :

12. This Court in the case of *Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.*, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

- (a) (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;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

13. This Court further held in paragraph 12 of ***Mahadeo S/o Kerba Maske*** (supra) as under:

“Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under

Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.”

(Emphasis supplied)

This Court therefore relied on the certificates issued by the Page 99 school in determining the age of PW.2 prosecutrix. In paragraph 13, this Court observed:

“In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where PW.2 prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of PW.2 prosecutrix to hold that PW.2 prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same.”

37] Considering above observations of Their Lordships of the Apex Court in the case of **Anoop Singh** (cited supra), it is not *res integra* that the school admission extract (Exh.104) from school first attended by PW.2 prosecutrix would be reliable to determine the age as she is victim of rape. To prove the school admission extract (Exh.104) the prosecution has examined PW.9 R.N.Daphane, who is the Headmistress of the Z.P. primary school Gevrai. She has testified that as per the record of school PW.2 prosecutrix was admitted in the

school in first standard and as per their school record her date of birth is 14/08/2001. The said extract is true copy made by the School Head mistress who had even also filed on record the copy of pages of the said register Exh.104. Thus, the school admission extract Exh.104 is duly proved and they depicts the date of birth of prosecutrix as 14/08/2001 which means that at the time of sexual assault she was below the age of 16 years.

38] Section 35 of the Indian Evidence Act refers to the relevancy of entry in Public record made in the performance of duty. Under Section 35, a register or official book maintained in terms of a statute or by a statutory authority in regular course of business would be a relevant fact. Therefore, the school admission extract Exh.104 of Z.P. primary School, Gevrai could be relevant and considered for it does satisfy the requirements of Section 35 of the Indian Evidence Act. It is reliable evidence on record to show that the date of birth was recorded in the school register is thus relevant under section 35 and as such are vital pieces of evidence, which clinches the issue to prove the birth date of PW.2 prosecutrix as to be 14/08/2001.

39] In this regard it would be apposite to make reference to the decision of their Lordships of Apex Court in case of in ***Birad Mal Singhvi vs. Anand Purohit*** [AIR 1988 SC 1796] , wherein it is held :

"...To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is

relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. "

The school admission extract Ex.104 is from school record register and it fulfills all three conditions and so it is admissible piece of evidence. In the present case in hand, the document is the extract of school admission register Exh.104 of the Zilla Parishad Primary School. No doubt, entry of date of birth from Gram panchayat record is not produced on record. But, then the register maintained in the terms of statute by statutory authority in regular course of its business would be relevant fact under Sec. 35 of the Evidence Act and same can be relied upon as a proof of date of birth of PW.2 prosecutrix.

40] That apart the genuineness of the verified copies of school admission extract Exh.104 has been ascertained as per the procedure laid down under the provisions of Indian Evidence Act regarding proof of documents. Ld. A.P.P.Smt. Mukim for the State is quite correct in her submission that the genuineness of the extract of original general register maintained by the Z.P. School Authority Ex.104 being verified copy of public record produced on record stands proved as that document had the presumption of correctness as stated above. Thus as the extract of page from school admission

register Exh.104 maintained by the Z.P. School is public document and its secondary evidence could be allowed and , it has been exhibited as Exh.104 by my learned predecessor and same is read in evidence. I do not have any doubt regarding genuineness of this document. Thus, the extract of page school admission register Exh.104 is trustworthy evidence regarding the age of PW.2 prosecutrix. Considering the said birth date recored as 14/08/2001 , the age of PW.2 prosecutrix at the time of occurrence did not exceed 16 years.

41] In the present case in hand PW.2 prosecutrix is of tender age not exceeding 16 years at the time of offence and seems have had no motive to falsely involve the accused in crime. It would be apposite to state here that the Courts while trying an accused on charges of rape and offences against child must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the victim and the documentary evidence, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. Therefore, the submissions of learned Adv. Smt. Wayal for the accused No.1 that the extract of school admission register Exh.104 is not duly proved is devoid of any merits. On the contrary, those documents certainly relied upon to determine age of PW.2 prosecutrix.

42] It is pertinent to note that in the cases of sexual assault on children, it is the psychology of child to obey the orders of the rapists if she is well acquainted with him. It is also seen that most of such children who are dependent on abusers abide by their orders. There are many reasons for children not disclosing the fact of sexual abuse to their parents. Therefore, the contention of the Ld. Adv. Smt. Wayal for the accused No.1 that PW.2 prosecutrix is unbelievable due to absence of blood and semen stains on the clothes of prosecutrix and accused has no substance for the reason that by the time the prosecutrix and accused were produced before the police they must have washed their clothes leaving behind no trace of evidence of sexual intercourse which apparently was a consensual relation. However, the fact that the prosecutrix had been willingly in sexual relationship with accused No.1 with her consent has no merits as she was not of the age to give consent for sexual relationship.

43] No doubt, PW.2 prosecutrix certainly must have consented to the accused to have sexual relations with her. However, at the time of said incident, the PW.2 prosecutrix was minor and the consent of minor is not a consent. This can be concluded from the fact that PW.2 prosecutrix was below the age of 16 years at the time when the rape and penetrative sexual assault was committed upon her. Therefore, even if, it is held to be proved that PW.2 prosecutrix was consenting party, question of consent as has been rightly submitted by Ld.A.P.P. Smt. Mukim is immaterial, as the offence

would fall within the clause sixthly of the definition of rape given in Sec.375 of I.P.C. Therefore, I hold that the prosecution has been able to prove that the accused had committed rape punishable u/s 376 of IPC and penetrative sexual assault on PW.2 prosecutrix which is punishable u/s 4 of the POCSO Act. Further, I also hold that the accused No.1 Vinayak kidnapped PW.2 prosecutrix with intent that she may be to marry him against her will and further in order to that she might be seduced for illicit relations and thereby the accused has committed offence punishable u/s 366 of IPC. Hence, point Nos. 2 to 5 are answered in the affirmative against accused No.1 Vinayak.

44] In view of the findings arrived at points Nos. 2 to 4, it is held that the prosecution has proved beyond reasonable doubt that accused No.1 Vinayak had committed offence punishable u/s 363, 366 and 376 of the Indian Penal Code and offence punishable under Sec. 4 of the POCSO Act.. Further, in view of reasonings given in paragraphs No. 7 it is held that the prosecution has failed to prove that the accused No.2 to 4 have not committed any of the offences charged with.

45] This takes me to hear the accused No.1 Vinayak on the point of sentence for the offence punishable under sections 363, 366 and 376 of the Indian Penal Code and u/s 4 of POCSO Act.

Jalna.
Date : 29/11/2018.

(D. S. Ghumre)
Addl. Sessions Judge, Jalna

46] The accused No.1 Vinayak has submitted that the lenient view may be taken for imposing the punishment. He further submitted that his parents are dependents upon him and so minimum punishment be imposed upon him.

47] Ld.Adv.Smt. Wayal for the accused No.1 Vinayak has submitted that the accused does not have any criminal antecedent and he is the first time offender and so lenient view be taken for imposing punishment. She also submitted that considering the age of the accused, it would not be proper to impose maximum punishment prescribed for the offence by the law.

48] As against this Ld.A.P.P. Smt. Mukim for the State submitted that the offence is serious and deserves no leniency. More so, when the accused had indulged in sexual relation with PW.2 prosecutrix by seducing her when she was a child of not more than 16 years age to marry him. She also submitted that crime is too much heinous and barbarous.

49] I have considered the rival submissions of Ld.A.P.P. Smt Mukim for State and Ld. Adv. Smt. Wayal for accused No.1. I find substance in this submission of learned APP Mukim for the State. PW.2 prosecutrix is hardly not more than 16 years of age at the time of the offence. It would be pertinent to note that accused No.1 Wayal had raped his own sister and this is barbaric crime besides being a heinous. However, considering the age of the accused is not above 25

years , it would not be appropriate for imposing stringent punishment provided by the Sec. 4 of POCSO Act and 376 of the IPC to the extent of life imprisonment.

50] I find that it would be appropriate to impose minimum punishment prescribed under law. Section 376 of I.P.C. specifically provides punishment for rape shall not be less than seven years. Therefore, the accused No.1 Vinayak deserves punishment of seven years for offence punishable under Section 376 of the I.P.C. Further, I find it appropriate to impose minimum punishment of seven years rigorous imprisonment prescribed for Sec. 4 POCSO Act. So also, it would be appropriate to impose punishment of five years rigorous imprisonment for the offence punishable u/s 366 of IPC. I did not specifically state any distinct punishment of offence u/s 363 of IPC as the same is covered by sec. 366 of IPC which is aggravated offence of kidnapping. Besides the above substantive punishment the accused is also liable for the punishment of fine of Rs.4,000/- for each of the offence. Out of the fine amount, Rs.10,000/- should be paid to PW.2 prosecutrix as compensation payable u/s 357(1) of Cr.P.C. for the injury caused to her. In facts and circumstances of the case the substantive sentence deserves to be ordered to run concurrently.

In the result, the following order is made :

Contd. 32 ..

: ORDER :

- (i) Vide section 235 (2) of the Code of Criminal Procedure, the accused No.1 Vinayak s/o Khanderao Kamble is convicted for the offence punishable under Section 366 of I.P.C. and is sentenced to suffer Rigorous Imprisonment for the period of **five years** and shall pay fine of **Rs.04,000/- (Rupees Four thousand only)** in default of payment of fine to suffer Rigorous Imprisonment for the period of six months.

- (ii) Vide section 235 (2) of the Code of Criminal Procedure, the accused No.1 Vinayak s/o Khanderao Kamble is convicted for the offence punishable under Section 376 of I.P.C. and is sentenced to suffer Rigorous Imprisonment for the period of **Seven years** and shall pay fine of **Rs. 04,000/- (Rupees Four thousand only)** in default of payment of fine to suffer Rigorous Imprisonment for the period of six months.

- (iii) Vide section 235(2) of the Code of Criminal Procedure the accused No.1 Vinayak s/o Khanderao Kamble is convicted for the offence punishable under Sec.4 of POCSO Act and is sentenced to suffer Rigorous Imprisonment for the period of **Seven years** and shall pay fine of **Rs.04,000/- (Rupees Ten thousand only)** in default of payment of fine to suffer Rigorous Imprisonment for the period of six months.

- (iv) The abovesaid sentences imposed upon the accused No.1 Vinayak s/o Khanderao Kamble shall run concurrently.
- (v) The accused is ordered to be taken in custody forthwith to serve out the sentences of imprisonment imposed upon him.
- (vi) The accused No.1 Vinayak Khanderao Kamble was in jail from 05/07/2016 to 19/08/2016 and the said period of detention undergone by him shall be given as set off U/Sec.428 of Cr.P.C.
- (vii) Vide Sec 235(1) of Cr.PC. accused No.2 Achyut Bhagwan Kamble, No.3 Vijay Kisan Sirsath and No.4 Kavita Vijay Sirsath are hereby acquitted of the offences punishable under Sec. 363 read with Sec. 34 of I.P.C.
- (viii) The bail bonds of accused no.2 to 4 stand discharged.
- (ix) The accused No.2 to 4 shall furnish PB & SB in sum of Rs.15,000/- each within two weeks vide Sec. 437(A) of Code of Criminal Procedure for his appearance before the Hon'ble Appellate Court and it shall remain in force for six months period.
- (x) The Muddemal property be destroyed after appeal period is over.

- (xi) The part of fine in sum of Rs.10,000/- (Rupees Ten thousand only) recovered from the accused No.1 Vinayak shall be paid to PW.2 prosecutrix under Sec. 357(1) of Cr.P.C. as a payment of compensation for injury caused by the offence and same shall be paid to her after the period allowed for presentation of appeal is elapsed and if the appeal is presented then not before the decision of the appeal.

Jalna.
Date : 29 /11/2018.

Sd/-
(D.S.Ghumre)
Judge, Special Court &
Addl.Sessions Judge, Jalna

Certificate

I affirm that the contents of this PDF file are word to word as per original order.

Name of Steno : Deshpande B.N.
Name of Court : Dist. Judge-2 & ASJ.
Date of PDF : 29/11/2018.

Sd/-
B.N.Deshpande