

Presented on : 14/08/2013
Registered on: 14/08/2013
Decided on : 07/05/2016
Duration : 02Y/08M/23D

IN THE COURT OF ADDITIONAL SESSIONS JUDGE, PUNE. AT PUNE

(Presided over by A.G.Bilolikar)

SPECIAL (POCSO) SESSIONS CASE NO. 57/2013

Exh. no.

The state of Maharashtra | .. Complainant.
Through Lonawala City Police Station. |

Versus

Ganesh Shashikant Waghmare |
Age: 23 years , Occ.: Gardener |
R/o.: Kusgaon, Tal. Maval, |
District Pune. | .. Accused.

Offences punishable u/s. 376(f) &(h) 506 of I.P.C. and u/s. 6 of
The Protection of Children From Sexual Offences Act, 2012.

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Appearances:

Mr. M.G. Gate, learned APP for the State.

Mr. Sumant Deshpande, learned advocate for the accused.

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J U D G M E N T

(Dictated and delivered in open Court on 07/05/2016)

1. The accused is facing trial for the offences punishable under section 376(2)(f) and (h) and 506 of Indian Penal Code as well as section 6 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act), for having committed rape and

aggravated penetrative sexual assault upon the prosecutrix (name not disclosed in view of the provisions of section 228-A of I.P.C.), on 13/05/2013 at about 10.00 to 10.30 a.m. in flat No.11 situated in Vardhaman Enclave Society at Lonawala, Tal. Vadgaon Maval, District Pune by committing criminal intimidation giving threats to her.

2. The prosecution case in short is that, on 13/05/2013, the prosecutrix lodged report at Lonawala City Police Station, Pune alleging that on 13/05/2013 she was 13 years of age. She was residing at Khondgewdi, Lonawala, with her parents, sister and brother. She was learning in 6th standard. Her parents were working on wages. She was working as maid servant since one month at the house of Dimple Balsara who was residing in Vardhaman Enclave Society. Because the accused was working with one Virendra Parakh residing in that society, he used to meet her while she was going to the house of Dimple Balsara and thus the accused was acquainted with her since 8 days prior to the date 13/05/2013.

3. The informant alleged that on 13/05/2013, at 10.00 a.m. she had reached near the bungalow wherein she was working as maid servant. The accused met her there. He asked her as to whether she would work as maid servant at the house of Shantilal to which she answered in affirmative. Then he asked her to accompany him stating that he would show that house of Shantilal located in Vardhaman Society. Accordingly

she accompanied him to that house of Shantilal where one old lady was found present. The accused told that lady that he had brought maid servant for cleaning her house. The lady insisted that she should do the work of maid servant daily after 10.00 a.m. However, it was inconvenient to her as she had to attend the school from 11.00 a.m. Therefore, she declined to work between 10.00 a.m. to 11. 00 a.m. Then the accused asked her to accompany him stating that he would take her to another place of work. Therefore, she accompanied him to a building located in Vardhaman Society.

4. She alleged that, applying the key possessed by him, the accused opened the door of that flat. She entered that flat and he followed her. Then he put on latch of the door of that flat from inside. When she asked him why he had closed the door, he answered that outsiders would enter the flat if it was not closed. On asking by the accused to clean the bathroom, she cleaned the same. The accused told her that he would pay to her Rs.1,000/- per month for cleaning that flat comprising 4 rooms and two latrine bathrooms. Then he had taken her to another bath room. He closed the door and started touching her body. When she pushed him and asked why he was behaving like that, he caught hold of her and kissed her cheeks for 3-4 times. When she requested him to relieve her, he caught hold of her hands. After opening the door of that bathroom, he forcibly dragged her to bathroom. He pushed her to bed and he lied upon her. He kissed her. When she offered

resistance and told him that she would shout, he gave threats to her. He removed her clothes as well as his clothes and committed rape upon her. Then she as well as he himself put on their respective clothes. When she started to go out, he threatened her that in case she told the incident to anybody, he would beat her. Then she went to Dimple Balsara and told her about the incident. Said Dimple called some persons and asked her to show the accused. Upon showing the accused by her to Dimple and others and upon inquiry, the accused denied to have committed rape upon her. Then said Dimple called her parents by giving phone call to them. Then she went with her parents to Lonawala City police station and lodged report.

5. As per her narrations, her report was reduced into writing. On the basis of that report, Crime No. 52/2013 was registered at Lonawala City Police Station. The statements of witnesses were recorded. The prosecutrix was sent to Sassoon Hospital, Pune for medical examination. She was medically examined. The medical officer noted down the history as narrated by the prosecutrix and examined her. The medical officer opined that from the history and clinical examination of the prosecutrix, there was possibility of recent penetrative sexual intercourse. Accordingly the Medical Officer issued certificate. The Medical officer also obtained sample blood, vaginal swab, pubic hair of the prosecutrix and handed over the same to police in sealed condition.

6. The spot panchnama was drawn and one bed-sheet was seized as per that panchnama. Clothes of the prosecutrix which were on her person at the time of incident were handed over to police and seizure panchnama in that regard was drawn.

7. The accused was arrested. During the course of interrogation the accused made disclosure leading to discovery of his underwear and half pant. Accordingly his memorandum statement was recorded under section 27 of Evidence Act. He led the policemen and panchas to his house. On production of one underwear and one half pant by him, the same were seized under panchnama. The statements of witnesses were recorded. The accused was sent for his medical examination for seeking opinion as to whether he was potent. Accordingly the medical officer attached to Sassoon Hospital, Pune examined the accused and issued certificate that the accused was potent. The sample blood, pubic hair and sample semen of the accused were collected. The seized clothes and samples collected at the time of medical examination of the accused and prosecutrix were forwarded to C.A. The C.A. reports are received after analysis of those samples. Under this backdrop of the circumstances, charge-sheet came to be filed in the Court.

8. My learned predecessor framed the charge at Exh.7 on 16/02/2016. The contents in it were read over and explained

to the accused in vernacular to which he pleaded not guilty and claimed trial. His defence is of total denial.

9. In order to prove it's case, the prosecution has examined as many as nine witnesses. PW1 is the prosecutrix, PW 2 Chand Kayum Shaikh is the supervisor at Vardhaman Enclave Society, Lonawala. He has been also examined to prove the spot panchnama Exh.15 drawn in his presence and seizure of bed-sheet as per that panchnama. He also witnessed the seizure of clothes of the prosecutrix as shown in panchnama Exh. 16 as well as seizure of clothes of the accused as per his memorandum statement Exh. 17 and panchnama Exh. 18. PW 3 Indirabai is the mother of the prosecutrix, PW4 Dr. Mrs. Kagane is the Asstt. Professor who had examined the prosecution on 13/05/2015 at Sassoon hospital Pune and certified through report Exh.23 that history and clinical examination demonstrated recent penetrative vaginal intercourse with the prosecutrix. PW5 Padma Shantilal Sancheti has been examined to prove that she knows the accused and on 13/05/2013 at 10.00 a.m. the accused had brought the prosecutrix to her to work as maid servant. PW6 Mrs. Dimple Manish Balsara has been examined to prove that the prosecutrix was working with her as maid servant and on 13/05/2013 she had informed the said Dimple the incident in question. Said Dimple in turn had called upon the accused as well as parents of the prosecutrix and then the accused was taken to Lonawala City Police station. PW7 Virendra Kantilal

Parakh has been examined to prove that he had appointed the accused as gardener in Vardhaman Enclave Society and on 13/05/2013 also the accused was serving as gardener. PW8 Mr. G.M. Deshmukh, API had drawn the spot panchnama as well as panchnama of the seizure of clothes of the prosecutrix. He had sent the prosecutrix to Sassoon hospital, Pune for examination. He had arrested the accused on 13/05/2013 itself. He had recorded his memorandum statement Exh.17 and seized as per panchnama Exh. 18 the underwear and half pant of the accused. On 17/05/2013 he referred the accused to Sassoon hospital for his medical examination. He forwarded the seized articles to C.A. with letter Exh.20 for analysis. PW9 Mr. G.R. Hinge, H.C. deposed that on 13/05/2013 he had recorded the report as narrated by the prosecutrix. He registered crime NO. 52/2013 and arrested the accused. The learned APP filed evidence closed pursis at Exh.44 on 22/04/2016.

10. The statement under section 313 of Cr.P.C. of the accused has been recorded and the arguments advanced by the learned counsel representing both sides have been heard at length.

11. On 03/05/2016, the learned APP filed application Exh.48 with prayer to alter the charge by framing charge for the offence under section 5(p) punishable under section 6 of The Protection of Children from Sexual Offences Act,2012

instead of section 3(i) punishable under section 4 of that Act as well as section 376(2)(f) and (h) of I.P.C.. The learned defence counsel opposed that application. However, after hearing the arguments advanced by the learned counsel for both the sides, that application came to be allowed on 04/05/2016. Thereafter charge was altered accordingly and altered charge was framed at Exh.49 on 04/05/2016. The contents in it were read over and explained to the accused in vernacular to which he pleaded not guilty and claimed trial.

12. The learned APP filed pursis Exh.53 on 04/05/2016 itself stating that the prosecution does not want to adduce any more evidence after alteration of the charge. The learned defence counsel filed an application Exh. 54 seeking recall of PW1, PW5 and PW8. However, after hearing the arguments for both the sides that application Exh. 54 came to be rejected.

13. As it was not found necessary to record additional statement of the accused under section 313 of Cr.P.C., the additional arguments advanced by the learned counsel for both sides have been heard.

14. The following points arose for determination and same have been answered as under along with findings thereon for the reasons to follow.

POINTS**FINDINGS**

- 1) Whether the prosecution has proved that on 13/05/2013 at about 10.30 a.m. the accused being in position of trust committed rape upon the prosecutrix aged below 18 years, in flat No.11, situated in Vardhaman Enclave Society at Lonawala and thereby committed an offence punishable under section 376(2)(f) and (h) of Indian Penal Code?
.. In affirmative.
- 2) Whether the prosecution has proved that in the course of the same transaction, the accused committed criminal intimidation by giving threats to her with injury to her person with intent to cause alarm and thereby committed an offence punishable under section 506 of Indian Penal Code?
.. In affirmative.
- 3) Whether the prosecution has proved that in the course of same transaction, the accused being in a position of trust committed penetrative sexual assault upon the prosecutrix a minor aged about 13 years and thereby committed an offence under section 5(p) punishable under section 6 of the Protection of Children from Sexual offences Act, 2012?
.. In affirmative.
- 4) What order?
.. As per final order.

REASONS**AS TO POINTS NOS. 1 TO 3:**

15. Out of the 9 witnesses examined by the prosecution, the deposition of PW1 the prosecutrix, PW2 Mr. Chand Kayum

Shaikh, PW3 Indirabai, the mother of the prosecutrix, PW4 Dr. Swati S. Kagane, PW5 Smt. Padma Shantilal Sancheti and PW6 Mrs. Dimple Manish Balsara assumed much significance.

16. The sum and substance of the oral and documentary evidence adduced by the prosecution is that, PW3 Indirabai was working as maid servant with PW6 Mr. Dimple Balsara. As stated by PW3 Indirabai, in the year 2013 the prosecutrix was studying in 6th standard in Girls' School, Lonawala and she used to assist her in her work as maid servant as and when there were holidays to her school.

17. As deposed by the prosecutrix, since prior to one month of the incident dated 13/05/2013, she was working as domestic help with PW6 Mrs. Dimple Balsara for cleaning her house in Vardhaman Enclave Society, Lonawala. The accused was serving with one Virendra Parakah who was residing in the same Vardhaman Enclave Society. As deposed by the prosecutrix, she had acquaintance with the accused since prior to 8 days of the incident and he used to speak with her whenever she met him while going to the residence of PW6 Mrs. Dimple Balsara.

18. PW1 the prosecutrix deposed that on 13/05/2013 at 10.00 a.m., when she reached near the residence of Mrs. Dimple Balsara for serving as maid servant with her, the accused met her. On asking by him as to whether she would

do the work of cleaning at the house of Shantilal, she answered in affirmative. Thereafter she accompanied him to the residence of said Shantilal. The accused told the old woman found present in that house that she was the same girl to whom he was to bring to her for working as maid servant. However, because that old woman insisted her for working as maid servant between 10.00 a.m. to 11.00 a.m. daily at her residence which was not convenient for her as she had to attend the school between 11.00 a.m. to 5.00 p.m., she declined to work with that old woman.

19. PW5 Padma Sancheti is the wife of said Shantilal. She categorically deposed that she knew the accused because he was serving as gardener in the society. She also deposed that she told the accused in the year 2013 that, she needed maid servant to assist her in household work. Accordingly on 13/05/2013, the accused had brought the prosecutrix at 10.00 a.m. to her. However, when she had told her that she was required to work with her after 10.00 a.m. daily, she had answered that it was not possible for her to work with her after 10.00 a.m. because she had to attend the school daily at 11.00 a.m.

20. The prosecutrix also deposed that thereafter she departed from that house of Padma Sancheti along with the accused and that assertion of the prosecutrix has been sufficiently corroborated by said Padma Sancheti who deposed

that the prosecutrix had departed with the accused from her residence.

21. The prosecutrix further deposed that the accused told her that he would take her to another place of work and he brought her to a flat. Applying key which was with him, the accused opened that flat. She entered into it and he followed her. Then by closing the door he put on latch of the door from inside. On asking by him to clean the bathroom, she did the same accordingly. Then the accused told her that he would pay Rs.1,000/- per months to her for cleaning that flat.

22. It has also come in the evidence of the prosecutrix that thereafter the accused had taken her to another bathroom in that flat. She deposed that after closing the door of that bathroom, he started touching her body. When she pushed him, he had forcibly caught hold of her and kissed her cheeks for 4 to 5 times. When she asked him why he was doing so and relieve her, he caught hold of her hand and brought her to bedroom. He pushed and made her to lie on the bed and he lied on her. Then he kissed her for 4 to 5 times by touching his lips. When she offered resistance, he kissed her neck. When she asked him to relieve her otherwise she will shout, he threatened her that he would beat her. Then he forcibly removed her clothes and after removing his clothes he committed rape upon her. Then they put on their respective clothes. When she started to go out of that flat he had

threatened her that in case she made disclosure about the incident, he would beat her.

23. The prosecutrix also deposed that thereafter she had gone to the residence of PW6 Mr. Dimple Balsara and told her the entire episode. Upon that Dimple called 2-3 persons . The accused was found present in front of the residence of Virendra Parakh. Upon showing him she told PW6 Dimple that he is the same person who molested and raped her. When other persons who had accompanied Dimple asked the accused as to what he had done to the prosecutrix, initially he denied to have committed rape upon her. However, subsequently he consented the guilt. Then her parents were called and they were told about the incident. Her report Exh.10 was recorded by police as narrated by her. Then policemen had drawn the spot panchnama Exh.15. She handed over to police the clothes which were on her person at the time of incident and the same came to be seized as per panchnama Exh.16.

24. PW6 Dimple deposed that occasionally PW3 Indira used to bring the prosecutrix aged about 12 years to her residence to work with her and generally she used to play with her daughter. She asserted that on 13/05/2013 the prosecutrix had been to her at 11.30 a.m. and that time she was weeping. She also asserted positively that the prosecutrix was quite scared. She narrated the entire sequence of events before her and told her that the accused committed rape upon

her. Then as directed by her PW2 Chand brought the accused to whom the prosecutrix identified as the same person who committed rape upon her. She also deposed that then she herself and PW2 Chand had taken the accused to PW7 Mr. Parakh. On contacting by her on phone, the parents of the prosecutrix arrived and then the accused was taken to police station. Thus, PW6 Dimple Balsara fully supported the assertions of the prosecutrix as regards the sequence of events after 11.30 a.m. dated 13/05/2013.

25. PW5 Padma Sancheti has also deposed that on 13/05/2013 itself in noon time, the policemen had inquired with her as to whether the prosecutrix and the accused had come to her on that day, upon which she answered in affirmative. Said Padma has not been cross-examined and her assertions in examination in chief went unchallenged.

26. PW1 also deposed that on 13/05/2013 itself she was referred to Sassoon Hospital for medical examination and she was medically examined there. She has also deposed that as shown in bonafide certificate article A, her date of birth is 01/06/2000.

27. PW2 Mr. Chand Kayum Shaikh, deposed that on 13/05/2013 at 10.00 a.m. he happened to see the accused taking one girl with him. When he asked him as to where he was taking her, he answered that he was taking her to

Shantisheth Sancheti. At about 11.30 a.m. on 13/05/2013 itself, PW6 Dimple had brought the same girl i.e. the prosecutrix to whom the accused had taken with him at about 10.00 a.m. saying that he was taking her to Shanti Seth. On asking the whereabouts of the accused, on his instruction Babu watchman brought the accused. He came to know that the accused committed rape upon the prosecutrix. Meanwhile her parents arrived there and she accompanied her parents to police station.

28. PW2 Chand Shaikh also deposed that, on 13/05/2013 itself at 2.00 p.m., the policemen had come to him and he told them the above stated facts. On showing the spot of incident by the prosecutrix, the policemen had drawn the spot panchnama Exh.15 and seized one bed-sheet from the spot. So also on production of the clothes of the prosecutrix, the same have been seized vide panchnama Exh.16.

29. PW2 Chand Shaikh also deposed that, on 17/05/2013 as per disclosure made by the accused under section 27 of Indian Evidence Act, on production of his underwear and half pant by him, the same were seized as per panchnama Exh.18. He also identified the seized clothes as the same.

30. PW4 Dr. Swati Kagane deposed that on 13/05/2013 the prosecutrix aged 13 years had narrated the history in presence of her mother and she noted down the same. She also

deposed about the detailed history noted down by her. She deposed further that she clinically examined the prosecutrix. She opined on the basis of the history recorded by her as well as clinical examination of the prosecutrix that there was recent penetrative vaginal sexual intercourse. Accordingly she certified so, as per the printed form Exh.23 bearing the nomenclature "Examination of Victim in the Case of alleged rape". She also deposed that she handed over to police, the samples which were collected at the time of medical examination of the prosecutrix.

31. Deposition of PW7 Virendra K. Parakh is formal in the sense that he just deposed that on 13.05.2013 PW2 Chand Shaikh told him about the rape committed by the accused upon the prosecutrix. He deposed that PW2 Chand Shaikh, PW6 Mrs. Dimple Balsara and other occupants of Vardhaman Enclave Society had brought the accused to him. The prosecutrix was also with them at that time. On advising by him to take the accused to police station, they had taken him to police station.

32. PW8 Mr. G.N. Deshmukh API deposed that, as per the report Exh.10 lodged by the prosecutrix on 13/05/2013 at Lonawala City police station, crime No.52/2013 was registered. On showing the spot of incident by the prosecutrix, he had drawn the spot panchnama Exh.15 and seized one bed-sheet. So also he seized the clothes of the prosecutrix

produced by her as per panchnama Exh. 16 and sent her to Sassoon Hospital for Medical examination. He arrested the accused and recorded the statements of witnesses.

33. He further deposed that on 17/05/2013 as per the disclosure Exh. 17 made by the accused in presence of panchas, he seized as per panchnama Exh. 18 , the underwear and half pant of the accused. He had also sent the accused to P.H.C. Khandala for obtaining his sample blood, pubic hair, semen. Accordingly samples were collected and handed over to him by the medical officer, P.H.C. Khandala. Then he forwarded to C.A. the clothes of the prosecutrix and of the accused as well as samples collected by the medical officers at the time of their medical examination. C.A. reports Exh. 38 to 40 are also received in that regard. He produced the extract Exh. 41 of Khatawani showing that the accused was involved in Crime No. 110/2011 at Lonawala Police station for commission of the offence of gang rape.

34. Whereas PW9 Mr. G.R. Hinge, H.C. deposed that on 13/05/2013 as per narration of the prosecutrix he had recorded report Exh. 10 and on the basis of that, Crime No. 52/2013 was registered at Lonawala City police station.

35. The learned APP argued vehemently that, the report Exh.10 lodged by the prosecutrix specifically reads that after passing 5th standard examination she was admitted in 6th

standard. She also deposed that prior to 8 days of 13/05/2013, when she was going to the house of PW6 Mrs. Dimple for doing work as maid servant, the accused met her. On 13/05/2013, because the accused had asked her to accompany him to the residence of one Shantilal and because she reposed trust and confidence in him she accompanied him to the house of Shantilal Sancheti. PW5 Padma wife of said Shantilal had asked the prosecutrix to work between 10 a.m. to 11 a.m. daily as domestic help with her to which she declined because she had to attend the school from 11.00 a.m. to 5.00 p.m. on reopening of the school after summer vacation. Then the accused had told her that he would take her to another landlord to enable her to work there as maid servant. Because the prosecutrix reposed trust and confidence in the accused, she accompanied him to flat No.11 located in Vardhaman Enclave Society. He opened that flat applying the key available with him and committed rape upon her as deposed in detail by the prosecutrix. After lodging report Exh. 10 by her, the spot panchnama Exh. 15 has been drawn and bed-sheet stained with human semen came to be seized. The prosecutrix was medically examined as deposed by PW4 Dr. Swati. She noted down history disclosed by the prosecutrix and opined as per Form Exh. 23 that as per the history narrated by the prosecutrix and on her clinical examination, there was possibility of recent penetrative vaginal intercourse with her.

36. The learned APP also argued that, admittedly the accused was serving as gardener in Vardhaman Enclave Society and as deposed by PW Chand and PW6 Dimple on 13/05/2013 after seeing the accused, the prosecutrix identified him to be the same culprit who had committed rape upon her. Then he was taken to the police station. The samples of his blood, pubic hair, semen were obtained by the medical officer, P.H.C. Khandala. At his instance, as per disclosure Exh. 17 made by him his underwear and half pant came to be seized as per panchnama Exh.18. As per the certificate Exh. 30 issued by the doctor attached to Sassoon Hospital, Pune, it has been certified that the accused is potent. The samples were forwarded to C.A. and as per C.A. reports Exh. 38 to 40, the nicker of the prosecutrix was stained with human blood and bed-sheet seized as per panchnama Exh. 15 was stained with human semen. Thus, according to him the prosecution has sufficiently proved the guilt of the accused beyond reasonable doubt and he deserves conviction.

37. Inviting attention towards the extract Exh. 41 of Khatawani maintained at Lonawala police station, he argued vehemently that, admittedly the accused and 3 others were prosecuted as per Crime No. 110/2011 registered at Lonawala police station for commission of offence of gang rape. However, because the present accused and other three accused managed to prevent the prosecutrix in that case from appearing and deposing before the court, the present accused

and 3 others came to be acquitted as per the judgment dated 31/10/2012 in Sessions case No.44/2012. However, according to him, registration of Crime No.110/2011 for the offence of gang rape against the present accused prominently demonstrated that he is certainly a sex maniac. Therefore, according to him the accused deserves conviction and he deserves to be dealt with stern hands as per law.

38. In support of his arguments, the learned APP placed the reliance on the authorities specified in list Exh.49.

39. On the other hand, the main thrust of the arguments advanced by the learned defence counsel is that, there is no whisper in the report Exh. 10 lodged by the prosecutrix denoting that her date of birth is 01/06/2000 . Even the bona fide certificate marked as article A was apparently obtained by police on 17/06/2013 i.e. after about more than one month of lodging of report Exh.10 on 13/05/2013 by the prosecutrix. Apart from that, the bonafide certificate article A has not been duly proved by adducing cogent and convincing evidence. Because of that it is not possible to believe that, the date of birth of the prosecutrix is 01/06/2000. According to him, specific suggestion has been given to the prosecutrix denying her assertion that her date of birth is 01/06/2000. However, despite that the prosecution has not taken any pains to examine the concerned school authorities to prove that, as per the school record, date of birth of the prosecutrix is

01/06/2000. According to him, it will have to be held that on 13/05/2013 the prosecutrix was more than 18 years of age.

40. During the course of his argument, the learned defence counsel fairly conceded that the accused is not disputing the fact that he was serving as gardener in Vardhaman Enclave Society . So also the accused has not disputed the fact that the prosecutrix was having acquaintance with him since 8 days prior to lodging of report Exh. 10. He also conceded that, the accused has not disputed the fact that, on 13/05/2013 the accused was caught hold of near the house of Virendra Parakh. However, according to him merely because of that, conclusion cannot be drawn that there is ring of truth in the depositions of PW1 to 9 proving beyond reasonable doubt the guilt of the accused of the offences charged with.

41. Another limb of the arguments advanced by the learned defence counsel is that, the prosecutrix deposed that the accused raped her in bedroom. Whereas PW4 Dr. Swati as well as PW6 Dimple deposed that the prosecutrix had told them that she was raped in bathroom in flat No.11. As such it has become doubtful as to whether she was really raped or otherwise.

42. The learned defence counsel also argued that as deposed by PW4 Dr. Swati Kagane, she did not notice any injuries on the body of the prosecutrix. Dr. Swati also admitted that

generally, the prosecutrix in an incident of rape may sustain bruises, abrasions or contusions while defending herself and while offering resistance, even the prosecutrix may scratch the accused. So also she deposed that she has not noticed any abnormality in the gait of the prosecutrix. Dr. Swati also admitted that she had not noticed swelling or reddishness on the private parts of the prosecutrix when she examined her and if the sexual intercourse is very recent, margins of tear of hymen may be reddish and swollen. As such according to him by no stretch of imagination it can be believed that the accused forcibly committed sexual intercourse with the prosecutrix. On the contrary, according to him, because the prosecutrix had not sustained any injury, it can be presumed that she was consenting party and therefore, the accused cannot be held guilty .

43. In support of these arguments he placed reliance upon the authorities as specified in list Exh.46.

44. The learned defence counsel has given much emphasis in his arguments on the point that for want of production of birth certificate and for want of examination of witnesses to prove that the date of birth of the prosecutrix is 01/06/2000, her date of birth 01/06/2000 as shown in bonafide certificate article 'A ' cannot be believed. Therefore, a legitimate point arose as to whether the prosecution has successfully established that the date of birth of the prosecutrix is

01/06/2000 or otherwise.

45. It is pertinent to note that the prosecutrix has specifically alleged at the beginning in report Exh. 10 that, on 13/05/2013 she was 13 years of age. She has categorically deposed that in the year 2013 she was learning in 5th standard in Kranti Jyoti Savitribai Phule Girls' School, Lonawala. During the course of her cross-examination, it has been brought on record that she secured 97 % marks in 7th standard examination and on the date 14/09/2015 when her deposition was recorded she was learning in 8th standard. Significantly enough no specific suggestions have been given to her denying her assertion that in the year 2013 she was learning in 5th standard and on 14/09/2015 she was learning in 8th standard.

46. Ordinarily bonafide certificate marked article "A" showing date of birth of the prosecutrix as 01/06/2000 would not have assumed much significance. Because it has not been exhibited with the help of requisite evidence. However, the particulars brought on record during the course of cross-examination of PW3 Indirabai, the mother of the prosecutrix have certainly ratified and rendered strong assurance to the assertion of the prosecutrix that her date of birth is 01/06/2000.

47. During the course of cross-examination of PW3

Indirabai, the defence side has brought on record the fact that Anganwadi Attendant had come to her residence after two days of the birth of the prosecutrix and she had noted down the date of birth of the prosecutrix in the record maintained by her. Not only that, even it has been brought in her cross-examination that the prosecutrix was initially admitted in Girls' school, Lonawala and from 1st standard to 6th standard she was in the same school. The bonafide certificate marked article "A" shows below the signature of the Head mistress the impression of seal of the said school "Kranti Jyoti Savitribai Phule Girls School, Lonawala". Even it is brought on record during the cross-examination of PW3 Indirabai that she herself and her husband had carried with them to the school while admitting the prosecutrix in it, the document which was handed over to her by Anganwadi attendant showing her date of birth. Not only that even PW3 Indirabai denied the suggestion that she deposed false that Anganwadi attendant had noted down the date of birth of the prosecutrix when she had come to her residence after two days of the birth of the prosecutrix. She has also denied the suggestion that she deposed false that she herself and her husband carried with them that document handed over to them by Anganwadi attendant when they had gone to the school to admit her in it. Because the learned defence counsel has brought on record the abovesaid details during cross-examination of PW3 Indirabai, those unequivocal assertions of PW3 Indirabai

certainly rendered strong assurance to the case of the prosecution that the date of birth of the prosecutrix is 01/06/2000. The above details brought in cross-examination of PW3 Indirabai certainly played a decisive role in strengthening the case of the prosecution that the date of birth of the prosecutrix shown in that bonafide certificate article A is correct.

48. As it is the case of the prosecution that the accused committed rape upon the prosecutrix on 13/05/2013 and because her date of birth is proved to be 01/06/2000 , it goes without saying that on 13/05/2013 she was 12 years 11 months and 12 days old.

49. Legally a woman of and above the age of 18 years is capable of giving consent to an act of sexual intercourse. However, at the same time, it is required to be observed that the consent is invalid when the woman is below 18 years of age and when it is obtained under threat and fear of death or hurt.

50. It has been specifically laid down on page No. 269 in the **“COMMENTARY ON PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (CRUELTY against CHILDREN)”** Edition 2014 by R. P. Kataria that -

“Section 114-A creates presumption as to absence of consent in certain prosecutions for rape. Consequently

the law of burden of proof in case of rape has undergone a radical change and the principle of law that burden of proof, always lies on the prosecution, shall not apply in the case covered by Section 114-A, Indian Evidence Act and the case-laws laying principle of burden of proof contrary to the rules laid down in Section 114-A are no longer good law.

Section 114-A, Evidence Act as per the amendment by Criminal Law amendment ordinance, 2013 (3 of 2013) reads as under :

“ 114-A. Presumption as to absence of consent in certain prosecutions for sexual assault- In a prosecution for sexual assault under clause (a), clause (b) clause (c) clause (d) clause (e) clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l) or clause (m) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in that person's evidence before the Court that such persons did not consent, the Court shall presume that such person did not consent.

Explanation: In this section “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (c) of section 375 of the Indian Penal Code (45 of 1860).

51. As the accused is charged with the offences punishable under sections 376(2)(f) and (h) of I.P.C. and section 5(p) punishable under section 6 of POCSO Act, it is necessary to ascertain as to whether the accused being in a position of trust committed rape and penetrative sexual assault upon the

prosecutrix. Therefore, having arrived at the conclusion that the date of birth of prosecutrix is 01/06/2000, the evidence has been scanned and scrutinized carefully.

52. As deposed by PW1 the prosecutrix, she had acquaintance with the accused since 8 days prior to the incident dated 13/05/2013 and he used to speak with her whenever she met him while going to the residence of PW6 Dimple Balsara. It has also come in her evidence that on 13/05/2013 at around 10.00 a.m., the accused met her and asked her to accompany him stating that he would show the residence of Shantilal where she could work as maid servant in lieu of some amount. Accordingly she accompanied him to that residence of Shantilal where PW5 Padma was present.

53. PW5 Padma also ratified the assertion of the prosecutrix by stating that on 13/05/2013 at 10.00 a.m. the accused had brought the prosecutrix to her. However, because the prosecutrix had to attend the school daily at 11.00 a.m., she had told said Padma that she would not be able to work with her after 10.00 a.m.. Padma also deposed that then the prosecutrix had departed with the accused from her residence.

54. The fact that the prosecutrix had gone with the accused to the residence of Shantilal also found corroboration in the testimony of PW2 Chand Shaikh. Said Chand Shaikh categorically deposed that upon seeing the accused taking the

prosecutrix with him, when he asked him as to where he was taking her, the accused had answered that he was taking her to the house of Shantilal. The prosecutrix also deposed that thereafter the accused had taken her to a flat giving assurance that he would show another place of work so that she could earn by working there.

55. This sequence of events as emerged from the depositions of PW1, the prosecutrix, PW2 Chand Shaikh and PW5 Padma Sancheti prominently demonstrated that because the prosecutrix was knowing the accused since 8 days prior to the incident dated 13/05/2013 and because he had taken her to PW5 Padma to enable her to work as maid servant for earning, obviously she was having trust in him. Because of that reposing confidence and trust in him, apparently she had accompanied the accused to the flat described in spot panchnama Exh. 15 and he committed rape upon her as deposed by her. Because the accused had taken the prosecutrix firstly to the residence of PW5 Padma to get the work as maid servant, there was every reason for her to repose confidence in him for believing that as her well wisher, he was taking efforts to enable her to get the additional work of maid servant. Thus the faith and trust reposed by her in the accused persuaded her to accompany him to the said flat, apparently because she was labouring under the wrong impression that he was taking her to another place of work. However, when he raped her, she realized that she committed

mistake by reposing faith and trust in him.

56. No doubt, the learned defence counsel argued vehemently that the prosecutrix has deposed that the accused had opened the door of that flat mentioned in spot panchnama Exh.15 applying the key which he was possessing. However, the key allegedly applied by the accused for opening the door of that flat has not been seized by the police. According to him it was imperative on the part of the investigating officer to seize that key and it was imperative on the part of the prosecution to examine Mr. Bongale , the owner of that flat to prove that in fact the key of that flat was entrusted to the accused. Moreover, the said key has not been seized by the investigating officer and no plausible explanation is coming from him in that regard. Therefore, it is not believable that the accused was able to open the flat by applying the key possessed by him.

57. However, significantly enough no suggestion has been given to the prosecutrix denying her assertion that accused had opened the door of that flat applying the key possessed by him. So also it is worth noting that it has been brought on record during cross-examination of the prosecutrix that it took about hardly five minutes for going with the accused from the place where he met her on 13/05/2013 to the house of Shantilal.

58. It is also pertinent to note that the prosecutrix has denied during her cross-examination that Shantilal's residence and the flat in which she was raped were not located in one and the same building. That assertion of the prosecutrix in her cross-examination positively demonstrated that the fact of rape committed upon her has not been disputed. On the contrary a lame attempt has been apparently made just to make out a case that Shantilal's residence and the disputed flat were not located in one and the same building.

59. According to the learned defence counsel, the prosecutrix asserted during her cross-examination that while she was proceeding from the spot of incident towards the residence of Dimple which was located near the gate of Vardhaman Enclave Society, she had noticed that some function was going on in the open place in that society and after crossing the persons present in that function she had gone to the residence of Dimple. Even she has stated that because the accused ravished her, she was proceeding to the house of Dimple weeping. She could have told the persons present in that function about the rape allegedly committed upon her. Even according to him, she could have gone to PW5 Padma and told her about the alleged rape, instead of that she went to PW6 Dimple. Thus, according to him, that unnatural conduct of the prosecutrix helped much in creating doubt about the alleged rape.

60. As deposed by the prosecutrix she met PW 5 Padma for the first time on 13/05/2013. Because of that obviously she might not have felt it comfortable to tell her anything. As she also deposed that, she was having well acquaintance with PW6 Dimple, naturally she might have felt it just, proper and desirable to tell PW6 Dimple about the incident of rape instead of telling about that to either PW5 Padma or the persons gathered in the function which was going on, on the ground floor of that building. Thus, displaying her natural course of conduct she rushed to PW6 Dimple as her house was located in vicinity of the spot of incident. As such the arguments advanced by the learned defence counsel as above about the conduct of the prosecutrix after the incident, are not acceptable.

61. The prosecutrix also asserted during her cross-examination that when she pushed the accused to offer residence, she had not scuffled with him. She also asserted that because she was frightened that time, she had not tried to remove the latch of the bathroom when the accused was overpowering her. Thus, the suggestion put to the prosecutrix and the answer to the same not only established the presence of the accused at the scene of occurrence, but also rendered strong assurance to the guilt of the accused.

62. The learned defence counsel has tried to make out a case that if really the prosecutrix had offered resistance then

she herself and the accused would have sustained certain injuries. However, because no injuries were found to have been sustained by the prosecutrix and the accused, it will have to be inferred that she was the consenting party.

63. However, in light of the candid and unequivocal assertion of the prosecutrix that because she was frightened while the accused was overpowering her, resistance offered by her might not be forceful. It cannot be said that whenever resistance is offered, there is bound to be injury on the body of the victim or of the accused. An act done under helpless resignation cannot be an act on consent. As such absence of injury cannot be always *sine qua non* of consent. Passive submission may be due to several factors. Thus, there is gulf of difference between consent and submission. While the consent involves submission, contrary is not always there and the mere act of submission does not involve consent.

64. In the instant case, it is the consistent stand of the prosecutrix that she was raped after giving threats to her. Nowhere it has come in her testimony that she offered consent to the sexual intercourse. As such presumption under section 114-A of Indian Evidence Act that she was subjected to sexual intercourse without her consent has to be raised. Even otherwise for the reason that it is established that the prosecutrix was a minor hardly aged about 13 years on 13/05/2013, the alternative defence as argued by the learned

defence counsel that she was consenting party cannot be believed. Because consent of the prosecutrix below 18 years of age is no consent in the eye of law.

65. As deposed by the prosecutrix, immediately after the incident she rushed to the house of PW6 Dimple and narrated the incident to her. Apparently because Dimple was satisfied that there was ring of truth in the assertions of the prosecutrix, she called some persons and the accused also and then the accused was handed over to police. No suggestions have been given to PW 1 to 6 that because they were grinding an axe against the accused and because they were having enmity with him, they deposed all false against him.

66. The medical evidence in the form of deposition of PW4 Dr. Swati Kagane as well as her opinion Exh. 23, that there was possibility of recent penetrative vaginal intercourse with the prosecutrix has certainly corroborated the assertion of the prosecutrix that she was subjected to sexual intercourse on 13/05/2013.

67. Placing reliance upon the judgments in the cases of **Skariya Vs. State of M.P. 1991 Cri. L.J. 1925 and Chandan and others Vs. State of Bihar, 2007 Cri.L.J. 1062**, the learned defence counsel argued that, as laid down in these judgments, suggestions put to the witness do no amount to an admission on the part of the accused. No inference can be

drawn against the accused that he admitted the fact suggested in the cross-examination. As such merely because PW3 Indirabai asserted that Anganwadi Attendant had noted down the date of birth of the prosecutrix after two days of her birth and that noting was carried by her to the school while admitting initially the prosecutrix in the school, no inference can be drawn that her date of birth is 01/06/2000.

68. As observed in para No. 15 in the judgment in the case of **Sakariya Vs. State (1991 Cri. L.J. 1925)** the observations in the judgment **Koli Trikam Jivraj Vs. State of Gujrat (1969 Cri. L.J. 409)** were followed and it was held that the accused is entitled to benefit of plea set up by his counsel, but it cannot be said that the plea or defence which the lawyer puts forward must be binding on the accused. Similarly, in **Chandan Das's (2007 Cri.L.J. 1062)** case, it was laid down that any suggestion given by the defence to the prosecution witness cannot take place of the evidence.

69. However, it is significant to note that in para 29 in the judgment in the case of **Tarjubhai Narsingbhai Rathwa Vs. Stae of Gujarat, 2014 DGLS (AHC) 1432** it has been specifically laid down that,

*“with great respects the views expressed by their Lordships in **Koli Trikam Jivraj** (supra) does not lay down the correct proposition of law in view of the subsequent decision of the Supreme Court on the issue in question.”*

70. As laid down in para No. 32 in the judgment in the case of **Tarjubhai Narsingbhai Rathwa(2014 DGLS (AHC) 1432)**

“Suggestion made by the defence counsel to a witness in the cross-examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestion in the nature of admission against his client.”

71. Even in para No. 34 in the case of **Tarjubhai** cited supra it has been laid down that-

“suggestions made to witness and the answer to the same would form part of the evidence on record. These suggestions can be taken into consideration while determining whether the reply given was believable or not.”

Even in Para No. 41, in the case of **Tarjubhai** (supra) it is laid down that,

“ suggestions made to the witness by the defence counsel and the reply to such suggestions would definitely form part of the evidence and can be relied upon by the Court along with other evidence on record to determine the guilt of the accused.”

72. Therefore, with great respects to the ratio and principles laid down in the case of **Sakariya Vs. State of M.P. 1991 Cri.L.J. 1925** and **Chandan and others Vs. State of Bihar, 2007 Cri. L.J. 1062**, the same are not useful to the accused in any manner.

73. Thus, upon appreciating the evidence of the prosecution witnesses as a whole, it is found that there is certainly ring of truth. Keeping in view the so called discrepancies, drawbacks and infirmities, pointed out by the learned defence counsel and upon evaluation of them, it is found that those minor discrepancies on trifle matters are not touching the core of the case and the so called technical errors committed by the investigating officer have not gone to the root of the matter. On the contrary, the detailed sequence of events dated 13/05/2013 brought on record by the learned defence counsel during the cross-examination of the prosecutrix and PW2 Chand as well as PW 6 Dimple established the presence of the accused with the prosecutrix as narrated by her.

74. Thus by virtue of denial of the prosecutrix brought by the defence side during her cross-examination that Shantilal's residence and the flat in which she was ravished were not located in one and the same building, the accused has not disputed the fact that on 13/05/2013 the prosecutrix was raped. From her denial in cross-examination that on 13/05/2013 at 10.00 a.m. one unknown boy who was not known to the accused met her near the gate of Vardhaman Society and she had accompanied him to some place which was not known to him, apparently the learned defence counsel wanted to establish that the accused was not the person who had committed rape upon the prosecutrix. However, the

answers brought on record during her cross-examination coupled with the assertion of PW2 Chand that he had seen the accused taking her with him followed by the assertion of PW6 Dimple that the prosecutrix told her the entire episode certainly led to the only hypothesis of guilt of the accused.

75. NO doubt, the learned defence counsel tried to assail the evidence of PW4 Dr. Swati Kagane by arguing that her evidence is not reliable to prove that the prosecutrix was subjected to sexual intercourse on 13/05/2013.

76. From the tenor of the cross-examination of Dr. Kangane, it is emphatically clear that apparently an attempt has been made to bring on record through her assertions that general condition of the prosecutrix was normal when she examined her. However, it is the case of the prosecution that on 13/05/2013 at about 10.30 a.m. the prosecutrix was raped by the accused. Whereas as evident from the format Exh. 23 issued by Dr. Kagane on 13/05/2013 she examined the prosecutrix at 11.00 p.m.. Thus, apparently, the prosecutrix was medically examined after about 12 hours of the incident. Because of that Dr. Kagane might not have noticed any abnormality in gait and general condition of the prosecutrix.

77. However, Dr. Kagane also asserted that depending upon the force applied, bruises and laceration of external genital may be present with tenderness, swelling and inflammation.

The prosecutrix has not deposed that she was subjected to forceful sexual intercourse. As such obviously because of that Dr. Kagane might not have noticed tenderness, swelling or inflammation over the genital organ of the prosecutrix. It is pertinent to note that Dr. Kagane specifically asserted that if sexual intercourse is very recent, then only margins of tears of hymen may be reddish and swollen. Here in the instant case according to the prosecution, the prosecutrix was medically examined after twelve hours of penetrative sexual assault upon her. Therefore, her hymen might not have been reddish and swollen when she was medically examined. However, Dr. Kagane also deposed specifically that she had noticed bleeding from the edges of hymen when she examined the prosecutrix, which supported her opinion shown in the format Exh.23.

78. Apart from that, as per definition of rape even slight penetration is sufficient to constitute the offence of rape. So also at the cost of repetition it may be observed that there is nothing in the deposition of the prosecutrix to demonstrate that she was subjected to forceful sexual intercourse and because she deposed that the accused committed rape upon her putting her under threat, there was no possibility of tenderness, swelling or inflammation over her genital organ.

79. In the judgment in the case of **Sunil Vs. State of Haryana, 2010 Cri.L.J. 839**, relied upon by the learned

defence counsel, it was established that the prosecutrix was in love with the accused and she was consenting party. As observed in para No.5 in that judgment, it was also established that the prosecutrix did not offer resistance despite her being repeatedly deflowered by appellant/accused. Thus as observed in para 34, in that judgment, in the totality of the facts and circumstances of that case, it was unsafe to convict the appellant when there were so many infirmities, loopholes and lacunae in the prosecution version. Therefore that appeal was allowed.

80. However, in the instant case, neither the prosecutrix deposed that she was having love affair with the accused nor any suggestion has been put to her during the course of her cross-examination that she was having love affair with the accused and she was consenting party. Moreover, Dr. Swati Kagane mentioned the age of the prosecutrix as 13 years in the format Exh. 23 bearing nomenclature “Examination of the victim in the case of alleged rape” and no suggestion has been given to Dr. Kagane that she mentioned incorrect age of the prosecutrix in that format.

81. Apart from that as asserted by the prosecutrix, immediately after the incident she had rushed to PW6 Dimple who was residing in vicinity of the spot of incident and narrated before her the entire episode. Moreover, even if the prosecution has not examined any school authorities to prove

the contents in bonafide certificate article 'A' , still the fact remains that the detailed explanation brought on record during the cross-examination of PW3 Indirabai as regards the date of birth of the prosecutrix, certainly established beyond reasonable doubt that the date of birth of the prosecutrix is 01/06/2000. PW3 Indirabai positively asserted that she herself and her husband had carried with them the document handed over to them by Aganwadi attendant showing date of birth of the prosecutrix, when they had been to the school to admit her in it. In view of that unequivocal assertion of PW3 Indirabai, the mother of the prosecutrix, it was certainly not necessary for the prosecution to get exhibited formally the bonafide certificate article 'A'. Therefore, with great respects to the ratio and principles laid down in the judgment in the case of **Sunil Vs. State of Haryana, 2010 Cri.L.J. 839**, the same are not helpful to the accused in any manner.

82. In the judgment in the case of **Sushil Kumar Vs. Rakesh Kumar, AIR 2004 S.C. 230** it has been specifically laid down in para 32 that, “the age of a person has to be determined in an election petition not only on the basis of materials placed on record, but also upon taking into consideration circumstances attending thereto. The initial burden to prove the allegation made in the election petition although is upon the election petitioner, but for proving the facts which are within special knowledge of the respondent,

burden is upon him in terms of section 106 of the Evidence Act. It is also trite that when both the parties have adduced evidence the question of onus of proof becomes academic. Furthermore, an admission on the part of the party to his shall be binding on him and in any event a presumption must be made that the same is taken to be established.”

83. In the judgment in the case of **Satpal Singh Vs. State of Haryana, 2010 AIR SCW 4951** as observed in para No.28, there was nothing on record to corroborate the date of birth of the prosecutrix recorded in school register. It was not possible to ascertain as to who was the person who had given her date of birth as 13/02/1975 at the time of initial admission in the primary school. Therefore, in those peculiar circumstances it could not be held with certainty that the prosecutrix was minor.

84. Here in the instant case, at the cost of repetition it may be observed that by virtue of the assertion of PW3 Indirabai in her cross-examination, that Aganwadi attendant had noted down the date of birth of the prosecutrix after 2 days of her birth and she as well as her husband had carried with them to the school that document of date of birth of the prosecutrix which was handed over to her by the Aganwadi attendant, it is established that the date of birth of the prosecutrix is 01/06/2000. Because of that examination of any other witness for proving the contents of that bonafide certificate article A

was not at all necessary. Therefore, with great respects to the ratio and principles laid down in the judgment in the case of **Sushil Kumar Vs. Rakesh Kumar, AIR 2004 S.C. 230**, and **Satpal Singh Vs. State of Haryana, 2010 AIR SCW 4951** the same are not helpful to the accused in any manner.

85. In the judgment in the case of **Mahendra Singh and others Vs. State of Rajsthan, 1992 Cri. L.J. 1401**, the girl was consenting party to go with the accused . The entries in the educational institutions regarding her date of birth were not reliable. There was no proof that the girl was minor under the age of 18 years on the date of occurrence. Therefore, the conviction of the accused under section 366 of I.P.C. was held illegal and the appeal was allowed.

86. So also in the case of **Y. Srinivasa Rao Vs. State of A.P. , 1995 Cr. L.J. 1597**, it was established that the age of the prosecutrix on the date of occurrence was below 18 years. Conduct of the prosecutrix showed that she accompanied the accused on her own accord. The medical evidence did not opine regarding forcible act with the prosecutrix. Therefore, in those circumstances, the appeal was allowed.

87. In the judgment in the case of **Ravinder Singh Gorkhi Vs. State of U.P. SIR 2006 S.C. 2157**, it has been laid down that an entry relating to the date of birth made in school register is relevant and admissible under section 35 of the

Indian Evidence Act, but the entry regarding the age of a person in the school register is of not much evidentiary value to prove the age of the person in absence of material on the basis of which that age was recorded.

88. In the judgment in the case of **State of Maharashtra Vs. Arvind Gopalrao Panchbhai, 2016 All MR (Cri) 312**, the prosecutrix went from one place to another with the accused. She did not confront the accused when introduced others as his wife nor she took assistance of others to get out of clutches of the accused. It was revealed that she had voluntarily gone with him and indulged in sexual intercourse with him. So also minority of the prosecutrix at the time of the alleged incident was not proved. Therefore, acquittal of accused was held to be proper.

89. In the judgment in the case of **Ajit Singh vs. State of Haryana, 2015)1) Crimes 425 (P & H)**, testimony of the prosecutrix did not inspire confidence, therefore in those circumstances, it was held that assertion cannot be believed without corroboration.

90. Likewise, in the case of **State of Madhya Pradesh Vs. Munna alias Shambhoonath, (2016) S.C.C. (Cri.) 536**, the evidence established that sexual intercourse was consensual. It was not proved that the age of the prosecutrix on the date of offence was less than 15 years. Therefore in those peculiar

circumstances it was held that the acquittal of the respondent/accused was proper.

91. Here in the instant case, the facts and circumstances are altogether different. PW3 Indirabai, the mother of the prosecutrix deposed that, after two days of the birth of the prosecutrix, Anganwadi attendant had noted down her date of birth and that document of noting was carried by her and her husband to school when the prosecutrix was initially admitted in it. She categorically denied the suggestion put to her that the above stated fact regarding noting of the date of birth of the prosecutrix by Anganwadi attendant is false. Because the above explanation has been brought on record by the defence side, during the course of cross-examination of Indirabai, the same has certainly rendered strong assurance corroborating the fact that the date of birth of the prosecutrix shown as 01/06/2000 in the bonafide certificate article 'A' is correct.

92. Moreover, there is absolutely no iota of evidence denoting even remotely that the prosecutrix was consenting party or she had sex with the accused voluntarily and on her own accord. So also there is ring of truth in the depositions of the prosecution witnesses. Moreover, merely because the prosecutrix deposed that the accused raped her in bed-room and Dr. Kagane deposed that when she noted history in Format Exh. 23 the prosecutrix had told that she has been raped in bathroom, it cannot be concluded that the prosecutrix

was not at all raped. Therefore, with great respects to the ratio and principles laid down in the judgments in the cases of Mahendra Singh and others Vs. State of Rajsthan, 1992 Cri. L.J. 1401 , Y. Srinivasa Rao Vs. State of A.P. , 1995 Cr. L.J. 1597, Ravinder Singh Gorkhi Vs. State of U.P. SIR 2006 S.C. 2157, State of Maharashtra Vs. Arvind Gopalrao Panchbhai, 2016 All MR (Cri) 312, Ajit Singh vs. State of Haryana, 2015)1) Crimes 425 (P & H) and State of Madhya Pradesh Vs. Munna alias Shambhoonath, (2016) S.C.C. (Cri.) 536, relied upon by the learned defence counsel, the same are not helpful to the accused in any manner.

93. By placing reliance upon the judgment in the case of Pratap Mishra and others Vs. State of Orissa, 1977 Cri. L.J. 817, the learned defence counsel argued vehemently that, absence of any injury either on the body of accused or that of prosecutrix, clearly showed that she did not put up any resistance to the alleged rape committed by the accused. Therefore, the only irresistible inference which can be drawn is that she was consenting party.

94. However, in the judgment in the case of Rajesh Namdeo Mhatre and others Vs. State of Maharashtra and others 2002 Bom. C.R. 708 in para 25 it has been observed that the learned defence counsel in support of his submission placed reliance upon the same decision in the case of Pratap Mishra and others (1977 Cri.L.J.817) cited supra. It has been

observed in para 25 and 26 in the judgment in the case of **Rajesh Namdeo Mhatre Vs. State of Maharashtra, 2002 Bom. C.R. 708** that-

*“this decision of the Supreme Court (**Pratap Mishra and others Vs. State of Orissa, AIR 1977 Cri.L.J.817**) is of 1977 i.e. much before the introduction of section 114-A of the Indian Evidence Act. - this section was inserted by the Act 43 of 1983 . Section 114-A reads :*

114-A. Presumption as to absence of consent in certain prosecutions for rape- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (f) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

“26. Under this provision once sexual intercourse by the accused is proved and if the woman alleged to have been raped states before the Court that she did not consent, the Court shall presume that she did not consent. In other words, the Court is required to presume that there is no consent once the prosecutrix states that she did not consent. Then it is for the accused to prove that the woman consented to the sexual intercourse. In other words, no burden is placed on the prosecution to adduce any evidence after proving the sexual intercourse that the prosecutrix did not give consent to the sexual intercourse. However, if the accused succeeds in rebutting the presumption of no consent, the prosecution may adduce the evidence. In

the present case we are of the considered view that the appellants have not rebutted the presumption of no consent.”

95. In this view of the matter in the light of the provisions of Section 114-A of Indian Evidence Act, because the sexual intercourse by the accused is proved, and because the prosecutrix deposed in unequivocal words that he committed rape upon her, it will have to be presumed that she did not consent. The accused certainly has not rebutted the presumption of 'no consent'. Therefore, with great respects to the ratio and principles laid down in the case of **Pratap Mishra** (cited supra) relied upon by the learned counsel for the accused, the same are not helpful to the accused in any manner.

96. It is also worth noting that as evident from the C.A report Exh. 38 the nicker of the prosecutrix was stained with human blood at the middle. Whereas the bed-sheet seized as per spot panchnama Exh. 15 was stained with human semen stains of about 2.0 cm. In diameter situated at middle portion. Thus, these findings in report Exh. 38 also sufficiently corroborated the case of the prosecution that the incident did take place as deposed by the prosecutrix and other witnesses.

97. Here in the instant case the initial onus of establishing the case against the accused beyond reasonable doubt has been sufficiently discharged by the prosecution. The

convincing evidence of the prosecutrix has certainly established that making false representation that he was taking her to a new place of working as maid servant, he brought her to flat No.11 described in spot panchnama Exh.15 and committed rape upon her. There is certainly ring of truth in depositions of all the witnesses.

98. Barring minor contradictions and inconsistencies here and there which have not gone to the root of the matter, the prosecution has sufficiently proved beyond reasonable doubt the guilt of the accused of the offence charged with. Hence, points Nos.1 to 3 are answered in affirmative.

99. Here, pause is taken to hear the accused on the point of sentence.

Pune.
Date: 07/05/2016.

(A.G.Bilolikar)
Special Judge,
Under POCSO Act.

100. The accused is heard on the point of sentence. He submitted that he is a poor labourer and first offender. He submitted that his wife, his daughter aged about 3 years and his mother are depending upon him. He has got repentance upon commission of the offences and he craved for a chance for reform himself. Thus he prayed for leniency.

101. The learned defence counsel is absent when called

repeatedly at 5.15 p.m. Therefore, he could not be heard on the point of sentence to be awarded to the accused.

102. The learned APP is present and he pointed out that admittedly the accused was involved in Sessions Case No. 44/2012 for the offence of gang rape and only because he and other co-accused managed to prevent the prosecutrix in that case from coming to depose before the Court, he along with the co-accused came to be acquitted in that S.C. No. 44/12. Even after that the accused committed the rape upon the prosecutrix, knowing fully well that she is minor below 18 years of age. Because he is sex maniac, he deserves stringent punishment.

103. The punishment provided for the offences under sections 376(2)(f) and (h) of I.P.C. as well as for the offence under section 5(p) punishable under section 6 of POCSO Act is rigorous imprisonment which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

104. Having regard to the facts and circumstances proved against the accused, as well as the factors bearing on the point of sentence it is found that this is certainly not a case wherein the accused is required to be sentenced to imprisonment for life. However, at the same time it has to be observed that in view of the legislative mandate that the

sentence for the abovesaid proved offences shall not be less than rigorous imprisonment for ten years and fine, the accused deserves to be punished accordingly. With these observations, following order is passed.

ORDER

1. Accused Ganesh Shashikant Waghmare is convicted under section 235(2) of Cr. P. C. of the offences punishable under sections 376(2)(f) and (h) and 506 of Indian Penal Code as well as section 5(p) punishable under section 6 of The Protection of Children from Sexual Offences Act, 2012.

A) For commission of the offence punishable under section 376(2)(f) of I.P.C. he is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.500/- (Rs. Five hundred only), in default of payment of fine he shall suffer rigorous imprisonment for one month.

B) For commission of the offence punishable under section 376(2)(h) of I.P.C. he is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.500/- (Rs. Five hundred only), in default of payment of fine he shall suffer rigorous imprisonment for one month.

C) For commission of the offence punishable under section 6 of The Protection of Children from Sexual Offences Act, 2012, he is sentenced to suffer rigorous imprisonment for ten and to pay fine of Rs.500/- (Rs.

Five hundred only), in default of payment of fine, he shall suffer rigorous imprisonment for one month.

D) For commission of the offence punishable under section 506 of I.P.C. he is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.200/- (Rs. Two hundred only), in default of payment of fine he shall suffer rigorous imprisonment for one month.

2. All the sentences shall run concurrently.
3. Set off as provided under section 428 of Cr. P.C. is granted for the period from the date 13/05/2013 to 07/05/2016.
4. The Muddemal clothes, being worthless property shall be destroyed after appeal period is over.
9. Copy of the judgment shall be handed over to the accused forthwith.

Pune
Date: 07/05/2016.

(A.G.Bilolikar)
Special Judge,
Under POCSO Act

I affirm that the contents of this P.D.F. file judgment are same word for word as per original Judgment.

Name of steno: Mrs. S. S. Chimbalkar.

Name of the Court: A.G.Bilolikar, District Judge-6 and
Special Judge under POCSO Act.

Judgment signed:

by presiding officer on: 07/05/2016

Judgment uploaded on : 11/05/2016