IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.28 OF 2016

BALAJI SARJERAO KAMBLE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Satyavrat Joshi, Advocate for the Appellant.

Mr.Vinod Chate, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 29th AUGUST 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order dated 15th December 2015 passed by the learned Special Judge, Pune, in Special (Child) Case No.66 of 2014 thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code (IPC) so also under Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act). For the offence punishable under Section 376 of the IPC, the appellant / accused

is directed to undergo rigorous imprisonment of 7 years apart from directing him to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment of 3 months. Similarly, for the offence punishable under Section 4 of the POCSO Act, he is sentenced separately to suffer rigorous imprisonment of 7 years, apart from directing him to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment of 3 months. For the offence punishable under Section 8 of the POCSO Act, the appellant / accused is sentenced to suffer rigorous imprisonment of 3 years, apart from directing him to pay fine of Rs.1,000/-, in default, to undergo further rigorous imprisonment of 1 month. Substantive sentences are directed to run concurrently.

2 Facts leading to the institution of the present appeal can be summarized thus :

(a) Informant PW2 Shamalata Gadkari used to reside at Hargudevasti, Chikali, Pune, with her husband Prashant, son Pranay and daughter (PW1) aged about 7 years, who is stated to be the victim of the crime in question. The incident allegedly took

place on 21st December 2013. The victim female child (PW1) at the relevant time was taking education in 1st Standard in Saraswati English Medium School at Pawarvasti, Chikhali, Pune.

(b) The appellant / accused is stated to be neighbour of First Informant-PW2 Shamalata Gadkari. He used to visit house of the First Informant-PW2 Shamalata Gadkari frequently. Children of First Informant-PW2 Shamalata Gadkari used to play games on mobile phone of the appellant / accused. Children of the First Informant-PW2 Shamalata Gadkari used to call appellant / accused Balaji Kamble as “mama” - maternal uncle.

(c) It is case of the prosecution that the incident in question took place on 21st December 2013 at about 8.00 p.m. Appellant / accused Balaji came to the house of PW2 Shamalata Gadkari, and the minor female child (PW1) who is daughter of PW2 Shamalata Gadkari, accompanied him for playing games on mobile phone. She returned to her house after half an hour. On 22nd December 2013 also, at about 6.00 p.m. appellant / accused Balaji came to

the house of PW2 Shamalata Gakari to enquire as to where the minor female victim (PW1) is. Upon being told that she had gone outside for playing, the appellant / accused left the house of PW2 Shamalata Gadkari. The minor female victim (PW1) then returned to her house and slept.

(d) In late night hours of 22nd December 2013, the minor female victim (PW1) informed her mother PW2 Shamalata Gadkari that she is suffering pain at abdomen and private part. However, PW2 Shamalata Gadkari did not pay any attention.

(e) In the morning hours of 23rd December 2013, the PW1 / minor female victim reiterated her complaint of pain at private part and abdomen to her mother PW2 Shamalata Gadkari. This resulted in detailed questioning of the minor female victim by her mother. It was thereafter that the minor female victim (PW1) disclosed to her mother PW2 Shamalata Gadkari that the day before yesterday, appellant / accused Balaji took her to the staircase, kissed her, took out her nicker and committed rape on her.

(f) PW2 Shamalata Gadkari then called her husband and took the minor female victim (PW1) to the hospital of PW3 Dr.Neelam Kale. Ultimately, PW2 Shamalata Gadkari went to Police Station Nigdi on 23rd December 2012 itself and lodged FIR Exhibit 12 against the appellant / accused which had resulted in registration of Crime No.3432 of 2013 for offences punishable under Sections 3, 4, 7 and 8 of the POCSO Act.

(g) During course of investigation, the minor female victim (PW1) was sent for medical examination to the Sassoon Hospital, Pune, where she came to be examined by PW4 Dr.Swati Kagne – Junior Resident. The appellant / accused came to be arrested. Statement of witnesses came to be recorded. Clothes of the appellant / accused so also that of minor female victim came to be seized. Seized articles were sent for chemical analysis and on completion of investigation, the appellant / accused came to be charge-sheeted.

(h) The learned trial court framed charges for offences punishable under Section 376 of the IPC and under Sections 4 and 8 of the POCSO Act. The appellant / accused abjured his guilt and claimed trial. In order to bring home the guilt to the appellant / accused, the prosecution has examined in all five witnesses. The minor female victim of the crime in question is examined as PW1 whereas her mother – First Informant Shamalata Gadkari is examined as PW2. Dr.Neelam Kale is examined as PW3 whereas Dr.Swati Kagne is examined as PW4. Exhibit 19 is the certificate of medical examination of the PW1 issue by PW4 Dr.Swati Kagne. Investigating Officer Rupali Bobade, A.P.I. of Nigdi Police Station, is examined as PW5.

(i) Defence of the appellant / accused is that of total denial as well as false implication. The appellant / accused belongs to Mang caste. According to him, his family has purchased a piece of land at Hargudevasti, dominated by people from Maratha community. Neighbours belonging to Maratha caste were not happy with this act. His elder brother was kidnapped which has

resulted in registering of the crime against persons belonging to Maratha caste. Similarly, one Shrikant Tambe had lodged report of commission of rape against eldest brother of the appellant / accused, in which brother of the appellant / accused came be acquitted. Thus, because of this hostility with people from Maratha community, the appellant / accused is falsely implicated in the crime in question. It is the defence of the appellant / accused that for withdrawing the case of abduction of his eldest brother, he is falsely implicated in the crime in question. At the time of the incident, he was giving examination at the Disha Computers.

3 I heard Shri Satyavrat Joshi, the learned advocate appearing for the appellant / accused. He argued that entire evidence of the prosecution is silent about age of the alleged vitim of the crime in question. The prosecution was duty bound to prove that the minor female victim was a child within the meaning of the said term under the POCSO Act. As age of the victim is not proved, the prosecution case suffers from serious infirmity. He

further argued that the victim of the crime in question, has not disclosed the date of the incident. Evidence regarding place of the incident is also discrepant. History given to the doctor shows that the incident allegedly took place at the terrace whereas, evidence suggests that it took place near staircase. According to the learned advocate for the appellant / accused, conduct of mother of the victim in not disclosing anything to PW3 Dr.Neelam Kale to whom she approached first, casts a shadow of doubt on the case of the prosecution. Alleged sexual assault on the PW1 was not at all disclosed to this witness. In submission of Shri Joshi, the learned advocate for the appellant / accused, medical evidence is also not supporting the prosecution case. Tearing of hymen is attributable to fingering and the tear was old one. Therefore, it cannot be said that it was the appellant / accused, who had committed the offence of penetrative sexual assault on the minor female victim.

4 As against this, according to the learned APP, the defence has never disputed age of the minor female victim, and as age of the victim coming on record through the chief examination

remained unchallenged, the same needs to be accepted. The learned APP drew my attention to the medical case papers proved by PW4 Dr.Swati Kagne, reflecting age of the victim. The learned APP, further argued that evidence of the minor female victim is cogent and trustworthy and the same is supported by other evidence on record, and as such, the impugned judgment and order is perfectly in consonance with the evidence on record.

5 With the help of the learned advocate appearing for the appellant / accused as well as the the learned APP, I have carefully gone through the record and proceedings including deposition of witnesses as well as documentary evidence adduced by the prosecution. I have carefully considered the rival submissions.

6 The case in hand is a case of rape / penetrative sexual assault on a minor female child, who according to the prosecution case, was just about 6 to 8 years, at the time of the alleged incident. It hardly needs to be mentioned that rape is a ghastly

act which leaves the victim shattered for the life as it causes not only physical but emotional and psychological trauma to the victim. Sexual activities with young girls of immature age have a traumatic effect on them, which persists throughout their life leading to several disorders and complications. It is well settled that the victim of a sexual assault is not an accomplice, but she is a victim of lust of another person. Her evidence stands at a higher pedestal than that of an injured witness. Evidence of victim of rape case is required to receive same weight as is attached to evidence of an injured witness. If totality of circumstances emerging on record discloses that the victim of such crime does not have any motive to falsely implicate the accused, then, it is not required to seek corroboration to her evidence and the court generally needs to accept her evidence. While dealing with cases of sexual assault on females of tender ages, the court is expected to shoulder great responsibility and is required to deal with such cases sensibly. Broader probabilities of the prosecution case are required to be examined in such crimes and the court is not expected to get swayed by minor contradictions or insignificant

discrepancies in the evidence of prosecution which does not go to the core of the prosecution case. At the same time, principle of criminal jurisprudence requires that the prosecution must establish its case by cogent and convincing evidence. No matter how diabolic is crime, the burden always rests on the prosecution to prove guilt of the accused beyond all reasonable doubts. The same principle is equally applicable to the cases of sexual offences against persons of tender years. Keeping in mind these principles of appreciation of evidence in such cases, let us examine evidence of the prosecution in order to ascertain whether the prosecution has established that the appellant / accused had committed penetrative sexual assault on a female child and whether evidence adduced by the prosecution justifies conviction of the appellant / accused.

7 Section 2(d) of the POCSO Act 2012 defines the term "child". The "child", according to this definition, means a person below the age of 18 years. Let us, therefore, at the outset examine whether evidence of the prosecution demonstrates that at the time

of commission of alleged offence, the victim thereof was a “child”. It is worthwhile to mention here that, though the victim of the alleged crime was taking school education, the prosecution has not cared to bring on record documentary evidence of her date of birth in the form of General Register maintained by the school, her Birth Certificate as per provisions of Registration of Birth and Death Act or Bonafide Certificate issued by the school. The prosecution is contented by adducing oral evidence in this regard. The PW1, who is alleged victim of the crime, has deposed before the court that she is 8 years old. She was unable to tell her date of birth. However, in her entire cross-examination, her version that she is 8 years old is not at all challenged by the defence. PW2 Shamalata Gadkari is mother of the PW1 / minor female victim. She deposed that her daughter is 8 years old. This statement was made by PW2 Shamalata Gadkari while in the witness box on 6th August 2015. Leave apart the fact that the defence has not challenged this version of PW2 Shamalata Gadkari, from cross-examination of this witness defence has brought on record, date of birth of the PW1 / minor female victim. As seen from cross-

examination of PW2 Shamalata Gadkari, date of birth of the PW1 / minor female victim is 14th August 2007. I see absolutely no reason to disbelieve version of mother of the minor female victim regarding her age coming on record from the cross-examination conducted by the defence. The incident in question took place allegedly on 21st December 2013. As such, at about the date of the alleged incident, the PW1 / minor female victim was certainly below 18 years of age. She was around 6 years and some months old at the time of commission of alleged offence, as seen from this evidence adduced by the prosecution.

8 PW3 Dr.Neelam Kale happened to see the PW1 / minor female victim on 23rd December 2013. This witness deposed that the minor female victim was about 7 to 8 years old. This version of PW3 Dr.Neelam Kale went unchallenged. PW4 Dr.Swati Kagne admitted that she did not conduct ossification test of the PW1, but the same is of no consequence, as there are no suggestions to this witness that the minor female victim was more than 18 years of age. The history recorded by PW4 Dr.Swati Kagne, as reflected

from the documents of medical examination at Exhibit 19 also reflects age of the PW1 as 7 years. The same is not challenged in cross-examination of PW4 Dr.Swati Kagne.

9 This position emerging on record goes to show that evidence of prosecution witnesses regarding age of the minor female victim went unchallenged and unrebutted. The cross-examination is a matter of substance and not that of a procedure. The effect of non-cross-examination is that the statement of witness is held to be undisputed. If evidence in chief-examination is not challenged in cross-examination by the other party, then the same is required to be accepted and the fact averred thereby is required to be held as fully established. In the wake of this position in law, it needs to be held that at the time of the alleged incident, the PW1 / minor female victim was a child as defined by Section 2(d) of the POCSO Act, she being below 18 years of age.

10 After concluding that the minor female victim was below 18 years of age at the time of the incident, let us examine

whether evidence of the prosecution demonstrates that she was subjected to rape i.e. penetrative sexual intercourse and sexual assault at the hands of the appellant / accused. The PW1 being the victim of the crime in question, her evidence assumes importance in such cases of sexual assault. She, at the time of the incident, was about 6 years and a few months old. One may argue that being a child witness, version of this minor female victim carries no weight and the same cannot be relied upon to base conviction in such serious offence. However, it needs to be kept in mind that as provided by Section 118 of the Evidence Act, a child is indisputably a competent witness if such child understands the questions put to her and gives rational answers. The PW1 being a child witness, due to tender years, is susceptible to tutoring, her evidence requires close scrutiny and the same is required to be scanned carefully. If on close scrutiny of the evidence of a child witness, the court is satisfied about the quality of the evidence as well as reliability of such witness, then conviction can be recorded safely. Keeping in mind this important aspect regarding appreciation of evidence of a child witness, let us

examine what the PW1/minor female victim states about the incident in question. The PW1/minor female victim in her deposition has spoken about the incident in following words :

> "I know accused Balaji Kamble present in the court and I used to refer him as Balaji Mama. I used to see him in the vicinity of my house. On that day he met me near my house and had taken me to stairs near the terrace of my house. He gave me game of card for playing. Thereafter he lifted my frock. Thereafter he pulled down my nicker. Thereafter he removed the chain of his pant. Thereafter he put is private part (शुची जागा) in my private part (माझ्याशुची या जागेत). I suffered pain in my private part. I told him that I am suffering lot of pain in my private part. Thereafter he left me. Thereafter I went to my house. I took meal and went to sleep. As I was suffering pain in my private part and in my abdomen, I told my mother. She took me to the doctor. I cannot tell the name of doctor. I went to the police station with my mother for lodging the report."

11 Though this evidence coming on record from the mouth of the child witness is giving vivid description of all sexual activities conducted on her by the appellant / accused, without placing implicit reliance on it, let us examine what is emerging on record from cross-examination of this child witness. She was subjected to searching cross-examination by the defence in order to bring on record that she is a tutored child witness. However, the PW1 / minor female victim has candidly denied that she is deposing before the court on instructions of others. This witness denied that one Dhanawadebai as well as Shailesh More had narrated the incident to police. The PW1 / minor female victim further denied the suggestion that she is deposing before the court what was told to her by her mother as well as Dhanawadebai before entering into the witness box. This witness candidly denied the suggestion that the appellant / accused had not done anything to her. The tone and tenor of evidence of PW1 / minor female victim reflects that she is a witness who has attained sufficient maturity and understanding in order to enable her to give rational answers to the questions put to her. She candidly

denied suggestion that the appellant / accused did not remove her nicker. She has candidly stated that when her nicker was being removed, she was in the standing position. All these aspects which are reflected from the cross-examination of the minor female victim show that the incident which took place with her was clearly imprinted in her brain so as to enable her to recollect the same upon being asked while in the witness box. There is nothing in the cross-examination of this witness to disbelieve her version recording the incident of sexual assault on her by the appellant / accused. On the contrary, evidence of the child victim is clear and cogent in respect of the penetrative sexual assault suffered by her. There is nothing in her evidence to indicate that she is a tutored witness.

12 True it is that the victim of the crime has not mentioned the date of the incident but that is inconsequential. Such a discrepancy cannot touch the core of the prosecution case which is in respect of the commission of penetrative sexual assault. Ultimately, the court will have to keep in mind age of the

PW1 at the relevant time, and therefore, merely because date of the incident is not stated by the victim, her evidence cannot be doubted. The PW1 is not expected to have such chronometric sense at the tender age.

13 According to the learned advocate for the appellant / accused, there is discrepancy in respect of the place of the incident. However, the argument so advanced is devoid of merit. The history recorded by PW4 Dr.Swati Kagne shows that the appellant / accused used to take the victim to the terrace. The PW1 / victim of the crime in her substantive evidence before the court has disclosed the place of incident as the staircase near the terrace. Thus, evidence regarding the place of incident reflecting from the history given to the Medical Officer and coming from the mouth of the victim is consistent.

14 Now let us examine whether evidence of the minor female victim is gaining corroboration from the medical evidence adduced on record. Though initially the minor female victim was

taken by her mother PW2 Shamalata Gadkari to PW3 Dr.Neelam Kale, this private medical practitioner had referred her to the specialist without giving any treatment. What was reported to this witness is suffering from pain in abdomen and private part. Except this, nothing was disclosed to this witness – PW3 Dr.Neelam Kale by mother of the victim of the crime. This, in my opinion, cannot cast a shadow of doubt on the prosecution case. Upon hearing the incident from the mouth of her minor daughter, PW2 Shamalata Gadkari had taken the PW1 / minor female victim to this witness but this private practitioner expressed her inability to treat the PW1. In such situation, there was no occasion for PW2 Shamalata Gadkari to disclose history of the patient to PW3 Dr.Neelam Kale. That apart, when PW3 Dr.Neelam Kale was not to give any medical treatment to the PW1, then it was not expected of PW2 Shamalata Gadkari to disclose very personal things regarding offence of rape on a minor daughter to PW3 Dr.Neelam Kale. It is a matter of common knowledge that such offence affects honour of the family and the victim as well as relatives of the victim feel embarrassed to disclose commission of

such offence because of feeling of shame. As such, on this count it cannot be said that the conduct of PW2 Shamalata Gadkari was not that of a prudent person, making the case of the prosecution suspect.

15 After lodging report, the PW1 / minor female victim was referred to PW4 Dr.Swati Kagne. PW2 Shamalata Gadkari had accompanied the minor female victim at the Sassoon hospital. The minor female victim and her mother reached the Sassoon hospital at about 1.55 a.m. of 24th December 2013 as seen from cross-examination of this witness. Ultimately, she came to be examined by PW4 Dr.Swati Kagne at about 6.00 a.m. of 24th December 2013. As further seen from cross-examination of PW4 Dr.Swati Kagne, it was the minor female victim who had given the history of the incident to her. This evidence brought on record from cross-examination of the Medical Officer needs to be accepted. As per version of PW4 Dr.Swati Kagne she has recorded the history given by the victim as well her mother. Then, clinical examination on the victim came to be conducted. Evidence of

PW4 Dr.Swati Kagne which is duly corroborated by the contemporaneous medical record at Exhibit 19 shows that though the PW1 had not suffered any injury to external part of her body, her hymen was found to have been torn. Presence of perihymenal inflammation came to be noticed by PW4 Dr.Swati Kagne. With these clinical findings, PW4 Dr.Swati Kagne has opined that there was possibility of penetrative sexual vaginal intercourse with the PW1.

16 It is seen from cross-examination of PW4 Dr.Swati Kagne that hymen of the PW1 was having old tear and it can be caused by inserting finger or foreign body. It is also elicited from her cross-examination that because of surgical procedures or use of tampons, hymen can be torn. In the case in hand, the victim has not attained menarche, she being a female child of about 6 years of age with rustic background. There are no suggestions either to her or to her mother to the effect that the minor female victim had attained the menarche and was using tampons. Similarly, there are no suggestions to the minor female victim that she was

indulging in fingering. No suggestions are given to the victim of the crime in question that she used to indulge in insertion of foreign body in her vagina. In the wake of this position such material elicited from cross-examination of the Medical Officer regarding causes of rupture of hymen is of no assistance to the defence. Similarly, the incident in question took place on 21st December 2013 and the PW1 was examined by PW4 Dr.Swati Kagne in the morning hours of 24th December 2013. Thus, there was gap of more than three days in medical examination of the PW1. There is no further cross-examination to ascertain what was the age of the tear to the hymen of the victim. Presence of perihymenal inflammation at the time of medical examination of the minor female victim, conducted after about three days supports the version of the PW1 about the sexual assault on her by the appellant / accused. Her evidence, as such, is gaining full corroboration from the medical evidence on record.

17 PW2 Shamalata Gadkari-mother of the victim of the crime in question, is not an eye witness to the incident in

question. She heard what her daughter disclosed to her on 23rd December 2013. Evidence of PW2 Shamalata Gadkari is to the effect that on 21st December 2013, the appellant / accused took the PW1 / minor female victim with him at about 8.00 p.m. This was on the pretext of playing games on mobile. PW2 Shamalata Gadkari further disclosed that on the next day also, the appellant / accused enquired about the PW1. Then in the night on 22nd December 2013, the PW1 complained to her mother about pain in the private part and abdomen. As seen from evidence of PW2 Shamalata Gadkari, the said complain was repeated in the morning hours also which resulted in detailed enquiry. Then comes narration by the PW1 to her mother PW2 Shamalata Gadkari. What was heard by PW2 Shamalata Gadkari from her minor daughter is reflected in paragraph 2 of her evidence, the relevant portion of which needs reproduction. It reads thus :

> "She informed me that two days prior, Balaji Mama had taken her to upstairs (jina) and took her kiss by putting his mouth in her mouth and she expressed that she did not feel good and asked him to take kiss of her cheek. She also informed me that the

> accused had lifted her frock and removed her nicker and also open his chain of the pant and put his private part in her private part and she felt pain. She also informed me that the accused then left her."

18 Let us consider evidentiary value of this disclosure. This constitutes former statement of the PW1 made to her mother PW2 Shamalata Gadkari after the incident. Section 157 of the Evidence Act deals with such disclosure and reads thus :

> **"157. Former statements of witness may be proved to corroborate later testimony as to same fact —** In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

19 Evidence on record shows that prior to the disclosure of the incident by the PW1 / minor female victim to her mother PW2 Shamalata Gadkari, mind of the PW1 / minor female victim was totally uninfluenced by any external factor prompting her to

tell something lie or incorrect against the appellant / accused. This being the position from the evidence on record, particularly coming on record through the PW1 / minor female victim, her former statement proved by PW2 Shamalata Gadkari can be used to corroborate the version of the PW1 / minor female victim.

20 Now let us examine the theory of possibility of false implication of the appellant / accused at the hands of the persons from Maratha community residing in his neighbourhood at Hargudevasti. As stated in foregoing paragraph, the defence of the appellant / accused is to the effect that he belongs to Mang caste whereas majority of the residents of Hargudevasti are Maratha. His younger brother had filed report of abduction of his eldest brother Rajkumar which resulted in prosecution of some persons from Maratha community. Similarly, brother of the appellant / accused is prosecuted at the instance of a person from Maratha community in a rape case which ultimately resulted in acquittal. Even if all this is accepted as it is, the question which falls for consideration is whether PW2 Shamalata Gadkari who is

totally unconcerned with hostility of the appellant / accused and his Maratha neighbours, would put future of her minor daughter at a stake in order to falsely implicate the appellant / accused in the crime in question. The answer to this question shall certainly be in negative considering the fact that the victim and her mother belongs to a tradition bound Indian society. This aspect is considered by the Hon'ble Apex Court in **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**[1] wherein atleast twelve reasons are narrated by the Hon'ble Apex Court as to why generally there are no chances of false implication in the case of rape. They read thus :

> (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred;
>
> (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the society including by her own family members, relatives,friends, and neighbours;
>
> (3) She would have to brave the whole world;

1 1983 AIR 753

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered;

(5) If she is unmarried, she would apprehend that it would be, difficult to secure an alliance with a suitable match from a respectable or an acceptable family;

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself;

(7) The fear of being taunted by others will always haunt her;

(8) She would feel extremely embarrassed in relating the incident to others being over powered by feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo;

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy;

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want

to avoid publicity on account of the fear of social stigma on the family name and family honour;

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence;

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

21 If evidence of the prosecution is tested on the touchstone of these contingencies enumerated by the Hon'ble Apex Court then it becomes clear that PW2 Shamalata Gadkari is neither concerned with the trial of rape case against the brother of the appellant / accused nor his hostile relations with Maratha community. Being a resident of Hargudevasti she may be knowing some persons from Maratha community but that is not sufficient to infer that honour of the family and future of the minor daughter would be put to stake by PW2 Shamalata Gadkari by indulging in dirty politics of the village with which she has no

concern. It is not even brought on record that the informant also belongs to Maratha caste or has close relations with opponents of the appellant / accused. Hence, the theory of false implication does not deserve a moment's consideration.

22 In view of foregoing discussion, even on re-appreciation of the entire evidence on record, I find no infirmity in conviction of the appellant / accused for offences alleged against him.

23 At this stage, the learned advocate for the appellant / accused argued that leniency in punishment should be shown considering the fact that the appellant / accused is just 22 years old having responsibility of maintaining his parents. It needs to be noted that punishment for the offence punishable under Section 4 of the POCSO Act cannot be less than 7 years. Similarly, punishment for the offence punishable under Section 376 of the IPC also cannot be less than 7 years. The State has not filed an appeal in this matter for enhancement of sentence though the case

of the prosecution is that of rape on a female child below 16 years of age warranting punishment under Section 376(2)(i) of the IPC.

24 At the same time, it is seen that the appellant / accused on his conviction for the offence punishable under Section 376 of the IPC as well as under Section 4 of the POCSO Act is sentenced to suffer punishments on both counts. For the offence punishable under Section 376 of the IPC, he is sentenced to suffer rigorous imprisonment of 7 years apart from directing him to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment of 3 months. Separately for the offence punishable under Section 4 of the POCSO Act the appellant / accused is sentenced to suffer rigorous imprisonment of 7 years, apart from directing him to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment of 3 months. As per provisions of Section 42 of the POCSO Act, where an act or omission constitutes an offence punishable under the said Act as well as under Section 376 of the IPC, then, notwithstanding anything contained in any law for the time being in force, the

offender / accused found guilty of such offence is liable for punishment under the POCSO Act or under the IPC, as provided for punishment whichever is greater in degree. As such, for the same offence i.e. the one under Section 376 of the IPC and another under Section 4 of the POCSO Act, the accused cannot be punished twice. However, in this case, the appellant / accused is punished twice – once for offence punishable under Section 376 of the IPC, and another for the similar offence punishable under Section 4 of the POCSO Act. On each count, he is imposed punishment separately. Therefore, by maintaining the sentence for the offence punishable under Section 4 of the POCSO Act, which is equivalent to Section 376 of the IPC, sentence of the appellant / accused for the offence punishable under Section 376 of the IPC, needs to be quashed and set aside. Therefore the order :

ORDER

i) The appeal is partly allowed.

ii) Conviction and sentence of the appellant / accused for offences punishable under Sections 4 and 8 of the POCSO Act is maintained.

iii) Conviction of the appellant / accused for the offence punishable under Section 376 of the IPC is also maintained. However, sentence imposed on him for the offence punishable under Section 376 of the IPC viz., rigorous imprisonment of 7 years as well as direction to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment for 3 months, is quashed and set aside.

iv) The appeal is disposed of accordingly.

v) Copy of this judgment be sent to the appellant / accused, who is undergoing jail sentence, at Yerwada Central Prison.

(A. M. BADAR, J.)