IN THE HIGH COURT OF JUDICATURE AT BOMBAY
: NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 425 OF 2023

APPELLANT : Aman S/o Ratnakar Tagade,
Aged about 23 years, Occu. Student,
R/o Ward No.3, Pethvibhag,
Tah. Narkhed, Dist. Nagpur.
Present in Central Prison, Nagpur.

VERSUS

RESPONDENTS : 1] The State of Maharashtra,
through Police Station Officer,
Police Station, Narkhed, Dist. Nagpur.

2] X Y Z (Complainant),
in Crime No. 64 of 2016, registered with
Police Station, Narkhed, Dist. Nagpur.

Mr. Mir Nagman Ali, Advocate for the appellant.
Ms. R. V. Sharma, A.P.P. for respondent no.1/State
Ms. Falguni Badani, Advocate appointed for Resp. no.2/victim

CORAM : G. A. SANAP, J.
DATED : OCTOBER 03, 2024.

ORAL JUDGMENT

1. In this appeal, challenge is to the judgment and order dated 14.06.2023 passed by learned Additional Sessions Judge, Nagpur in Special POCSO Case No. 51 of 2017, whereby the learned Judge convicted the appellant for the offences punishable under Sections 342

and 376(2) of the Indian Penal Code read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as **"the POCSO Act"** for short). He is sentenced to suffer imprisonment for 10 (ten) years and to pay fine of Rs.10,000/- and in default to suffer RI for 4 (four) months for the offence punishable under Section 376(2) r/w Section 4 of the POCSO Act ; and to suffer imprisonment for 3 (three) months and to pay fine of Rs.1,000/- and in default to suffer RI for one month for the offence punishable under Section 342 of the IPC.

2. BACKGROUND FACTS :-

The victim girl, on the date of the incident, which occurred on 20.05.2016, was below 18 years of age. She was studying in 12th standard at Nadekar Mahavidyalaya, Narkhed. The appellant, on the date of the incident, was 17 years and 9 months old. The appellant was also studying in 12th Standard. The crime was registered on the report of the victim at Narkhed Police Station, Dist. Nagpur. The case of the prosecution, which can be gathered from the report and the other materials is that the appellant on 20.05.2016 called the victim to his house on the pretext of discussion with her related to her studies. The

victim went to the house of the appellant along with her friend Hitesh (PW8). The victim and Hitesh knocked the door of the house. The appellant opened the door and took the victim into the house. When the victim insisted Hitesh to come along with her, the appellant did not allow Hitesh to enter into the house. The appellant locked the door and took the victim to the bed room. He switched on the television and the cooler. He caught hold the victim and dragged her near the wall. He tried to kiss her. The victim resisted this act. The appellant forcefully removed the clothes of the victim and his clothes as well. The appellant committed forcible sexual intercourse with her. The victim raised the shouts for help, but her shouts could not be heard outside as the television and the cooler were on. The appellant had increased the volume of the television. After the sexual assault, the victim put on her clothes and came out of the house. After coming out of the house, she narrated the incident to Hitesh (PW8), who was waiting on the road for her. The victim went to her house and narrated the incident to her parents. They went to the police station and the victim lodged the report (Exh.30). On the basis of the report, a crime bearing No. 64/2016 was registered against the appellant at Narkhed Police Station.

3. PW10 API Milind Paradkar carried out the investigation. He referred the victim for medical examination. He seized the clothes as well as the biological samples. The accused was arrested on 23.05.2016. He was referred for medical examination. His clothes and the samples had been seized. PW10 recorded the statements of the witnesses. He forwarded the samples to the Regional Forensic Science Laboratory (RFSL), Nagpur. On completion of the investigation, he filed charge-sheet against the appellant in the Court of law.

4. Learned Additional Sessions Judge framed the charge (Exh.14) against the appellant. The appellant abjured his guilt. The defence of the appellant is of false implication on account of his refusal to marry with the victim. It is also his defence that the victim had love affair with one Soukhya. He had good relations with the victim and therefore, he told the victim that he would tell her parents about her relations with the said boy. The prosecution, in order to bring home the guilt of the appellant, examined 10 (ten) witnesses. Learned Additional Sessions Judge, on analysis of the evidence, held the appellant guilty of the charge and convicted and sentenced him as above. The appellant is before this Court, against the said judgment and order, in appeal.

5. I have heard Mr. Mir Nagman Ali, learned advocate for the appellant, Ms. R.V. Sharma, learned Additional Public Prosecutor for respondent no.1/State and Ms. Falguni Badani, learned advocate appointed to represent respondent no.2/victim. Perused the record and proceedings.

6. Mr. Ali, learned advocate for the appellant raised a preliminary objection with regard to the conduct of the trial against the appellant as an adult. Learned advocate submitted that the appellant was juvenile on the date of commission of the offence. Learned advocate submitted that the Juvenile Justice Board (hereinafter referred to as "**the JJB**" for short), vide order dated 10.03.2017, contrary to the report of the Psychiatrist, who had examined the appellant, has recorded a finding that the mental and physical capacity of the boy was such that he understood the consequence of the offence and the circumstances, in which the offence was committed. Learned advocate submitted that the JJB, without conducting the inquiry, as required under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as **"the Act of 2015"** for short), without any cogent and concrete material, recorded a finding that the appellant was

physically capable to commit the offence and mentally capable to understand the consequences of the act committed by him. Learned advocate submitted that Section 15 of the Act of 2015 is an exception to the general rule that a juvenile cannot be tried as an adult. A juvenile can be tried as an adult, if the crime committed is a heinous crime and his mental and physical capacity to commit the crime and understand the consequences of the crime, is fully established. In the submission of the learned advocate, the trial against the appellant is vitiated. It is submitted that on this ground alone, the impugned judgment and order is required to be set aside.

7. Learned Additional Public Prosecutor submitted that the order passed by the JJB to try the appellant as an adult, is a well reasoned order. The JJB has taken into consideration the other crimes committed by the appellant, the heinous nature of the present offence, his physical capacity to commit such offence and his mental ability to understand the consequences of the offence committed by him. Learned APP submitted that as per Proviso to sub-section (1) of Section 15 of the Act of 2015, in the course of preliminary assessment as provided under Section 15, the JJB may take assistance of the

experienced psychologists or Psycho-social workers or other experts. Learned APP, therefore, submitted that in view of this Proviso, the opinion or the assistance of experienced psychologists or psycho-social workers, is not mandatory. Learned APP, however, submitted that while conducting preliminary assessment into the heinous nature of the crime and to try the juvenile as an adult, the JJB can very well take the assistance of the experienced psychologists or psycho-social workers to substantiate its opinion to try the juvenile as an adult. Learned APP further submitted that as per Section 101 of the Act of 2015, the order passed by the JJB under Section 15 is an appealable order. Learned APP, relying upon sub-section (2) of Section 101 of the Act of 2015, submitted that while hearing the appeal against the order of the JJB, passed under Section 15 of the Act of 2015, the Sessions Court can take assistance of experienced Psychologists and medical specialists, other than those, whose assistance has been obtained by the Board in passing the order under Section 15 of the Act of 2015. Learned APP pointed out that the appellant did not file any appeal against the said order, passed by the JJB under Section 15. In the submission of the learned APP, the appellant has given up his right to challenge the said order as provided under Section 101 of the Act of 2015. Learned APP further

pointed out that before the learned Additional Sessions Judge, either at the time of framing of the charge or after framing of the charge, till the judgment is delivered, the appellant did not raise any objection with regard to the order passed by the JJB. Learned APP submitted that admittedly, the appellant was above sixteen years of age on the date of the commission of the offence. The question before the JJB was whether the appellant should be tried as an adult, in view of the heinous offence committed by him, or not ? Learned APP submitted that the order passed by the JJB, after conducting preliminary assessment to try the appellant as an adult, cannot be questioned in this appeal.

8. Learned Advocate appointed to represent respondent no.2 has adopted the submissions advanced by the learned APP.

9. On going through the record and proceedings and particularly, the order passed by the JJB, dated 10.03.2017, I am satisfied that there is no substance in this preliminary objection raised by the learned advocate for the appellant.

10. Clause 33 of Section 2 of the Act of 2015 defines "*heinous offences*". It reads thus -

> *"2. **Definitions** – In this Act, unless the context otherwise requires, -*
> *(33) "**Heinous Offences** "includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1960) or any other law for the time being in force is imprisonment for seven years or more ;"*

11. As per the definition, the offence under the Indian Penal Code or any other law, which provides minimum punishment of imprisonment for seven years or more, is the heinous offence. In this case, the offence was rightly categorized as heinous offence by the JJB. It is to be noted that there is no dispute with regard to the composition of the JJB. Section 14 of the Act of 2015 provides for an inquiry by the JJB about child in conflict with law. The inquiry under Section 14 by the JJB, in case of heinous offence, is mandatory. Section 14, sub-section (5), clause (f), sub-clause (ii), provides for inquiry in case of child above the age of sixteen years on the date of the commission of the offence. It provides that it shall be conducted in terms of the provisions of Section 15 of the Act of 2015. As per Section 15, the JJB, in case of a child, who has completed or is above the age of sixteen years, is mandated to conduct preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in

which the offence is allegedly committed. It provides that after preliminary assessment, the JJB in terms of Section 18(3) of the Act of 2015, may pass an order that there is a need for trial of the child as an adult. The main thrust of the arguments of the learned advocate for the appellant is that the JJB did not insist for appellant's objective psychological evaluation by the Clinical Psychologist as suggested by the Psychiatrist vide certificate (Exh.5) dated 18.08.2016. It is to be noted that during the preliminary assessment proceeding, the JJB had referred the appellant to the Psychiatrist for psychiatry report regarding his psychological evaluation.

12. It is evident on perusal of the record that the appellant, on the date of the commission of the crime was 17 years and 9 months old. The record further shows that the appellant was uncooperative, defensive and totally denying his role in the crime at the time of his examination. The Psychiatrist, therefore, opined that in the absence of any valid objective data, it is impossible to reach to any definite impression about his mental capacity to commit such offence, his ability to understand the consequences of the offence and the circumstances in which he committed the offence. The Psychiatrist suggested to have

appellant's objective Psychological Evaluation by a Clinical Psychologist by making him undergo certain tests. It has come on record that the IGGMC, Nagpur, at the relevant time, was not having services of the Psychologist and therefore, the appellant was not referred to a Clinical Psychologist for evaluation. It is to be noted that this test had not been conducted. The question is, whether in the absence of objective Psychological Evaluation by the Clinical Psychologist, the JJB was justified in proceeding ahead with the preliminary assessment of the appellant for trying him as an adult ?

13. It is to be noted that as per Section 15, sub-section (1) of the Act of 2015, the JJB has to conduct preliminary assessment with regard to his mental and physical capacity to commit such an offence and his ability to understand the consequences of the offence and the circumstances in which the offence was committed by the child above 16 years of age. The Proviso to sub-section (1) of Section 15, states that for such assessment, the JJB may take assistance of experienced Psychologists or psycho-social workers or other experts. An Explanation to this Proviso states that for the purpose of this Section, the preliminary assessment is not a trial, but is to assess the capacity of

such child to commit and understand the consequences of the alleged offence. The proviso to Section 15 of the Act of 2015 fell for consideration of the Hon'ble Apex Court in ***Barun Chandra Thakur .vs. Master Bholu***, reported at ***AIR Online 2022 SC 1006***. The Hon'ble Apex Court has held that looking to the purpose of the Act of 2015 and its legislative intent, particularly to ensure the protection of the best interest of the child, the expression "may" in the proviso to Section 15(1) thereof and the requirement of taking assistance of experienced psychologist or psycho-social workers or other experts would operate as mandatory, unless the Board itself comprises of at least one member, who is a practicing professional with a degree in child psychology or child psychiatry. It is held that in case the Board comprises of at least one such member, who has been a practicing professional with a degree in child psychology or child psychiatry, the Board may take such assistance as may be considered proper by it and in case, if the Board chooses not to take such assistance, it would be required of the Board to state specific reasons therefor.

14. In this backdrop, the question involved in this case needs to be addressed. It is evident that the appellant was referred to the Psychiatrist. The report of the Psychiatrist is on record. The said report

shows that the appellant was uncooperative and defensive. He was totally denying his role in commission of the offence. In this case the appellant was referred to the Psychiatrist. The Board has considered all these facts before passing the order to try the appellant as an adult.

15. It would be necessary to consider the order passed by the JJB, dated 10.03.2017, whereby the JJB had ordered to try the appellant as an adult. It is evident on perusal of the said order that an opportunity of hearing had been granted to the appellant. The appellant was represented by the Advocate of his choice before the JJB. The JJB conducted full fledged preliminary assessment before passing the order. The JJB, as can be seen from the order, took into consideration the heinous nature of the crime committed by the appellant, his age, his physical capacity to commit offence and his conduct while committing this offence with prior planning. The order passed by the JJB further records that three more crimes, being Crime Nos.472/2016, 551/2016 and 552/2016, have been taken into consideration. The appellant was apprehended in these three crimes. The JJB has recorded that the material on record was sufficient to conclude that the appellant was physically capable of committing the said offence. He possessed the mental capacity to understand the

consequences of the act committed by him. The JJB has observed that there was nothing on record to conclude that the alleged offence was committed in response to any provocation. The JJB has also taken into consideration the age of the victim and the physical and mental agony undergone by her on account of this stigmatic offence. The JJB has observed that the conduct of the appellant, in the backdrop of his involvement in number of crimes, suggested that he was physically capable of committing the offence and had mental capacity to understand the consequences of the offence. In my view, the JJB has recorded the cogent reasons in support of its finding. This preliminary assessment into the heinous offence by the JJB, could not be said to be an eye-wash.

16. It is further pertinent to note that the submission of learned advocate cannot be entertained at this stage. The submission would have some force, if the appellant was tried as an adult without conducting the proper proceedings, as contemplated under Sections 14 and 15 of the Act of 2015. If the appellant was tried as an adult without conducting this preliminary assessment of his mental and physical capacity to commit such offence, then the entire proceeding would have been vitiated. It is to be noted that as per Section 101 of the Act of

2015, an appeal is provided against the order passed by the JJB under Section 15 and 18(3) of the Act of 2015. The appellant did not challenge the said order. The appellant has failed to avail the remedy of appeal and therefore, the order passed by the JJB has attained finality. It is further pertinent to mention that as per Section 101, sub-section (2), the Sessions Court, while deciding the appeal, can take the assistance of experienced Psychologists and medical specialists other than those whose assistance has been obtained by the JJB in passing the order under Sections 15 and 18 of the Act of 2015. The appellant did not file any appeal and therefore, forfeited his right to challenge the said order. The Sessions Court, while hearing the appeal, would have re-appreciated the entire material and taken the assistance of the experienced Psychologists and medical specialists to decide the legality and correctness of the order passed by the JJB. It is, therefore, apparent that the said order passed by the JJB has attained finality.

17. It is further pertinent to mention that at the stage of framing of charge, the appellant did not make any grievance against the order passed by the JJB. It is to be noted that if he had raised a grievance at the stage of framing of charge, then the learned Judge would have examined and dealt with the said challenge. The appellant

even at the stage of final arguments did not make any grievance about the said order passed by the JJB before the learned Sessions Judge. It is evident that since the appellant did not raise any objection till the judgment is delivered, the learned Sessions Judge had no advantage to deal with and decide this point. It is, therefore, apparent that it cannot be said that the trial was vitiated on account of the defective order passed by the JJB. In my view, while considering the appeal against his conviction, it would not be possible to entertain the submission advanced by the learned advocate for the appellant. On this count, there is no substance in the submission.

18. This would now take me to consider the appeal on merits. Learned advocate for the appellant submitted that the evidence adduced by the prosecution is not sufficient to prove the charge against the appellant. There are major inconsistencies, improvements and discrepancies in the evidence of the victim and the other witnesses. The evidence with regard to the occurrence of the incident is not credible and trustworthy. The evidence of PW8, who is an independent witness, is totally unbelievable. The victim, on material points has made contradictory statements. Learned advocate submitted that the evidence of the Medical Officer, who had examined the victim, is not

sufficient to corroborate the evidence of the victim on material aspects. In the submission of the learned advocate, the victim was examined after 15 hours of the occurrence of the incident and therefore, the possibility of sexual intercourse by any other person with the victim could not be ruled out. Learned advocate submitted that the conduct of the victim is unnatural. It is not consistent with the conduct of a man of ordinary prudence placed in similar situation. Learned advocate submitted that the case of the prosecution that on receipt of the message of the appellant through the friends of the victim, she went to the house of the appellant and then the appellant committed sexual intercourse with her, cannot be believed. Learned advocate submitted that the victim would not have, in ordinary circumstances, gone to the house of the appellant. Learned advocate submitted that as far as the incident of sexual assault is concerned, there is no corroboration to the evidence of the victim by any other witness. Learned advocate submitted that the statement of the victim that when the appellant committed forcible sexual intercourse with her and she screamed loudly, but her screams could not be heard on account of increased volume of the TV and noise of the cooler, can not be believed. It is pointed out that as per the case of the victim, PW8 Hitesh was standing outside the house of the

appellant and therefore, he could have easily heard the screams of the victim. Learned advocate submitted that in the panchanama, there is no statement with regard to the television in the house of the appellant. Learned advocate submitted that therefore, the defence of the appellant that he has been falsely implicated, is probable. It is further submitted that the prosecution has not proved the age of the victim.

19. Learned Additional Public Prosecutor submitted that the prosecution by adducing cogent and concrete, oral and documentary evidence, has proved that on the date of the offence, the victim was below 18 years of age. Learned APP submitted that the defence of the appellant is not at all probable. It is pointed out that the appellant has taken multiple defences. Learned APP submitted that the victim in her evidence has narrated the first hand account of the incident. The victim in the ordinary course of nature would not have lodged false report against the appellant. The victim on the date of the crime was above 17 years of age and therefore, in the absence of the occurrence of such an incident, she would not have taken the risk of putting such matter in the public domain and inviting stigmatic consequences. Learned APP submitted that such a crime, most of the time, is not reported to save the future of the girl as well as the pride and prestige of the family and

the girl. If such a crime is brought in the public domain, it can prove to be prejudicial to the future of the girl in all respects. It is submitted that the defence of the appellant that in order to take revenge, the victim had invented this *modus operendi*, cannot be believed. Learned APP submitted that the evidence of the victim has been corroborated by the evidence of the Medical Officer (PW5). The evidence of the Medical Officer is more than enough to prove that the victim was subjected to sexual intercourse. It is pointed out that apart from the injuries to the private part, the Medical Officer noticed certain injuries on the other parts of the body of the victim. It is suggestive of the fact that the victim tried her level best to resist the appellant. Learned APP submitted that the learned Additional Sessions Judge has considered all the aspects in great detail. The well reasoned judgment and order passed by the learned Additional Sessions Judge, in the submission of learned APP, does not warrant interference.

20. Learned advocate appointed to represent respondent no.2 has adopted the arguments advanced by the learned APP.

21. Learned advocate for the appellant and the learned APP took me through the oral and documentary evidence on record. PW1

and PW2 are the parents of the victim (PW4). The parents (PW1 and 2) have stated that the birth date of the victim is 03.06.1999. The victim has also stated that her birth date is 03.06.1999. The birth certificate of the victim is at Exh.34. It was issued on 20.03.2006 by Nagar Parishad, Narkhed. It is a public document. The birth of the victim was registered with Nagar Parishad, Narkhed on 17.06.1999. It has come on record that during the course of the investigation, the Investigating Officer (PW10) had collected the documentary evidence with regard to the birth date of the victim. The appellant in the cross-examination of the victim and her parents has not challenged the oral and documentary evidence with regard to the birth date of the victim. The crime was committed on 20.05.2016. The evidence on record is, therefore, sufficient to conclude that the victim, on the date of the incident, was below 18 years of age and as such, was a *'child'*, as defined under section 2(1)(d) of the POCSO Act.

22. Before proceeding to appreciate the evidence of the victim, her parents and other independent witnesses, it is necessary to mention that the incident occurred on 20.05.2016 at 18.30 hours. The victim, after coming back to the house, narrated the incident to her parents. The parents took the victim to the Police Station, Narkhed. The report

was lodged at 20.05 hours on the very same day. There was no delay in lodging the report. In my view, this is a most important circumstance in favour of the case of the prosecution and consistent with the conduct of the victim and her parents. It has come on record that after registration of the FIR, the victim was referred for examination to the Government Hospital at Narkhed. However, the Medical Officer was not available at Narkhed and the victim was then referred to the Mayo Hospital, Nagpur for examination. A submission was advanced by the learned advocate for the appellant that the victim was examined at Mayo Hospital, Nagpur on 21.05.2016 at about 1.20 p.m. and as such, it would be sufficient to infer that in the meantime, she could have indulged in sexual act with any other person. In my view, this submission cannot be accepted. It is nobody's case that from Narkhed hospital, the victim had come to her house and in the morning she went to the Mayo hospital at Nagpur. Exh.61 is the requisition to the Medical Officer of Rural Hospital, Narkhed for examination of the victim. Perusal of the report of the Medical Officer at Narkhed hospital shows that she was brought to the said hospital on 21.05.2016 at 1.00 a.m. She was then referred to Mayo Hospital. There is no separate requisition by the Investigating Officer to the Medical Officer at Mayo Hospital.

23. It is necessary to consider the evidence of the victim (PW4). Learned Judge has recorded a finding that the evidence of the victim is of sterling quality. I have minutely perused her evidence. It is seen on perusal of the evidence of the victim (PW4) that on some aspects, there are omissions and improvements in her evidence. Similarly, on one or two points, she has missed the sequence of some of the facts. It has come on record in the evidence that the appellant had committed sexual intercourse with the victim against her consent. The victim and the other witnesses have stated that she was horribly frightened on account of this incident. I do not think that there is any reason for not accepting the statement that the victim, after such an incident, was horribly terrified. PW4 has stated that Mayur Raut (PW6) had come to her house at 2.30 p.m. She has stated that Nihal Gohale had come to her house at 4.30 pm. These are the two boys, who had conveyed the message of the appellant to the victim. They told the victim that the appellant wanted to tell her something related to the studies and for that purpose, she was called at his house. She has further stated that she had received a phone call from Soukhya and he conveyed same message to her. She has stated that she went to Rahul Vasatigruha at 5.30 p.m. and met Hitesh (PW8). She requested him to

accompany her to the house of the appellant. She has stated that they went to the house of the appellant and pressed the bell. The appellant came out of the house. She has stated that at that time the appellant told her that he wanted to talk with her for two minutes with regard to her studies. The victim told the appellant to talk with her outside the house. However, the appellant told that he wanted to talk with her in isolation. At that time, the appellant pulled her in and dragged her inside the house. He did not allow Hitesh to come into the house. The victim has stated that the appellant increased the volume of the TV and dragged her to the bed room. He started the cooler in the bed room and closed the door of the bed room. She has further stated that the appellant pushed her on the wall and tried to kiss her. She resisted the appellant by pushing him. She has stated that the appellant moved a bit back and again came forward. She tried to come out of the bed room, but the door was closed. She has categorically stated that at that time, the appellant pushed her against the wall and removed her clothes. She has stated that while the appellant was removing his clothes, she thought of running away, but she could not come out of the room as the appellant had removed her clothes. She has stated that thereafter the appellant pulled her on the bed and committed rape on her. She was

screaming for help, but the same could not be heard outside on account of the increased volume of the TV and the noise of the cooler. The victim has described the entire incident. In short, she has stated that the appellant committed penetrative sexual assault on her. She has stated that the appellant threatened to kill her in case she disclosed the incident to anybody. The subsequent conduct of the victim is also relevant. She has stated that after this, she put on her clothes, opened the door and went outside the house weeping. She narrated the incident to Hitesh (PW8), who was standing at some distance on the road. She has stated that Hitesh dropped her at her house. She has stated that after reaching home, she narrated the incident to her mother. Thereafter, the report was lodged.

24. The victim was subjected to searching cross-examination. She has denied all the suggestions put to her consistent with the defence of the appellant. It is submitted on the basis of the material elicited in her cross-examination that her evidence with regard to the occurrence of the incident of penetrative sexual assault on her by the appellant, is unbelievable and as such can not be accepted. The victim has stated that on the date of the incident, there was weekly off to the tuition class. She has stated that while lodging the report, she stated that the

appellant had come to her house to call her and she accompanied him. She was confronted with her statement in the report, however she denied this fact recorded in her statement. The statement made by the victim that Mayur and Nihal carried the message of the appellant to her and after some time she received a phone call from Soukhya that the appellant wanted to talk to her and therefore, she went to Hitesh and took him to the house of the appellant, has been proved to be an omission. There are other omissions as well in her evidence. However, those omissions are not material. In the report (Exh.30), she has stated that when she came out of the house of the appellant, Hitesh (PW8) was not present there. She was confronted with this statement from her report. She has stated that on account of the trauma, the sequence has been missed.

25. As far as the evidence of Hitesh (PW8) is concerned, he has categorically stated that after opening the door of the house of the appellant, the victim came out crying and narrated the incident to him. The parents of the victim have also stated that after the incident, she was brought to the house by Hitesh. In the facts and circumstances, this contradiction was appropriately considered by the learned Judge. The learned Judge has observed that this contradiction by itself would not

dent the entire evidence of the victim.

26. It is to be noted that as far as the incident and involvement of the appellant in the incident is concerned, the evidence of the victim (PW4) is consistent with the facts stated in the report (Exh.30). It is apparent on the face of the record that the conduct of the appellant was abnormal. The victim did not expect the appellant to behave in this manner with her. She was ravished by the appellant. She immediately went to her house and narrated the incident to her mother. The conduct of the victim is consistent. It is pertinent to note that the victim, in the ordinary circumstances, would not have taken a risk of involving herself in such a dirty incident even for the sake of settling the score on some issue or the other. Reporting of such crime invites stigmatic consequences for the victim as well as for the family. The pride, prestige and reputation of the victim and the family is put to stake. Bringing such an incident in public can cause irreparable damage to the reputation of the victim and her family.

27. It would be appropriate at this stage to consider the nature of the offence and perception of the society about the offence of rape. The Hon'ble Apex Court in ***Bharwada Bhoginbhai Hirjibhai .vs. State***

of Gujarat, reported at *(1983) 3 SCC 217*, has considered this issue in the context of Indian setting. Paragraph 10 of the decision would be relevant. It is extracted below :

> *"**10.** By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :*
> *(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.*
> *(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 a 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."

28. It needs to be stated that in view of the above factors, the victims and their relatives are not too keen to bring the culprits to books. And when in the face of these factors the crime is brought to light, there is a built-in assurance that the charge is genuine rather than fabricated. In my view, these factors are required to be borne in mind while appreciating the evidence of the victim and other witnesses.

29. On going through the evidence of the victim, I am satisfied that there is no reason to discard and disbelieve her evidence. The defence of the appellant of false implication is not probable and as such

cannot be accepted. The evidence of the victim is cogent, concrete and reliable. Her credibility and trustworthiness has not been shaken at all. It is to be noted that the victim cannot be equated with an accomplice. The conviction can be based on the sole testimony of the prosecutrix or victim of the offence of rape. The corroboration in material particulars, as is required in the case of an accomplice, is not necessary. However, on minute scrutiny and appreciation of the evidence, the Court must be satisfied that the evidence of the victim/prosecutrix does not leave any scope to doubt her credibility and trustworthiness. In this case, I am of the view that the evidence of the victim is of sterling quality. I do not see any reason to doubt her evidence.

30. The most important evidence relied upon by the prosecution is of the Medical Officer (PW5). The victim was examined by PW5 Dr. Neeta Singh. The history of assault at the time of her examination was narrated by the victim. The history of the assault has been recorded in the medical certificate (Exh.37). It is consistent with the facts stated in the report viz-a-viz the incident. PW5, on examination of the victim, saw that the victim was hit with an object, violent of shaking, dragging, banging head. On her local examination,

PW5 found urethral meatus and vestibule normal, labia majora normal, labia minora normal, fourchette and introitus tear present over fourchette of size 0.5 x 0.2 cm, hymen fresh teat of 9, 3 and 7 O'clock position of size 0.3 x 0.1 cm, 0.2 x 0.1 cm and 0.1 x 0.1 cm. PW5 also found lacerated wound over 7 O'clock position over skin of size 0.3 x 0.1 cm muscle deep. There was bleeding, tear and tenderness over anus. She had collected the samples of the victim. PW5 on the basis of the observations, opined that the victim was subjected to forcible sexual intercourse. Perusal of the cross-examination of PW5 would show that the material of any significance has not been elicited in her cross-examination to demolish her testimony with regard to the presence of above stated injuries on the person of the victim and private part of the victim. The evidence of the Medical Officer (PW5), therefore, corroborates the testimony of the victim (PW4) on this material aspect. I do not see any reason to discard and disbelieve the evidence of the Medical Officer.

31. PW1 and PW2 are the parents of the victim. It is not necessary to reproduce their entire examination-in-chief at this stage. It would suffice to state that they have narrated the account of the

incident consistent with the victim. The victim had narrated the incident to them. They were subjected to searching cross-examination. The mother of the victim (PW1) has stated that she did not observe any injury on the person of the victim. The injuries admittedly noticed by the Medical Officer (PW5) were not visible. They have denied the suggestions put to them by the appellant consistent with his defence. PW1 has categorically stated that the victim was brought to the house by Hitesh (PW8). Hitesh has also corroborated the version of the victim. As far as the evidence of the mother is concerned, it would show that immediately after coming to know about the incident, they went to the police station and reported the matter. This conduct is consistent. PW8 Hitesh has deposed in his evidence that on the date of the incident at about 4.00 to 4.30 p.m., the victim had come to Rahul Vastigruha and told her that the appellant had called her for study notes. He has stated that on the request of the victim, he accompanied her. The further part of his evidence is consistent with the version of the victim. He has stated that the appellant told him to wait outside the house as he wanted to talk with the victim in the house alone. He has stated that after waiting for half an hour, he knocked the door and after some time, the victim came out of the house. She was crying. He has

stated that on his inquiry, the victim narrated the incident to him. Perusal of the evidence of Hitesh (PW8) would show that there are no major discrepancies and inconsistencies in his evidence. The omissions are minor.

32. The prosecution examined PW6 Mayur Raut, who was instrumental in conveying the message of the appellant to the victim. His evidence is consistent with the victim. He has stated that the appellant at about 4.00 p.m. told him that he wanted to talk with the victim about her studies and he and Nihal should convey his message to the victim. He has stated that they accordingly went to the victim and conveyed this message to her. Perusal of his cross-examination would show that the sum and substance of his evidence has not been dented. I do not see any reason to discard and disbelieve his evidence.

33. It is pertinent to note that PW6 Mayur and PW8 Hitesh have no enmity or any other reason to depose against the appellant. They narrated the sequence of the incident occurred on 20.05.2016. The evidence of the independent witnesses (PW 6 and PW8) inspires confidence.

34. It is submitted that while drawing the panchanama (Exh-23), presence of TV in the house was not noticed. Learned APP took me through the contents of the spot panchanama (Exh.23) and pointed out that it has been recorded in the panchanama that TV was very much there in the house. Perusal of the panchanama would show that the TV was there in the house. It is seen that while drawing the sketch map, TV was not shown. The cooler was shown. However, perusal of the panchanama in entirety would show that there was TV in the house of the appellant. This fact has been recorded in the panchanama. In my view, the evidence on record is sufficient to prove the guilt of the accused beyond reasonable doubt. The presumption under Section 29 of the POCSO Act was triggered in this case. The prosecution has proved the foundational facts viz-a-viz the charge against the appellant. The appellant has not adduced any evidence to rebut the presumption. Similarly, he has not made good his defence on the basis of the materials and the evidence on record.

35. The next important point is with regard to the offence made out against the appellant. The learned Judge has convicted and sentenced the appellant under Section 376(2) of the IPC. The sentence

of 10 (ten) years' imprisonment is awarded for the proved offence under Section 376(2) of the IPC. On going through the record and proceedings, I am satisfied that the offence made out is punishable under Sec. 376(1), and not under Section 376(2) of the IPC. Similarly, the evidence is sufficient to prove the offence punishable under Section 4 of the POCSO Act. Learned advocate submitted that the minimum sentence provided on both counts is 7 (seven) years imprisonment. Learned advocate submitted that considering the age of the appellant and other related circumstances, the sentence of 10 (ten) years imprisonment is on the higher side. It is submitted that it may be reduced to 7 (seven) years. It is submitted that seven years' imprisonment would meet the ends of justice.

36. I have given thoughtful consideration to the submission. Keeping in mind all the facts and circumstances, in my view, there is substance in the submission advanced by the learned advocate for the appellant on the point of sentence. Learned Judge has awarded 10 years' imprisonment to the appellant because of his conviction under Section 376(2) of the IPC. In my view, the offence made out was not under Section 376(2), but it was under Section 376(1) of the IPC.

Prior to the amendment of sub-section (1) of Section 376 of the IPC, the minimum sentence provided was 7 (seven) years' imprisonment. In this case, to the extent of sentence, the submission deserves acceptance. The sentence of 7 (seven) years' imprisonment would meet the ends of justice. In view of the above, the appeal deserves to be dismissed. However, the impugned judgment and order needs to be modified as above.

37. Accordingly, the Criminal Appeal is dismissed.

(i) However, the judgment and order of conviction and sentence passed against the appellant by learned Additional Sessions Judge, Nagpur, dated 14.06.2023 in Special (POCSO) Case No. 51/2017, is modified.

(ii) Appellant – Aman S/o Ratnakar Tagade is held guilty of the offence punishable under Section 376(1), in stead of 376(2) of the Indian Penal Code. He is directed to suffer imprisonment for 7 (seven) years, in stead of 10 (ten) years.

(iii) Except this modification, remaining part of the impugned judgment and order is maintained.

38. Ms. Falguni Badani, learned advocate appointed to represent respondent no.2/victim is entitled to get her fees. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fees to the learned appointed advocate, as per the Rules.

39. The appeal stands disposed of in the aforesaid terms.

(G. A. SANAP, J.)

Diwale