

(2013) 02 BOM CK 0081

In the Bombay High Court

Case No : Criminal Appeal No. 388 of 2010

Raghunath Ramnath Zolekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 114, 114A, 35, 4
Immoral Traffic (Prevention) Act, 1956 — Section 3, 4, 5, 5(1)(b), 5(1)(d)
Penal Code, 1860 (IPC) — Section 109, 114, 120B, 34, 363
Registration of Births and Deaths Act, 1969 — Section 21, 26, 28

Citation : (2013) 2 ABR 545 : (2013) ALLMR(Cri) 1023 : (2013) 2 BomCR(Cri) 348

Hon'ble Judges : U.D. Salvi, J;A.H. Joshi, J

Bench : Division Bench

Advocate : S.T. Shelke in Criminal Appeal No. 388 of 2010, Mr. Satej S. Jadhav in Criminal Appeal No. 426 of 2010, Mr. V.N. Damle, for Mr. K.N. Lokhande in Criminal Appeal No. 413 of 2010, Mr. Vijay Nahar, for Mr. A.C. Darandale in Criminal Appeal No. 623 of 2011, Mr. Satej S. Jadhav in Criminal Appeal No. 431 and 395 of 2010, Mr. Shirish Gupte, with Mr. N.V. Gaware in Criminal Appeal No. 412 of 2010, Mr. V.D. Hon in Criminal Appeal Nos. 415 and 416 of 2010, Mr. N.S. Ghanekar in Criminal Appeal No. 397 of 2010, Mr. A.P. Mundargi, with Mr. S.P. Brahme in Criminal Appeal Nos. 394, 429 and 430 of 2010 and Mr. V.D. Salunke in Criminal Appeal No. 432 of 2010, for the Appellant; Vijay Sawant, Special P.P. with Mrs. V.A. Shinde, Assistant Public Prosecutor and Shri J.R. Shaikh, Advocate appointed as amicus curiae in Criminal Appeal Nos. 388, 426, 413, 431, 395, 412, 415, 416, 397, 394, 429, 430 and 432 of 2010 and Criminal Appeal No. 623 of 2011, for the Respondent

Judgement

A.H. Joshi, J.

5th November, 2012.

1. We have heard all these appeals at length. Perused the record. All appeals are being decided by this common judgment. First Information Report was

registered, taking statement of prosecutrix as the foundation. In all 23 accused were named in commission of the various acts. After investigation, the charge sheet was filed. All accused including one absconding accused Ram Salve were charged for their collective act of conspiracy, abetment etc. in kidnapping the prosecutrix, a minor girl who was below 16 years of age for procuring and using her for prostitution and committing on her gang rape and related offences. All accused were charged for commission of offences under Sections 366A, 376, 376(2)(g) read with Sections 109, 114 and Section 34 of the Indian Penal Code and for offence under Sections 3, 4, 5 and 7 of Immoral Traffic (Prevention) Act, 1956 (PITA for short).

2. Accused No. 1 Sheela Bargal died during pendency of trial.

Absconding accused Ram Salve and accused No. 20 Vilas Karale, are named as persons who have played primary role in procurement of prosecutrix for commission of different offences by different accused at different places.

3. Case of prosecution, in brief, is as follows:

The prosecutrix lodged complaint that she was studying in Markandeya Vidyalaya, Gandhi Maidan, Ahmednagar. According to the prosecutrix, her date of birth is 29.5.1991. According to her, accused No. 1 Sheela Bargal, accused No. 20 Vilas Karale and absconding accused Ram Salve induced her by telling her that she would get lot of money if she does the work of sleeping with other persons and doing sexual intercourse with persons and accordingly, compelled her to have sexual intercourse with several persons. In the beginning, she refused; but ultimately she succumbed to inducement and pressure and later on, she was compelled to do such acts repeatedly at different places by threatening her that in the event of her refusal, her photographs will be published in the newspapers and she would be defamed. According to the prosecutrix, she was required to have sexual intercourse with accused No. 2 Hardik Jaggad, accused No. 4 Akash Rathi, accused No. 5 Tukaram Misal, accused No. 6 Balkishan Goel, accused No. 7 Ramesh @ Ramakant Barkase, accused No. 8 Ajay Kate, accused No. 9 Harjeetsingh Rajpal, accused No. 10 Aba @ Dnyandev Gondkar, accused No. 11 Ramrao Dengale, accused No. 12 Abdul Haq Fakir Mohammad Kureshi, accused No. 13 Chetan Bhalgat, accused No. 14 Rajendra Thorat, accused No. 15 Ravindra Thorat, accused No. 16 Ramakant Dengale, accused No. 17 Pappu @ Aatmaram Dengale, accused No. 18 Ashok Kasar, accused No. 19 Ruchin Mehta, accused No. 21 Raghunath Zolekar and accused No. 22 Vasant Pawara.

4. The prosecution has enlisted along with charge sheet in all 53 witnesses.

Out of those, 37 witnesses were examined before this Court. Names and categories of these 37 witnesses has been referred to in this judgment at suitable place.

5. In response to the statement of charge to the accused, they pleaded not guilty and claimed to be tried.

6. The substance of the version of witness who have deposed before the Court is as narrated in following paragraphs.

Summary or substance of oral evidence of different witnesses:-

(A) Witnesses pertaining to first report by Anil Jadhav and efforts to trace the Prosecutrix

(1) P.W. 1 - Anil Gawade Exh. 275 at p.6 PB-III

P.W. 1 was working as a Coordinator with a non-Government Organisation called Snehalaya Child Line. This organisation was functioning at Ahmednagar. Anil Jadhav, who is father of the complainant (P.W. 5), approached P.W. 1. This witness has listened to the version of Anil Jadhav, who told him that his daughter-the prosecutrix, aged 14 years was missing since last two days. After two days, a telephone call was received in the office of Snehalaya Child Line that the prosecutrix was seen in a house on the Pipeline Road. The prosecutrix was recovered from that place and her statement was recorded by P.W. 1. The prosecutrix gave names of various persons who had dragged her into the sexual acts and the names of the persons who had sexual relation with her.

(2) P.W. 2 - Ajay Wabale Exh. 287 at p.28/PB-III

P.W. 2 was working with the institute "Snehalaya" Child Line, and under the directions of and coordinating with P.W. 1 Anil Gavade he had participated in the work.

(B) Witnesses pertaining to record of age of complainant:

(1) P.W. 27 - Dr. Narsing Paithankar Exh. 484 at p.277 PB-III

P.W. 27 was Registrar of Births and Deaths with Municipal Council, Ahmednagar. He has produced documents which contain a mention about the date of birth of complainant as 29.5.1991. He has proved birth certificate at Exh. 485, extract of register of birth entry No. 3280 at Exh. 486 and slip received by the Corporation from Balasaheb Deshpande Hospital at Exh. 487.

(2) P.W. 15 - Balkrishna Gotipamul Exh. 440 at p.190 PB-III

Relevant text of deposition of this witness reads as follows:-

2. During the educational year 2005-06, a student viz. the prosecutrix Anil Jadhav was taking education in our school. Today I have brought with me General Register for the period 13.6.2003 to 11.10.2007. The Registration No. 12636 dated 13.6.2003 is in respect of admission of the prosecutrix in our school. As per the said entry, the birth date of the prosecutrix is 29.5.1991. She was admitted in 8th Std. As per the register, the name of the prosecutrix is not yet deleted. The said entry is taken by concerned Clerk Shri Makasare while discharging his duty. The entry shows that the certificate in respect of the entry was given to C.I.D. Police.

3. Priya Jadhav, sister of the prosecutrix was also taking education in our school. Reg. No. 12955 is in respect of admission of Priya in our school. As per the record, the birth date of Priya is 1.11.1989. Priya has taken admission in our school on 14.6.2004 in 9th Std. The entry in respect of Priya is also taken by the concerned Clerk Shri Makasare while discharging his duty. I know handwriting of Shri Makasare.

(Quoted from Page 190 of Paper Book III)

(3) P.W. 28 - Sushama Akadkar-Exh. 488 at p.285 P.B.-III

P.W. 28 was Teacher of Kishor Sanskriti Sanvardhini Primary School. She has sought to prove date of birth of the complainant/prosecutrix by producing the record and birth certificate produced in the school at the time of admission by her mother. Date of birth of the prosecutrix as per record is 29.5.1991. The said register and birth certificate are at Exh. 489, admission form of prosecutrix at Exh. 490 and xerox copy of school register at Exh. 491. The prosecutrix was admitted to the school on 12.6.1996.

She has deposed on the basis of record that birth date of the prosecutrix's elder sister Priya is 17.11.1989. Priya was admitted to the school on 1.6.1995. Both left school on passing 7th Standard examination.

(C) Witnesses who were examined to prove expert opinion (Medical) about age of the prosecutrix and about opinion as regards rape:-

(1) P.W. 29 - Dr. Sunil Pokharna Exh. 511 at p.312 PB-III

P.W. 29 is M.S. (Ortho.) and is a Medical Officer in Civil Hospital, Ahmednagar. He examined the complainant and issued certificate, expressing opinion that at the relevant time age of the prosecutrix was around 15 years. He has proved requisition letter issued by police at Exhs. 512 & 513, medical certificate at Exh. 514 and medical case papers at Exh. 515 collectively.

(2) P.W. 31 - Dr. Swapnali Kale Exh. 521 at p.341 PB-III

P.W. 31 was working as a Medical Officer in Civil Hospital. She issued provisional certificates Exh. 513 and Exh. 515 giving her observations made on examination of the prosecutrix as follows:-

2. On my examination, it was found that general examination was normal. The breasts were well developed and there were no injuries. Axillary veins were present. Pubic hair were well developed. On ibiamagora and libia minora, no injuries were found. Vagina was admitting two fingers easily. Cervia vagina was healthy. Mucous was normal ante-verted. In my opinion, the prosecutrix was habituated to sexual intercourse. As per the case papers, age of the prosecutrix was 15 years. On page No. 7 of the case papers, there is overwriting in the figure of age and figure 16 is scratched and 15 is written by me. It was done at the time of issuing provisional certificate.

(Quoted from Page 342 of Paper Book No. III)

(D) All I.Os. and police witnesses:

(1) P.W. 32 - Ranjit Abhinkar Exh. 544 at p.361 PB-III

P.W. 32 was Police Inspector at Topkhana police station at relevant time. He had recorded the complaint of the prosecutrix. He has proved complaint at Exh. 331, seizure panchnama in respect of cell phone of Sheela Bargal at Exhs. 416 & 417, seizure panchnama in respect of TVS scooty of accused Sheela Bargal at Exh. 419, seizure panchnama of auto rickshaw at Exh. 420 and seizure panchnama in respect of Indica Car vide Exh. 421/all respectively at Page 361 P.B. No. III.

(2) P.W. 33 - Rakesh Mangaonkar Exh. 569 at p.369 PB-III

P.W. 33 was attached to Topkhana Police Station as P.S.I. He had accompanied the police party deputed to arrest the accused persons, viz., Ravi and Raju Thorat, Vasant Pawara, Aba, etc. He has proved panchnama of the place of occurrence at Hotel Tarang at Exh. 399, panchnama in respect of seizure of clothes of accused at Exhs. 400, 401, 403 and panchnama of scene of offence at Hotel Raj Palace at Exh. 402, respectively at Page No. 569 P.B. No. III.

(3) P.W. 35 - Ramakant Jawale Exh. 596 at p.233 P PB-IV

P.W. 35 was Sub-Divisional Police Officer for Ahmednagar city. The complaint was recorded in his presence. He had ordered search and arrest of six accused persons, and sent accused Sheela Bargal and complainant/prosecutrix for medical examination. On the whole, he was overseeing the investigation. He has proved, report at Exh. 600, seizure of clothes and mobile of the prosecutrix and Sheela Bargal, and Panchnama in respect of search of Hotel Sai Balaji, respectively at Page 233, P.B. (IV).

(4) P.W. 36 - Savita Turekar Exh. 618 at p.246 PB-IV

P.W. 36 was Dy. S.P., Headquarters at Ahmednagar. She inquired with the victim girl-the prosecutrix and Priti Sonawane as to facts leading to the incident. The complainant had informed P.W. 36 that her date of birth was 29th May, 1991, and further disclosed the names of various accused persons who had raped her time and again.

(5) P.W. 37 - Pushpa Deshmukh Exh. 622 at p.249 PB-IV

P.W. 37 was Dy. Superintendent of Police. She was attached to C.I.D., Pune. She was the seniormost lady Dy. S.P. The investigation was entrusted to her. She has proved letter to Forensic Lab., panchnamas of some places of offence, letter to M.O. and statements of complainant and witnesses at Exhs. 623 to 633.

(6) P.W. 38 - Sushma Chavan Exh. 659 at p.265 PB-IV

P.W. 38 was holding the post of Dy. S.P., State C.I.D. Crimes, Pune. The investigation was transferred to her on transfer of Pushpa Deshmukh, the former

investigating officer.

(E) ALL PANCH WITNESSES:

(1) P.W. 6 - Hanif Shaikh Exh. 397 at p.117 PB-III

P.W. 6 was a panch, who witnessed search of various places of offence as pointed out by the complainant and the discoveries made by the accused Nos. 8, 9 and 10 under panchanamas at Exh. 398, 399, 400, 401, 402 and 403, respectively.

(2) P.W. 7 - Anil Pimpalkhare Exh. 406 at p.141 PB-III

This P.W. 7 was panch to the recording of statement of accused Vilas Karale regarding destruction of mobiles screen prints of the victim and also to the house search leading to discovery of the photographs of prosecutrix and Priti Sonawane.

(3) P.W. 8 - Raju Sharma Exh. 413 at p.148 PB-III

P.W. 8 was panch to seizure of the clothes of complainant/the prosecutrix, at Exh. 414.

(4) P.W. 9 Shaikh Iliyas Shaikh Kasam Exh. 415 at p.152 PB-III

P.W. 9 was panch to the seizure of mobile phone from the prosecutrix. He turned hostile to the prosecution.

(5) P.W. 10 - Mohan Duggal Exh. 418 at p.157 PB-III

He was a panch to the seizure panchanamas Exh. 419 to 421 in respect of seizures of (i) TVS Suzuki Scooty No. MH-16/V-5522 from the house of Sheela Bargal, (ii) Auto Rickshaw No. MH-16/9233 from the accused Ramesh Barkase, (iii) Indica Car No. MH-16/R-2550 used in the crime. This panch was declared hostile.

(6) P.W. 11 - Anil Salve Exh. 428 at p.175 PB-III

P.W. 11 was panch to house search of accused Raghunath Zolekar from where the photographs of the prosecutrix/victim and chit bearing mobile numbers was seized.

(7) P.W. 12 - Gaffar Vazir Shaikh Exh. 432 at p.184 PB-III

P.W. 12 was panch to seizure of clothes of victim and mobiles. He has proved seizure panchnamas of clothes at Exhs. 414, 416 and 417, respectively.

(8) P.W. 3 - Ravi Diprus Exh. 297 at p.38 PB-III

P.W. 3 was Land Surveyor at the relevant time. He drew map of the location of the residence of accused Sheela Bargal at Exh. 299.

(F) HOTEL OWNER:

(1) P.W. 19 - Kailash Suryawanshi Exh. 452 at p.203 PB-III

P.W. 19 Suryawanshi, owner of Kailash Lodging, identified the accused Vilas Karale as the person who lodged in his hotel as Ashok Bhimraj Thube for about one and a half month and 4-5 times previously.

(G) CAR OWNER/OPERATOR AND DRIVER:

(1) P.W. 13 - Prasad Bhadake Exh. 437 at p.185 PB III

P.W. 13 Bhadake is the owner of Indica car hired by accused Vilas Karale for moving the prosecutrix from place to place-Shirdi, Dhule, Shahada etc.

(2) P.W. 20 - Dinesh Kusalkar Exh. 453 at p.205 PB-III

P.W. 20 Kusalkar was the Driver of the Indica Car hired by accused Vilas Karale.

(3) P.W. 16 - Adinath Shinde Exh. 443 at P.1999 PB-III

P.W. 16 was owner of one Reliance Mobile No. 9326005011 which he exchanged for a Nokia mobile handset at Mahendra Padole's shop.

(4) P.W. 34 - Sachin Shinde Exh. 579 at p.376 PB-III

This witness worked with Idea Cellular Company. He has provided information about call details of certain cell phone numbers.

(H) RELATIVES OF ACCUSED:

(1) P.W. 4 - Dilip Bargal Exh. 305 at p.41 PB-III

This P.W. 4 is the husband of accused Sheela Bargal (deceased accused No. 1). One accused Ramesh Barkase, had illicit relationship with Sheela Bargal and used to represent himself to be husband of Sheela Bargal. The accused No. 1 Sheela and accused No. 7 Ramesh Barkase were indulging in sexual activities at his house. He made complaint against accused No. 1 and accused No. 7 disclosing these acts. However, police had not taken any action. These accused threatened him that they would kill him.

(2) P.W. 21 - Sagar Rathi Exh. 457 at p.216 PB-III

P.W. 21 is the brother of accused Akash Rathi. He has been declared hostile.

(3) P.W. 22 - Shobha Rathi Exh. 459 at p.224 PB-III

P.W. 22 is the mother of accused Akash Rathi and has also been declared hostile.

(I) OTHER HOSTILE WITNESSES:

(1) P.W. 14 - Mahendra Narang Exh. 438 at p.187 PB-III

P.W. 14 was acquainted with accused Ram Salve and Vilas Karale. He claims to be aware of their illegal occupation. He has been declared hostile.

(2) P.W. 17 - Mahendra Padole Exh. 444 at p.200 PB-III

P.W. 17 sold a Reliance Mobile handset to accused Vilas Karale which was

previously used by Adinath Shinde. He is declared hostile.

(3) P.W. 18 - Somnath Chavan Exh. 445 at p.202 PB-III

P.W. 18 is brother of accused Vilas Karale's wife. He has been declared hostile.

(4) P.W. 22 - Shobha Rathi Exh. 459 at p.224 PB-III

P.W. 22 is the mother of accused Akash Rathi. She has been declared hostile.

(5) P.W. 24 - Sopan Navale Exh. 473 at p.261 PB-III

P.W. 24 has given his deposition in the negative. He has been declared hostile.

(6) P.W. 25 - Sharad Mehta Exh. 474 at p.264 PB-III

P.W. 25 is the father of accused Ruchin Mehta, did not support the prosecution.

(7) P.W. 26 - Govardhan Murumkar Exh. 477 at p.272/PB-III

P.W. 26 Murumkar was working as Waiter in Hotel Sai Balaji run by accused No. 18 Ashok Kasar and he identified various accused persons as the visitors to the Lodge.

(J) The witnesses who provided transporting, i.e. the transport operator and the driver.

1) P.W. 13 - Prasad Bhadake

2) P.W. 20 - Dinesh Kusalkar

Indica Car No. MH-16/R/2550 was engaged by accused Vilas Karale for the business of trafficking girls for prostitution in collaboration with Ram Salve.

Prosecutrix was taken to Hotel Tarang at Nimgaon Jali.

(K) Witnesses about Vilas Karale's involvement in the business of procuring girls for prostitution:-

(4) P.W. 23 - Sanjay Thanekar Exh. 460 at p.227 PB-III

P.W. 23 Thanekar deposed about his acquaintance with accused Vilas Karale and the extra judicial confession given by the accused No. 20 Vilas Karale regarding his involvement in the business of prostitution. He handed over one Hero Honda motorcycle to police.

(L) Prosecutrix:-

Evidence of this witness is discussed at appropriate stage. It shall suffice to mention that she has named all the accused, identified them before the Court and has deposed that various accused persons committed acts of sexual intercourse with her from time to time.

7. We had orally invited members of bar to come forward to assist the Court on the point of mens rea since the said point was raised and argued by the defence

with much vehemence, and, therefore, some impartial assistance was considered necessary.

In response, learned Advocate Mr. Javed R. Shaikh has come forward and offered his assistance. We have, therefore, called upon and as well allowed learned Advocate Mr. Javed R. Shaikh to make his submissions as amicus curiae on the questions of law in the background of facts as had surfaced.

Learned A.P.P. Mrs. Vaishali A. Shinde has also volunteered and sought permission to address the Court on pure questions of law apart from the submissions made by Special P.P.

8. All the learned Advocates had advanced oral submissions. They have also furnished written notes of arguments.

9. In order to deal with the points raised by learned Advocates and for avoiding the repetition or overlapping, we have condensed the submissions made by the defence, prosecution, and by the amicus as under:-

10. Summary of the submissions of the defence/accused:-

10-A. The accused have chosen to exercise right of silence, and as such did not take any specific defence. They rely on a stand that it is the duty of prosecution to prove the charge beyond reasonable doubt.

10-B. Without admitting any incriminating act by the accused/appellants, they have alternatively urged that the prosecutrix was a sex worker arranged for by accused No. 1 and accused No. 20. Accused were merely customers availing the services from the prosecutrix.

10-C. The accused, as customers, were not expected to indulge into making any enquiry or verification as to whether the prosecutrix is not below 16 years, particularly when she with appearance of a well grown up woman was offered for services, and was a consenting party.

10-D. It has come on record through medical evidence that the prosecutrix was having well developed secondary sexual organs and was habituated to sexual intercourse. It has also come on record through the cross-examination of the prosecutrix that she used to drive motorcycle, used to possess two cell phone handsets which she used frequently and used to freely roam about outside and did not attend the school regularly, and used to frequently move out on motorcycle with accused Ruchin Mehta, suppressed Ruchin Mehta's name from the police for long duration of six months after lodging F.I.R. All these facts prove that the prosecutrix was a female of sound understanding and maturity possessing all features of a grown up woman and she did every act with full knowledge and design.

10-E. The overall behaviour of the prosecutrix has led the accused persons to believe that the prosecutrix was major.

10-F. Considering the description of the prosecutrix that has come on record, there would be no presumption that she is below 16 years.

10-G. The fact that she freely moved from place to place with strangers, stayed at Shirdi, Dhule, Shahada each for more than a day without any grudge or demur and returned only after she was searched, leads to a belief that the prosecutrix had submitted to the sexual act, rather participated in it with willingness.

10-H. The medical evidence relied upon by the prosecution has proved the age of prosecutrix to be 15 to 16 years. Medical witness has accepted the opinion expressed in the text of Modi's Medical Jurisprudence as authoritative proposition. The settled legal position accepts possibility of actual age being around two years on either side.

10-I. Law does not attach any conclusive value or mandatory presumption to the date of birth reflected from the register of date of birth maintained by the Registrar.

10-J. The fact of date of birth will have to be proved like proof of any other fact. In absence of primary evidence of date of birth, the age based on date of birth will have to be proved by fool proof evidence.

10-K. The register of Birth will only prove that an entry was made and not that it pertains to the fact of birth of the prosecutrix.

10-L. The school record relating to attendance of the prosecutrix, where the age of the prosecutrix is shown, varies at different places. It only suggests a fact that her age is below 16 years is not proved.

10-M. The fact that prosecutrix was below 16 years warranted strict proof, particularly when the prosecution argues on the basis of age of the prosecutrix that it is a case of an offence attracting strict liability.

10-N. Considering the total effect of personality, maturity and medical evidence, it will have to be held that the prosecution has failed to prove beyond reasonable doubt that prosecutrix was below 16 years of age on the date of any one of the incidents.

10-O. If the entries in the birth register which are liable to be construed as tentative are considered collectively with medical evidence, it will suggest that the age of the prosecutrix, as proved by the prosecution, is over 16 years and even it could even be 18 years.

10-P. Alternatively, if at all it is held that prosecutrix was below 16 years, particularly in the background of the nature of present case, where behaviour and appearance of the prosecutrix is that of a well grown female and even upon considering the medical opinion about growth of her secondary sexual characteristics, it was the duty of the prosecution to prove that the accused had "knowledge" that age of the prosecutrix was below 16 years before indulging in

sexual intercourse with her.

10-Q. Proof of knowledge to the accused as to age of the prosecutrix to be below 16 years is sine qua non. Law of land requires that mens rea must be proved for attracting penal liability. In the case of present nature, mens rea could be proved only if it is proved that the accused had done the act with knowledge that the prosecutrix was below 16 years.

10-R. The words "with knowledge" that the prosecutrix is below 16 years, will have to be read in the clause "sixthly" incorporated below Section 375 of the Indian Penal Code. Once the word "knowledge" is read as in existence, it will mean that mens rea will have to be proved as proof thereof is not dispensed with. Law of land requires that no act is an offence and no one can be punished in absence of proof of mens rea.

10-S. It is not the story of prosecution that the prosecutrix had prior acquaintance with the accused. In absence of proof of prior acquaintance of accused with victim, identification of accused before any progress in the investigation and much before commencement of trial was imperative. This type of identification with aid of test identification parade was never done.

10-T. In absence of identification parade or other efforts for identification, the very filing of charge sheet turns out to be exercise based on guess work and hence is illegal to be a foundation of conviction. The identification before the Court does not bring home the charge and the accused are entitled for acquittal.

10-U. The mistake in identification committed by the prosecutrix renders the identification being extremely tentative. Thus, it is conclusively proved that since the prosecutrix did not identify few, it means identification of some amongst them too was a guess work. The prosecutrix had indicated a person as an accused while he was a stranger to the trial and happened to sit in the box meant for the accused by sheer coincidence. This renders entire identification done by prosecutrix to be suspicious and hence untrustworthy.

11. Points urged by the prosecution and amicus curiae are as follows:-

11-A. SUBMISSIONS ADVANCED BY MR. SAVANT, SPECIAL PUBLIC PROSECUTOR ON FACTS:-

11-A.(1) Test identification parade/identification in Court:-

(a) The version of the prosecutrix that acts of various accused were multiple. Therefore, lack of prior acquaintance carries no significance. It is a case of acquaintance both by appearance and name in the process which was recurrent. In the result, the failure to hold a test identification parade is inconsequential, and this failure does not prejudice the accused.

(b) The test identification parade is not substantive evidence. Evidence given in Court is substantive evidence.

(c) The test identification parade of known persons/accused would not serve any purpose.

11-A.(2) The prosecutrix has voluntarily come forward to lodge the report. Any discrepancies or omissions in her deposition cannot and ought not be magnified to her prejudice.

11-A.(3). None amongst the omissions strongly relied during submissions are legally proved as omissions and contradictions.

11-A.(4) The prosecution has proved that the age of prosecutrix at the time of alleged incident was below 16, as her age on the date of complaint was 14 years and 6 months.

11-A.(5) Girl being below 16 years, her consent is immaterial, as she is not competent in law to accord consent.

11-A.(6) As the victim is made to surrender under threat and duress, the victim cannot be said to be a consenting party irrespective of her age.

11-A.(7) In case of present nature, the prosecution has to "broadly" prove sexual intercourse, and it too be without consent if the victim is above 16 years of age.

AGE AND DATE OF BIRTH

11-B.(1) Considering the scheme of the Registration of Births and Deaths Act, 1969 (Act No. 18 of 1969), though presumption of any particular category referable to Section 4 of the Evidence Act is not prescribed/attached, the totality of scheme of the Registration of Births and Deaths Act will have to be considered and in the result it will have to be held that rebuttable presumption is attached to the entry as to date of birth recorded in the register maintained under Registration of Births and Deaths Act.

11-B.(2) The record maintained under the said Act is a public record, maintained by public officer in due course of his official business. Unless the said character of the record is brought into shadow of doubt, presumption u/s 114 of Evidence Act which has to arise therefrom will have to be accredited to said record.

11-B.(3) The sanctity of its maintenance in due course of official business is attached to record maintained under the Registration of Births and Deaths Act, the presumption of the category "shall presume" emerges from totality of the scheme of the Act.

11-B.(4) If the scheme of the Act is considered, it would be imprudent if the presumption of "shall presume" is not attached. The record maintained under said Act will have to be presumed to be correct and to hold the fact represented therein to exist, since it is maintained by a public servant in due course of official business, therefore, it has sanctity of the truthfulness and correctness of fact depicted in it unless rebutted by the person claiming otherwise.

MEDICAL EVIDENCE AS TO AGE

11-B.(5) The medical evidence relating to age cannot be read in isolation and without advertent to other documentary evidence.

11-B.(6) In absence of evidence in form of record of public document having the presumptive value or any other primary evidence standing on the higher pedestal and/or degree, the medical evidence will stand next in the order of rank of its value. The evidence of a Medical expert in regard to age is essentially an "opinion".

11-B.(7) Whenever any evidence in the form of public record maintained under statute by a public officer is available, in absence of its rebuttal by any other evidence of like rank, opinion shall always take a back seat. The medical opinion, which is an expert opinion, cannot be accredited with a value to undermine the evidentiary value of the record maintained by the public officer in due course of exercise of statutory function as public servant.

11-B.(8) The date of birth recorded in the register maintained under the statute and the date of birth appearing in the school record are one and the same and, therefore, 29.5.1991 as the date of birth of the prosecutrix is a fact duly proved from record maintained under statutory authority by a public servant, it being as well corroborated by school record.

11-B.(9) Further corroboration of fact of probable age proved by evidence of expert in the field of medical science will have to be construed to admit possibility of two years on lower side of 15 to 16 years and hence around 13 to 15 years.

11-B.(10) Margin of plus or minus two years in the figure of age based on opinion of expert in medical science is a rule, yet this rule is not without explanations and exceptions. Qualifying standards, which can be carved out as deduction from case law, are as follows:-

(a) Whenever opinion is sole material to prove age, the allowance of plus and/or minus one or two years is permissible rather mandatory.

(b) It being opinion, cannot override the value of:-

(i) Record of category of "shall presume",

(ii) Primary evidence of impeccable quality.

(c) When the evidence brought before the Court is purely of foregoing explanation given in the foregoing point (a),

(d) The question as to whether exact age is proved, is a matter of appreciation of evidence and recording of fact finding by the Court, but not when it falls in foregoing category (b).

11-B.(11) On the fact as proved, age is proved by proof of date of birth from register of deaths and births as maintained under the Registration of Births and Deaths Act by public servant attached with duty under a statute to maintain it,

and its maintenance in due course as such is proved and is corroborated by other evidence.

11-B.(12) The evidence namely that Priya, elder sister of the prosecutrix was born and she was admitted to the school prior, and was taking education in same school one division ahead of the prosecutrix, isolates and substantiates thereby the date of birth of the prosecutrix relied upon by the prosecution, as a specific date of birth which proves that her age on the date of incident was below 16 years.

11-B.(13) The fact that the father of prosecutrix Anil Jadhav could have been one amongst the witnesses having worth of primary evidence of proof of age of the prosecutrix, does not in any manner undermine the value of evidence of the public record maintained by public servant in due course of business relating to date of birth as corroborated by school record and also supported by opinion of medical expert which is relevant as well as admissible.

AS TO CONSENT

11-B.(14) The version of prosecutrix that she was coerced to keep sexual relations with various persons at the instance of the accused Ram Salve and accused No. 20 Vilas Karale, in the background of her incompetence to give consent, has to be relied.

11-B.(15) The prosecutrix has proved that it is a case of sexual act by accused with the prosecutrix who was below 16 years. Nothing is brought forward by the defence to persuade this Court to discard the testimony of prosecutrix.

11-B.(16) Testimony of prosecutrix is further strengthened by the mandate of Section 114 of Indian Evidence Act.

11-B.(17) The plea that the consent expressed from the evidence of the prosecutrix that she was coerced due to the threats by absconding accused Ram Salve and accused No. 20 Vilas Karale to publish her photographs which Ram Salve had snapped, if she was not to engage herself in the said activities, creates adequate ground to believe that her consent was not free.

11-B.(18) In the background that photographs allegedly snapped were not recovered, the version of prosecutrix could have been easily liquidated by pushing in service any specific defence from the accused by their specific effort, probabilized it, than barely by denial.

11-B.(19) Movement of prosecutrix at different places and that she did not make any efforts to flee or seek any rescue from the racket or seek any help, by itself does not lead to constitute an inference that her acts were with free consent or free submission to the acts of sexual relation. The circumstances in which she had given consent have to be taken into account.

11-B.(20) No material or defence is brought forward by the prosecution to nullify the presumption u/s 114 of the Indian Evidence Act.

Testimony of prosecutrix cannot be regarded as wholly unreliable.

11-B.(21) Sheerly because the prosecutrix is a participant in the act which is described as an offence, her testimony cannot be discarded.

11-B.(22) Sexual offences are an exception to the rule of prudence that the testimony of a victim needs corroboration.

11-B.(23) The argument normally advanced in such cases and now actually advanced, namely that the defence of the prosecution will have to be magnified in the background that the prosecutrix is a participatory in the crime and almost an accomplice, cannot at all apply in the case of present nature, where the age of the prosecutrix is proved to be below 16 years on the date of incident.

11-B.(24) The concept of being participatory shall apply only when the prosecutrix is proved to be above 16 years of age, and her evidence is "not wholly reliable" or "wholly unreliable".

The concept of mens rea will have to be held as inapplicable:-

11-B.(25) In the present case, in the background that it is an age-based offence, text of Section 375 of the Indian Penal Code does not provide that it should be proved that the accused had the "knowledge of the age of the prosecutrix" to be below 16 years. Lack of such knowledge is not provided as an exception.

11-B.(26) If at all it is to be presumed that mens rea needs to be proved, the general rule of law that the accused will have to probabalize the existence of facts constituting defence as to absence of mens rea shall apply with equal rigidity. No steps whatsoever for probabalizing this defence were taken by the accused persons.

Abetment and conspiracy etc.

11-B.(27) The prosecution has succeeded in discharging its burden of proof. The facts that the accused No. 1 Sheela Bargal, accused No. 20 Vilas Karale and absconding accused Ram Salve have collectively procured the prosecutrix for prostitution are proved. It is also proved that all other accused participated in acts abetting further continuation of the said procurement and sexual assault on prosecutrix by different accused persons.

11-B.(28) Abetment and conspiracy by all accused in commission of offences will have to be inferred from their conduct. Conspiracy cannot be usually proved by any direct evidence as the acts of conspiracy are often done secretly. The inference has gone un-rebutted and rebuttal is not even probabalized.

11-B.(29) Latter part of Section 114A of the Evidence Act introduced by the Criminal (Amendment) Act, 1983 prescribes that when the victim states on oath in her evidence that she did not accord the consent, the burden to prove that consent existed falls on the accused. This burden is not discharged by the accused.

Authorisation to investigate the offence under PITA

11-B.(30) S.D.P.O. is competent to investigate offence under PITA as seen from Government notification.

CONCLUSION

11-B.(31) The conviction deserves to be confirmed, and sentence be maintained as the acts of accused are grave social evil as well.

12. SUBMISSIONS ADVANCED BY MR. J.R. SHAIKH, AMICUS CURIAE AND BY MRS V.A. SHINDE, A.P.P.

12-A. The sequence of events apparent from the evidence of P.Ws. 5, 35, 23, 36, 37 and other witnesses, which proves the sexual acts of accused, whether these acts were with consent are totally irrelevant as the prosecutrix was not competent to give consent. Moreover, prosecutrix has stated on oath that her acts were not based on free consent.

12-B. A presumption u/s 114A of the Indian Evidence Act lends support to the evidence of the prosecutrix as to commission of the offence by the accused under first to third and sixth clause of Section 375 of the Indian Penal Code.

12-C. The prosecution is not required to prove that the accused had knowledge that the victim is under 16 years of age.

12-D. The defence of the accused that they reasonably believed that the girl is above 16 years of age is not a good defence as there is no legal foundation for recognizing this plea as a valid defence.

12-E. Mere act of sexual relation with the minor below 16 years of age has been made culpable.

12-F. Rape is typically an act attracting "strict liability" under penal law. Any exceptions whatsoever, therefore, are not attached as riders. By literal interpretation, the proof of the act ipso facto attracts punishment.

12-G. When it is proved that an offender has sexual relation with minor girl below 16 years of age, "whether or not the offender knows the age of girl" the person is guilty of "rape". No other consideration comes into play.

12-H. In Section 375 sixthly or kidnapping a minor girl u/s 366A of the Indian Penal Code and for kidnapping from a lawful guardianship and for offences under PITA, the Legislators in their wisdom thought it fit to declare bare act as offence. The element of "mens rea" is not made an essential ingredient. Thus, it is not necessary for the prosecution to prove that accused committed the act with the knowledge as regards age of prosecution.

12-I. The proposition about consensual sex canvassed for the first time across the bar on behalf of the accused based on the proof of free movement and conduct of prosecutrix is absolutely untenable and unsustainable.

12-J. The defence of the accused is that the victim is a "sex worker". The concept that sexual act with a "Sex worker" child and even with her consent, is not recognized as an exception to strict liability-rape law in Indian legal regime. The said defence, however, goes against the accused and depicts that the accused have taken the risk of admitting commission of act which may eventually found to be a grave offence.

12-K. In answer to reliance on the judgment of R Vs. B, a Minor it is urged that, criminal laws of foreign country cannot be enforced in India.

12-L. Requirement of reasonable belief about the age of prosecutrix to be competent to consent cannot be read as bodily incorporated in Section 375 as an exception. The offence of rape as defined u/s 375 of the Indian Penal Code attracts strict liability and is a complete well defined code.

12-M. It is the policy of law and a need of society to curb the act which is defined as rape. Hence, no exceptions whatever are left nor can those be transplanted by medical interpretation.

12-N. The general rule is that unless the mens rea is excluded either by express words in the statute or by necessary intendment as an element of an offence a person ought not to be found guilty under the criminal law. There may be cases, in which the legislators in their wisdom have thought it fit to declare some offences without an element of mens Rea in them. But, they are by way of "Exception" as a "General Rule".

12-O. On the provision of the act now in question, it cannot be held that such an intendment has been dispensed with. In the clause sixthly of Section 375 or kidnapping a minor girl u/s 366 of the Indian Penal Code (kidnapping from a lawful guardianship) or other offences like "strict liability" the legislature has in its wisdom thought it fit to declare the acts as offences without need of proof of any element of mens rea.

12-P. One could see a distinction in cases of Kidnapping and Rape, there is a moral turpitude in violating chastity of a girl and offending parental feelings.

12-Q. A distinction can be made between the crimes, which are intrinsically immoral or wrong in themselves such as Murder, Rape, Kidnapping, Arson and Burglary. The latter class consists of those acts, which in the absence of statute will not be considered as immoral or no moral. Therefore, proof of mens rea is dispensed with by necessary implication.

12-R. Legislature must have known that it was to be known to the men that conviction shall follow the act of sexual intercourse with a girl below 16 years of age despite their genuine belief that the girl was over 16, a matter which may stand as a device for mitigation but not as a defence.

12-S. The prosecution cannot be burdened to prove a fact which would be exclusively within the knowledge of the accused himself, namely the absence of

knowledge about the victim being below 16 years of age.

12-T. The presence of state of mind i.e. reasonable belief of accused regarding prosecutrix being above 16 years is his mental state and as such, can only be within his special knowledge. If at all accused wants that Court should believe his state of mind, he has to prove it either with the evidence adduced by the prosecution or the evidence led by him.

12-U. The statutory rape as defined in Section 375 of the Indian Penal Code furthers a significant object of the society of deterring sexual activity with children by discouraging a mistake-of-age as a defence. It renders unjustifiable a defence-based on the child's appearance and level of maturity.

12-V. Therefore, a defence that the accused had no knowledge about the prosecutrix being below 16 years of age or belief that she was over 16 years of age, cannot be allowed to be taken.

12-W. An assertion by accused that he had made a reasonable mistake regarding the victim's age is no defence anywhere in the world.

12-X. The need of protection of children from sexual abuse is felt or recognized world-over. Law deals with the offenders against children everywhere in the world rigorously and with heavy hand.

12-Y. The age of valid consent has been subjected to increase more than once in India. The historical development in this regard is indicated in a chart which is quoted below:-

CHART

This aspect of amendment in age upwards needs to be adverted to.

13-Z. It also needs to be kept in mind that even the age of marriage was fixed at 14 in 1929 and was made 15 in 1940 and 18 in 1978.

AS TO JUDGMENTS RELIED UPON

13. Judgments relied upon by various Advocates for the defence, prosecution and amicus are as listed below with respective points and propositions:-

(A) WHEN PROSECUTRIX AS SOLE WITNESS SHOULD NOT BE RELIED:

1] Vadivelu Thevar Vs. The State of Madras,

Rameshwar Vs. The State of Rajasthan, and

Kartar Singh V. State of Punjab & Kripa Shankar Rai Vs. The State of U.P. & anr., 1994 Cri.L.J. 3139 (1).

2] Bhimappa Chandappa Hosamani and others V. State of Karnataka: (2007) 1 SCC (Cri) 456, Rameshwar Vs. The State of Rajasthan, and

Sheikh Zakir V. State of Bihar:

Sheikh Zakir Vs. State of Bihar,

Testimony of single witness can be relied only when it is wholly trustworthy.

On the basis of the testimony of a single eyewitness a conviction may be recorded. While doing so the court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the court as wholly truthful, must appear to be natural and so convincing that the court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.

B] CORROBORATION TO THE TESTIMONY OF PROSECUTRIX IS NECESSARY.

- 1] Sidheswar Ganguly Vs. The State of West Bengal, Supreme Court
- 2] Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi),
- 3] State of Punjab Vs. Gurmit Singh and Others,
- 4] Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat,
- 5] Santosh Hollya and others V. The State of Karnataka: 2010 (3) Mh.L.J. (Cri.) 538.
- 6] Siddharth Sawant Vs. State,
- 7] Wahid Khan Vs. State of Madhya Pradesh,
- 8] Malkhansingh and Others Vs. State of Madhya Pradesh,

PROPOSITIONS:

- (a) Girl who is victim of an act of sexual violence is not an accomplice.
- (b) Nature and extent of corroboration shall vary depending upon facts and circumstances of each case.
- (c) Testimony of prosecutrix must be appreciated in the background of entire case-if no strong case/motive to falsely implicate accused, Court can accept her evidence. Even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable, the testimony can be relied upon without insisting upon corroborations as it is not a sine qua non for conviction in rape case. Victim of sexual assault can be relied upon on par with injured witnesses.
- (d) Mental faculties cannot be expected to be attuned to absorb all details and the testimony cannot be gauged with arithmetic accuracy. Minor, irrelevant variations no ground to discard evidence.
- (e) All that is required is that the evidence of prosecutrix must inspire confidence.

C) GENERAL RELIABILITY OF PROSECUTRIX

1] Narender Kumar Vs. State (NCT of Delhi),

On facts the evidence of prosecutrix did not inspire confidence.

2] Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another,

Narender Kumar V. State (NCT of Delhi): Criminal Appeal Nos. 2066-67 of 2009.

Evidence of prosecutrix must inspire confidence to sustain the conviction.

2] Deelip Singh @ Dilip Kumar Vs. State of Bihar,

On the facts it was held that the prosecutrix was a consenting party, and her age being below 16 years was not proved.

D) Judgments on the point that "Mens rea is required to be proved:-

1] Nathulal Vs. State of Madhya Pradesh,

State of Gujarat and Another Vs. Acharya D. Pandey and Others, etc., and

Inder Sain Vs. State of Punjab,

(a) Prosecution has duty to prove mens rea.

(b) In the process of deciding the question whether the element of guilty mind is excluded while defining the offence, the object of the statute, which is to promote welfare activities or is to eradicate grave social evil is not by itself decisive.

(c) Exclusion of mens rea may not be inferable by necessary implication. Its inclusion from a statute has to be express and not implied.

2] REGINA V.K.: [2001 3 WLR. 471

AND

3] HOUSE OF LORDS-REGINA V.K. 2001] UKHL 41.

It is an overriding presumption of statutory interpretation that mens rea was an essential ingredient of every statutory offence unless Parliament had indicated, by express words or by necessary implication that, mens rea does not apply when offence is of strict liability.

E) CONSENT AND PROOF OF GIRL'S AGE

1] Harpal Singh and Another Vs. State of Himachal Pradesh,

(1) The entry made in the Birth Register is self admissible even though formal proof of officer who had recorded it as it is admissible u/s 35 of the Evidence Act being made by concerned official in discharge of his official duties. Evidence in the form of Birth Register is adequate evidence to prove the age of the prosecutrix.

(2) Delay caused in filing of F.I.R. remaining unexplained on plausible reasons was considered to be duly explained and was not fatal to the prosecution.

(3) The Birth Register when corroborated with report of Radiologist who has certified the age of the prosecutrix to be 15 years, collectively has resulted in proof of fact that the girl was below 16 years of age on the date of incident.

2] Bishnudas Behera Vs. State of Orissa,

3] Nand Kishore Vs. State of Rajasthan,

4] The State of H.P. Vs. Jarnail Singh,

5] Sunil Vs. State of Haryana,

When correct date of birth is not proved, conviction on charge of rape on minor girl cannot be ordered.

6] Sidheswar Ganguly Vs. The State of West Bengal,

7] Vishnu @ Undrya Vs. State of Maharashtra,

8] Harpal Singh and Another Vs. State of Himachal Pradesh,

9] Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi),

10] State of Maharashtra Vs. Gajanan @ Hemant Janardhan Wankhede,

11] State of Chhattisgarh Vs. Lekhram,

Common proposition to these 7 cases:-

1] Only conclusive piece of evidence as to age is birth certificate. If unavailable, physical features and oral testimony may be relied upon.

2] Ossification test cannot form the basis for determination of age in face of evidence of facts tendered by father and mother coupled with unimpeachable documentary evidence.

3] Register maintained in a school is admissible.

4] If there be no other evidence, expert opinion as regards age of the prosecutrix may be accepted.

F] OTHER GENERAL PROPOSITIONS:-

1] Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh,

2] Ramesh Baburao Devaskar Vs. The State of Maharashtra,

3] Raghunath Krishna Mujumale and Others Vs. State of Maharashtra,

4] Chandrakant Narayan Chavan Vs. State of Maharashtra and another,

5] K. Hashim Vs. State of Tamil Nadu,

- 6] Moijullah @ Puttan Vs. State of Rajasthan,
 - 7] State of U.P. Vs. Anil Singh,
 - 8] The State of Maharashtra Vs. Ganesh Shamrao Andekar and Others
 - 9] Ranjyotsingh Gurudayalsingh Vs. The State of Maharashtra (at the instance of Senior Inspector of Police),
 - 10] Wahid Khan Vs. State of Madhya Pradesh,
 - 11] Balwant Singh and Others Vs. State of Punjab,
 - 12] Dharma Vs. Nirmal Singh Bittu and another,
- G] Judgments on Leniency in the matter of sentence.
- 1] State of Punjab Vs. Rakesh Kumar,
 - 2] Suresh Balkrishna Nakhava Vs. State of Maharashtra,
 - 3] Sukhwinder Singh v. State of Punjab, (2000) 9 SCC 204
 - 4] Phul Singh Vs. State of Haryana,

We wish to emphasise that the special circumstances of this case constrain us to relent a little on principle because the retributive approach to sentencing has been jettisoned by the Courts below.

H] Judgments on severe sentence

While on one hand, there are certain cases where even while upholding the conviction on account of the peculiar facts, such as love affair, compromise arrived later on, that the relations of the parties have turned into matrimonial tie, the victim has been compensated etc., the Hon"ble Supreme Court and some High Courts have taken lenient view. Nevertheless, the statement of law on the point of severity of the punishment is that in no manner the faith of the litigant should be shattered. With all ideals of reformatory theory, in cases of the nature of rape etc., the reformation would not really play the desired role, the punishment has to be severest and deterrent, leaving a message that the offences of strict liability would attract severest sentence.

The prosecutrix has got married and she did not want the matter to be carried any further so as to lead a happy and healthy married life with her husband and had filed the compromise petition to that effect was an adequate and special reason to invoke the proviso (supra). While maintaining the conviction, the High Court ought to have for the reason aforesaid, reduced the sentence to the period already undergone by the appellant. Such a course was in the interest of the prosecutrix herself.

Overall trend as regards leniency is seen in the judgments noted above whenever Courts had noted that it is a case of elopement by the prosecutrix with the

accused. Though law does not recognise, but on facts it was a case of a love affair which had ultimately ended into marriage and consequent motherhood on the girl which she had happily accepted. In some cases wherein the victim was compensated and parties had agreed to live with peace, the Courts have shown the trend of not interfering with the conviction. However, on facts of the case, have shown leniency.

In the present case, appellants claim that the same attitude of leniency be adopted in their favour.

(I) Judgments on appreciation of evidence:-

1] State of M.P. Vs. Basodi,

Cited by Special P.P.

3] Himat Popatlal Raval Vs. State of Gujarat,

These judgments have been relied upon to show and/or illustrate the manner in which appreciation of evidence should be done. These judgments also guide the manner in which omissions and contradictions should be seen in order to assess exact weight of the evidence.

General proposition which emerges from these testimonies is that the overall effect of testimony of prosecutrix as a sole witness should be such as to inspire confidence in order to believe it as truthful.

J] No effort be made to tinker with the definition of rape u/s 375 of the Indian Penal Code by judicial interpretation:

1] Sakshi Vs. Union of India (UOI) and Others,

An exercise to alter the definition of rape, as contained in Section 375, IPC, by process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment, is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large. Section 375 is clear and does not admit any ambiguity. No effort be made to tinker with it by reading in it what is not intended.

K) Mistake of fact is not available as a defence.

Regina V. Prince: [LR 2 Cr. Cas. Res. 154 (1875)]

Based on the Sexual Offences Act, 1956, (as it applied in United Kingdom), it was held that the defence of the defendant (accused) that he had believed the representations made by the girl who was involved in consensual sex that she was above 16 years, was not available to him as a defence.

In this judgment, the case of B (A Minor) Vs. Director of Public Prosecutions: 2002 Appeal cases was considered. The case of B (A Minor) Vs. Director of Public Prosecutions was of the offence of far lesser gravity-being of improper relations.

It was not a case of act of sex with the minor. The proposition of law propounded in the case of B (A Minor) Vs. Director of Public Prosecutions, that proof of mens rea is necessary, does not apply to the case of offence of rape which is based on the principle of strict liability.

L) Whether statement u/s 161 of the Criminal Procedure Code be read to use it in favour of accused.

Abdul Latif and Others Vs. State of Uttar Pradesh,

In this case the statement u/s 161 of the Code of Criminal Procedure was perused by Hon''ble Supreme Court to understand as to what was the version of witness who was not examined. This judgment does not lay down as judicial dictum that statement u/s 161 of the Code of Criminal Procedure can be read in evidence.

6th November, 2012.

14. Considering the rival submissions, points which arise for consideration and findings thereon are noted below.

DISCUSSION AND REASONS Date of birth and age on the date of incident

15. The prosecution has brought the evidence of P.W. 15 Balkrishna Gotipamul (Exh. 440/Page 190 of Paper Book Part III) and P.W. 27 Dr. Narsing Paithankar (Exh. 484/Page 277 of the Paper Book Part III), to prove the record relating to date of birth of the prosecutrix. Other evidence pertaining to the age is based on testimonies of P.W. 28 Sushma Dilip Akadkar, P.W. 29 Dr. Sunil Pannalal Pokharna, P.W. 30 Gangadhar Kisan Thangune and P.W. 31 Dr. Swapnali Shashikant Kale.

16. We have perused the evidence of these witnesses and the documentary evidence in support. It is seen that, these witnesses P.W. 15 Balkrishna Gotipamul and P.W. 27 Dr. Narsing Paithankar have placed on record the birth register, wherein there is entry relating to birth of a girl child, and its true extract.

17. The Head Mistress P.W. 28 Sushma Akadkar has produced the school record pertaining to the admission as well as record pertaining to the transfer certificate of the prosecutrix and her sister Priya. From entries therein, the date of birth of the prosecutrix as 29.5.1991 is proved.

18. P.W. No. 29 Dr. Sunil Pokharna and P.W. 31 Dr. Swapnali Kale are the witnesses pertaining to medical examination of the prosecutrix and their opinion in relation to her age based thereon. These witnesses have testified that the prosecutrix was capable of sexual act and her secondary sexual organs were very well developed. Any opinion relating to sexual intercourse or rape is not certain. They opined that age of the prosecutrix at the time of incident was 15 to 16 years. These witnesses concurred with the observations recorded in Modi''s Medical Jurisprudence that there could be margin of two years on either side.

Free movement of Prosecutrix

19. Second set of evidence, which pertains to the movement of prosecutrix, are two witnesses namely P.W. 13 Prasad Bhadake, the owner of Indica Car, who had given the said car to Vilas Karale on hire for taking the prosecutrix to Shirdi and to Dhule, Shahada etc. The driver of the vehicle was P.W. 16 Avinash Shinde. These witnesses prove the fact that the vehicle was taken on hire by Vilas Karale and some girl was taken from Ahmednagar to Kolhar and other places.

PANCH WITNESSES

20. Other evidence which pertains to various panch witnesses is of formal nature and the description for the purpose of which those are being examined, is briefly noted in the paras hereinbefore where list of witnesses and purpose of their examination is quoted. Testimonies of these witnesses pertain to peripheral matters.

PROOF OF FACTS BY PROSECUTRIX

21. The prosecutrix is the only witness of the incident of sexual intercourse by different accused persons with her from time to time.

22. The prosecutrix (Exh. 322) disclosed in her examination-in-chief the names of accused persons who had sexual intercourse with her. She also narrated the manner in which movement occurred and how at different places the incident of sexual intercourse by different accused persons took place.

23. The testimony of the prosecutrix can be broadly divided in three parts. As to identification:-

Relevant text of the testimony reads as below:

7. I can identify those persons who has misdid with me. (Note:- For the purpose of identification witness left dock and went nearer to accused with permission of Court and then identification process started). Now I have shown person who is namely Harjit Sing Rajpal (Accused No. 9) (The said person has disclosed his name to me as Harjit Sing Rajpal (Accused No. 9) who is accused No. 9. I say that the next person is namely Abdul Quereshi (Accused No. 12). On asking the said person has stated his name as Abdul Qureshi (Accused No. 12) who is accused No. 12. Now I identify the next person who is namely Sudhakar Kate (Accused No. 8). On asking his name he has disclosed as Raghwendra Poojari. It is noticed that the said person is accused of another sister case bearing Sessions Case No. 100/06 he was asked to go out. The next person I say is Manager of Hotel Tarang. On asking said person has stated his name as Ramakant Dengle accused No. 17. I do not remember the name of next person. On asking by me he has disclosed his name as Vilas Karale who is accused No. 20. The next person is namely Balkisan Goyal (Accused No. 6). On asking by me he has disclosed his name as Balkisan Goyal who accused No. 6. The next person I say is Ruchin Mehta. On asking by me he has disclosed his name as Ruchin Mehta

(Accused No. 9) who is accused No. __*). I do not remember the next person seated in row. On asking his name by me, he has disclosed his name as Raghunath Zolekar who is accused No. 21. I do not remember the next person seated in row. On asking his name by me, he has disclosed his name as Ajay Sudhakar Kate who is accused No. 8.

8. In next line the first person is owner of Hotel Tarang who is namely Mr. Dengle. On asking his name, said person has disclosed his name as Ramrao Dengle (Accused No. 11), accused No. __*. The next accused is namely Thorat (Accused No. 14). On asking his name he has said his name as Rajendra Thorat (Accused No. 14) who is accused No. 14. (Note:- At this stage witness has stated that concerned Thorat and the next accused seated alongwith him is also Thorat and as both appears to be similar she is unable to say first name of said Thorat). The next person is namely Ravi Thorat (Accused No. 15). On asking said person has disclosed his name as Ravindra Thorat who is accused No. 15. The next accused is namely Ashok Kasar (Accused No. 8). On asking said accused has disclosed his name as Ashok Kasar, accused No. 18. The next accused is namely Chetan Bhalgat (Accused No. 13). On asking said accused has disclosed his name as Chetan Bhalgat, who is accused No. 13.

9. In next line first accused is namely Ramesh Barkase (Accused No. 7). On asking said accused has stated his name as Ramesh Barkase (Accused No. 7), who is accused No. 7. The next accused is namely Vasant Pawara (Accused No. 22). On asking he has disclosed as Vasant Pawara who is accused No. 22. The next accused is Akash Rathi. On asking he disclosed his name Aakash Rathi who is accused No. 4. The next accused is Shri Dengale of Hotel Tarang. On asking he disclosed his name as Atmaram Dengale who is accused No. 16. The next accused is Hardip Jaggad (Accused No. 2). On asking he disclosed his name as Hardip Jaggad who is accused No. 2. The next accused is Aba @ Dnyandeo Gondkar (Accused No. 10). On asking his name, he disclosed his name as Dnyandeo Godkar who is accused No. 10. The next seated accused is Tukaram Misal (Accused No. 5). On asking his name, he disclosed his name as Tukaram Misal who is accused No. 5. (Note:- Witness went very close to all accused and identified them from their distance ranging between 2 ft. to 8 ft.).

(Blank spaces are left as per original)

(Quoted from paras 7, 8 & 9 of deposition of P.W. 5 the prosecutrix (Exh. 322)

(No. of accused quoted by us in Italics is added by us for quick identification while reading)

24. In para Nos. 5 and 6 the prosecutrix has deposed as regards the circumstances in which she has moved from one place to another for sexual relations. Relevant text is quoted hereinbelow:

5. Ram Salve always used to threaten me and he was saying that if I refused for such act he would publish my photographs in newspaper and he will cause

trouble to my family members. Due to such threats I had no option but to surrender them.

6. I used to attend various places by a vehicle and rickshaw which those persons brought. Some time we used auto rickshaw of Ramesh Barkase (Accused No. 7), vehicle of Chetan Bhalgat (Accused No. 13), Car of Vasant Pawara (Accused No. 22) and some hired vehicles which were arranged by them for reaching destination. Communication was made through mobile handset in each other. One Priti Babanrao Sonwane was also with me.

(Quoted from paras 5 & 6 of deposition of the prosecutrix (Exh. 322)

(Figure of accused number quoted in bracket in Italics is our addition for identification)

25. Insofar as involvement of different accused persons is concerned, she has narrated those in paras 3, 4, 12 to 18. Relevant part of her testimony is quoted below:

3. Those places are like house of Sheela Bargal (Accused No. 1), Hotel Surabhi, Hotel Sai Balaji, Hotel Tarang, Hotel Sai Village, Hotel Raj Palace, House of Sabhapati of Dhule at which I had been raped against my consent.

Tukaram Misal (Accused No. 5), Abdul Qureshi (Accused No. 12), Balkisan Goyal (Accused No. 6), Chetan Bhalgat (Accused No. 13) have committed rape on me against my will at the house of Sheela Bargal (Accused No. 1).

The persons namely Sheela Bargal (Accused No. 1), Ramesh Barkase (Accused No. 7), Ram Salve and Vilas Karale (Accused No. 20) were standing out of the house and were guarding the things to prevent me from raising alarm or going away.

4. Accused Chetan Bhalgat (Accused No. 13) had raped me in Hotel Surabhi.

The persons namely Ashok Kasar (Accused No. 18), Hardik Jaggad (Accused No. 2), Aakash Rathi (Accused No. 4), Ruchin Mehta (Accused No. 19) have committed rape on me in Hotel Sai Balaji against my will and consent.

The persons namely Hotel Owner Dengle, Hotel Manager, Ravi Thorat

(Accused No. 15), Raju Thorat (Accused No. 14), Raghunath Zolekar (Accused No. 21), Aba @ Dnyandeo Gondkar (Accused No. 10) have committed rape on me against my will and consent at Hotel Tarang.

At Hotel Raj Palace, Hotel owner namely Harjitsing Rajpal (Accused No. 9), his friend Sudhakar Kate and one Ravi have raped me.

At one bungalow in Dhule area Sabhapati of said area namely Vasant Pawara (Accused No. 22) had raped me against my consent.

12. Once Ram came to my house and said that I should accompany him as I am

in need of money to which I refused. On which Ram (absconding accused) caught hold my shoulder, pulled, made me to sit in auto which he brought and took me to the area of Bhingardive Mala, Bhutkar Wadi. At said place I was taken to the house of Sheela Bargal (Accused No. 1). At said place Ram (absconding accused) introduced me with Sheela Bargal (Accused No. 1) and Dilip Bargal alias Ramesh Barkase (Accused No. 7). Ram (absconding accused) introduced to me another man as Dilip Bargal but Sheela Bargal (Accused No. 1) said that the said person is not her husband Dilip Bargal but he is Ramesh Barkase (Accused No. 7).

At said place I was introduced with a person namely Tukaram Misal (Accused No. 5) who relates to Mahanagar Palika. Tukaram Misal (Accused No. 5) forcibly took me at inner side room. Though I refused he raped on me against my will and consent (Note:- Witness has used Marathi words as "Balatkar" which is throughout mentioned in deposition as "rape"). Then Sheela Bargal (Accused No. 1) gave me Rs. 250/- at my hands. So also Sheela (Accused No. 1) said that I should not disclose the things otherwise she would publish my photographs in newspapers and she would cause trouble to my family members. As such instance was happened in my life for first time I said to Sheela (Accused No. 1) that it pains me to which she threatened me accordingly. Then Sheela (Accused No. 1) took me on her scooty two wheeler and left me at my house in Maliwada area.

13. Thereafter, within 2/3 days Ram again came to my house and forcibly took me to the house of Sheela Bargal (Accused No. 1). At said place again Ram introduced with Misal. Thereafter, again Misal raped me at said place without my consent.

On the same day, Ram introduced one another person who was there as Abdul Quereshi (Accused No. 12) with me. The said Abdul Quereshi (Accused No. 12) was resident of Khatik Galli Ahmednagar. I complained with Sheela (Accused No. 1) that the said person belongs to Mohammedan community. Sheela said that if I did not listen to her then she will publish my photographs in newspaper, she would cause trouble to my family members and also said that her reach is up to very high level. Sheela Bargal (Accused No. 1), Vilas Karale (Accused No. 20), Ram Salve and Ramesh Barkase (Accused No. 7) threatened me accordingly.

Then in inner room of said house Quereshi (Accused No. 12) raped me against my will and consent. At the same time above named four persons were guarding the place by remaining outside.

14. Then within 1 or 2 days Ram took me to Hotel Surbhi at Ahmednagar.

At said place Ram introduced one Chetan Bhalgat (Accused No. 13) to me. At said place Chetan Bhalgat (Accused No. 13) had sex with me against my will and consent.

15. Once again Ram took me to the house of Sheela Bargal (Accused No. 1). At said place Ram introduced a person namely Balkisan Goyal (Accused No. 6) with

me. Sheela (Accused No. 1), Ram and Vilas threatened me, did not listen me and compelled me to have physical relations with said Goyal (Accused No. 6) at inner side room.

As those three persons threatened me I required to do such acts.

On the same day Chetan Bhalgat (Accused No. 13) came at the house of Sheela (Accused No. 1). He had raped me against my consent.

16. Then once Ram took me to Hotel Sai Balaji of Ahmednagar. At said place Ram introduced the then Hotel owner namely Ashok Kasar (Accused No. 18) with me. At said place Ashok Kasar (Accused No. 18) had raped against my will and consent.

On the same day at said place Hardik Jaggad (Accused No. 2), Ruchin Mehta (Accused No. 19) and Aakash Rathi (Accused No. 4) turn by turn raped on me against my will and consent.

17. Then after 4 to 5 days Ram again came to me and said that we have to go to Shirdi for Darshan of Lord Saibaba. I have refused to Ram but by threats and force he took me to Shirdi at Hotel Tarang. We went to Shirdi by car. I myself, Ram, Vilas Karale (Accused No. 20) and driver namely Sandip went by car. The said hotel situates at Nimgaon Jali, Ashwi Fata. At Hotel Tarang Ram introduced Ravi Thorat (Accused No. 15), Raju Thorat (Accused No. 14) and Raghuseth to me.

Though I refused these three persons turn by turn had physical relations with me against my will. Then Ram introduced one Aba @ Dnyandeo Gondkar (Accused No. 10) with me.

The said Gondkar also had physical relations with me against my will and wish. Ram and Vilas introduced said Gondkar to me. As Ram and Vilas always used to threaten me I had physical relations. At said place it was great pains to me hence there was oral dispute between me and Ram. Even then Ram continued to threaten me. Due to such threats I surrendered to the things.

18. We remained at Hotel Tarang for 2 days and from that place Ram took me to Dhule. I was taken to Hotel Raj Palace of Dhule. Said Raj Palace Hotel situates at Shahada. One Harjit Sing Rajpal (Accused No. 9) was the owner of said hotel. At said place Ram and Vilas introduced Harjit Rajpal (Accused No. 9), his friend Ajay Sudhakar Kate (Accused No. 8) and person namely Ravi.

Those three persons had raped me at said place without my consent and will.

Then Ram and Vilas took me at Dhule to the house of Sabhapati of Dhule namely Vasant Pawara (Accused No. 22) and introduced him to me. Ram threatened me. Then Sabhapati had raped me at his house against my wish.

(Quoted from paras 3, 4, 12 to 18 of deposition of the prosecutrix (Exh. 322)

(Figure of accused number quoted in bracket in Italics is our addition for

identification)

26. In the cross-examination of the prosecutrix, an effort is made to extract from this witness certain possibilities namely:-

- (1) That she has moved from various places and she did not offer resistance.
- (2) Her movement was not restricted rendering her being in custody and/or confinement of the accused.
- (3) She has moved freely and undertook marketing etc. wherever she moved and stayed in the hotel or private residence, there was no restrain or control against her by anybody after sexual intercourse with different accused persons.
- (4) She was paid money which was generally half of the money recovered from different customers and half of the money was retained by accused No. 20 Vilas Karale.
- (5) Her memory about the incident is vague.
- (6) Her memory about identification is vague.
- (7) She was away from the house without intimation to her parents.
- (8) She told about the names etc. for the first time to the police at different time and in different supplementary statements.
- (9) Her father who approached P.W. 1 and P.W. 2 complained that the prosecutrix was kidnapped and taken for abuse etc., but he was not ready to come forward and be the witness for prosecution.
- (10) She had learnt that her father made efforts to exploit the incident since her father was not ready to come forward as a witness nor her sister was willing.
- (11) She had absconded from the Child Care Home.
- (12) She was always in contact with various persons including accused No. 20 and that her participation in the entire incident was voluntary.
- (13) She did not name accused No. 19 Ruchin Mehta till last statement made by her before the police almost after six months from the date of recording of F.I.R.

27. The entire effort of the cross-examination was to discredit the worthiness of this witness and to project her to be a willing/consenting participatory of the crime.

28. Ultimate effort was to classify her to be a witness wholly untrustworthy or at least partly untrustworthy without any corroboration independent in nature.

29. After considering the testimony of various witnesses, as we notice, fate of the case rests solely on two aspects namely: -

- (a) Whether the exact age of the prosecutrix on the date of any or all acts of

sexual relationship by different accused is proved ?

(b) Whether the statement that various accused persons had sexual relations with the prosecutrix made by her on oath rises to the height of being wholly reliable ?

30. If the prosecutrix is proved to be below 16 years at the material time, the question, whether her conduct tends to render her consent to be free shall become irrelevant.

31. Now we have to discuss as to what is proved. What emerges after marshalling the evidence is as follows:

(a) Birth Register Exh. 486 at Page 282, which is a photo copy of register, shows that birth of a girl child born on 29.5.1991 in the hospital of Balasaheb Deshpande was registered. The name of father of said child is Anil Narayan Jadhav and of mother is Mangala. The birth certificate Exh. 486 based thereon was issued and mother's name appearing therein is Mangala.

(b) It is seen that certificate of Birth (Exhibit 487) issued by the Maternity Home where the girl child was born and her date of birth given therein along with the names of her parents, corresponds with the record.

(c) P.W. 27 Paithankar revealed that entry in original birth register vide extract Exh. 486 produced before the Court was made on the basis of certificate Exh. 487 issued by the maternity home and certificate Exh. 485 was issued from the entries in the register Exh. 486.

(d) In the admission register from school record, the date of birth of the prosecutrix is shown at Entry No. 616 at Exhibit 491/Page 291, name of the prosecutrix and her date of birth is shown as 29.5.1991. This register is found maintained in due course of business.

(e) School leaving certificate of the prosecutrix Exh. 489 Pg. 289 shows that she had left the school when she was taking education in 7th Standard and it shows her date of birth as 29.5.1991.

(f) Entry regarding Priya Anil Jadhav, the prosecutrix's elder sister is shown in general school register at Exhibit 492/at Page 293. Date of birth of Priya shown therein is 17.11.1989 and date of her entry in the school is shown to be 1.6.1995. In that register, it is entered that she left the school on 3.5.2002 when she was taking education in 7th Standard.

(g) The admission register and school leaving certificates of the prosecutrix and Priya (Exhibits 491, 492, 489 etc. are proved by P.W. 28 Sushma Dilip Akadkar, Head Mistress of the school.

32. Now this Court has to see the collective effect of the certificate relating to birth of the girl child i.e. the prosecutrix, her record in the school at the time of taking admission and leaving her sister Priya's birth and entry in the school.

33. Collective effect of this evidence is as follows:-

(a) Priya was admitted to the school in 1995 while the prosecutrix was admitted to the school in the year 1996.

(b) Priya's date of birth is 17.11.1989 while the prosecutrix's date of birth from the register is 29.5.1991.

(c) It suggests that Priya was elder sister and the prosecutrix was younger.

(d) The deposition of the prosecutrix conforms to the fact that her date of birth is 29.5.1991.

34. Now this Court has to consider what is the effect of the opinion relating to her probable age brought before the Court by the prosecution in the shape of medical experts based on ossification test etc. According to opinion of P.W. 29 Dr. Sunil Pokhara and P.W. 31 Dr. Swapnali Kale (Exhibits 511 and 521) the prosecutrix was capable of sexual act. Her secondary sexual organs were well developed. These witnesses have opined that age of the prosecutrix may be around 15 or 16 years at the time of incident. Margin of two years from either side is permissible.

35. Now this Court has to match the documentary evidence and oral evidence as proved by testimony of different witnesses which relates to the date of birth and the value and worthiness of medical evidence. The worth of documentary evidence is such that the birth register and school register are maintained in due course of business.

36. The documentary evidence in the form of record maintained by public officer is duly proved. Its value and effect to be assessed in the background on one hand and an opinion of expert which is relevant fact and admissible in evidence, is on the other hand.

37. It is necessary to assess the value of birth record and other documentary and oral evidence in eye of law.

38. Birth register is maintained by public officer, who is a public servant, exercising powers under Registration of Births and Deaths Act, 1969.

39. u/s 26 of the said Act, the Registrar and Sub-Registrar are deemed to be public servants. Section 26 of the said Act reads as follows:

26. Registrars and Sub-Registrars to be deemed public servants:---

All Registrars and Sub-Registrars shall, while acting or purporting to act in pursuance of the provisions of this Act or any rule or order made thereunder, be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

40. Section 28 further shows that no suit or proceedings of law pertaining to performance of statutory duties can be instituted against these persons.

41. Any of the provisions contained in this Act, however, do not create any presumption of either character as provided u/s 4 of the Evidence Act.

42. The officer maintaining the register is bound by law in preparation, maintenance and preserving the record. Any failure to maintain the record faithfully is met with penalties. Even the amendment in the record has to be made on the orders of the Court.

43. Considering the purport and totality of the scheme of the Act, namely the Registrar and Sub-Registrar are public officers and they have statutory duty to maintain the record, the entries made by them will have to be attached value of the category "shall presume" and it would be open to the parties to prove to the contrary by proving a fact to the contrary by producing primary evidence if available.

44. In the present case, the birth register as brought on record finds corroboration in the form of school record of admission i.e. general register, the school leaving certificate and the copy of general register pertaining to elder sister of the prosecutrix.

45. In view of foregoing discussion, we are of the considered view that on the basis of law before us that the age of any person could ordinarily be proved by following sequence of worth and value of evidence.

(1) Primary evidence.

(2) Documentary evidence.

(3) Expert opinion.

46. In the present case, the primary evidence in the form of statement of parents could have been available. Any such testimony has not been brought on record. Thus, the possibility of getting proof of age of the prosecutrix by primary evidence is ruled out.

47. Next best evidence of date of birth is by production of record or record maintained by public officer in due course. This record would have presumptive value due to collective effect of the provisions of Registration of Births and Deaths Act, 1969 and the scheme of Registration of Births and Deaths Act as indicated in foregoing paras read with Section 114 of Evidence Act.

48. This documentary evidence is supported by the testimony of the prosecutrix who claims to be 14 years of age at the time of incident.

49. Now the question is whether the opinion/evidence of medical experts could override the worth of evidence of the nature "shall presume" category which is brought on record and is duly proved.

50. The opinion of expert is for all purposes an opinion and is a relevant fact. In our considered view, it being an opinion, will stand far below in pedestal than primary evidence and proof of facts brought forth by public record carrying

presumptive value. Therefore, in our view, an opinion as to age will not be competent to override the worth of evidence and probability as would emerge as a fact from the public record. Evidentiary value of such public record would stand on higher pedestal, value and worth of its being factual.

The collective effect would be that the prosecution has succeeded in proving the date of birth of the prosecutrix to be 29.5.1991 and we hold accordingly.

51. Based on acceptance of such date of birth, the prosecutrix is proved to be below 16 years of age on all material occasions.

52. The aspect of consent of the prosecutrix will become totally insignificant after having held that she was below 16 years of age on the date of last amongst incident whichever.

Are acts of prosecutrix participatory and with free consent ?

53. Though a finding indicated in foregoing paras regarding age of prosecutrix is recorded, it is necessary and useful to examine the aspect of consent as a matter of duty in order to adjudicate all points involved in this case.

54. Considering the testimony of the prosecutrix, vide para 5 of her deposition, which is quoted by us, it is seen that the accused Sheela Bargal, Ramesh Barkase and Ram Salve always used to threaten her that if she refuses to act according to their wishes they would cause trouble to her family. The defence has urged that the photographs referred to by the prosecutrix have not been seized or recovered etc. and the plea of the prosecution and the prosecutrix about the photographs is imaginary. The defence contention needs to be dealt with.

55. If it is a case that accused Ram Salve being unavailable and absconding, the photographs, if any, in his possession could not be recovered. It may also be considered probable that such photographs must have been done away with and hence, those could not be recovered. In view that accused Sheela Bargal and Ramesh Barkase were very well available during investigation, it was necessary for the defence to have explored every possibility such as probabilizing that any such photographs did not exist and the version of the prosecutrix contained in para 5 of the testimony was a bald contention or sheerly fictitious.

56. Keen scrutiny of cross-examination of the prosecutrix or of other witnesses does not reveal that her entire participation in crime in company and association of Ram Salve and/or accused No. 20 and with all other accused persons at different places was an act of sheer violation than due to threat or any other illegal inducement. Even if the contention of accused that prosecutrix joining company of various accused persons was her sheer voluntary act or rather such voluntariness could be inferred, such voluntariness or consent was not due to free will but due to threats as deposed by prosecutrix.

57. As regards contradictions, the same cannot be used so long as those are not proved. The defence has failed to prove any contradiction which would result in

nullifying the prosecution case that the consent was not free.

58. We, therefore, hold that the version of prosecutrix that her consent was not free has gone totally un-challenged and un-refuted inasmuch as there is failure in even bare probalizing a possibility that the story of threat/coercion is sheer telltale.

Has the prosecution proved sexual acts of accused with prosecutrix ?

59. Insofar as the act of the accused persons in having sexual relations with the prosecutrix at various places is concerned, the version of the prosecutrix is criticised as extremely scanty and that it does not contain detailed narration.

60. We have to be mindful of the fact, as judicially noticed as well, that narration of what happened to a woman, and even assuming with consent with the child victim, is a thing of shame. A witness who is very well grown up, cannot be expected to give narration of sexual wrongs done to her which are per-se traumatic, with minutest details or particulars. It shall suffice if she utters the words physical/sexual relationship or rape. Touching body is certainly not contact of sexual organs. It may connote something more rather complete sex with penetration. The ambiguity, if any in that regard, could be magnified by competent cross-examination and thereby probalizing the defence.

61. In present case, probably accused were happy with plea saying that prosecutrix was a sex worker and, therefore, whatever was done was just a "transaction" than a rape.

62. We have no hesitation to believe prosecutrix as to the manner in which she, a child, was dragged into the activity of prostitution with coercion and inducement. It was not a case where she was simply coerced by physical force. It is shown that prosecutrix was submitting to the prostitution and consequent sexual wrong as a result of threat/inducement and being driven in it frequently so as to habituate her to those acts.

63. In the case, where her consent had become insignificant being incompetent in law, her submission to the sexual act, by itself is sufficient to answer the description of rape, it being act of sexual intercourse done with a girl below 16 years. The description of sexual act involving the accused as given by the prosecutrix, in the present case, though extremely brief, constitutes adequate description of the acts of accused persons particularly with aid of Section 114A of the Indian Evidence Act.

64. We, therefore, find that the testimony of the prosecutrix to be wholly worthy of trust.

65. In the result, the testimony of prosecutrix deserves acceptance as statement of whole truth. What else could occur with a child groomed in absence of mother and lured to do an act which she believes to be improper but then coerced to do under the fear which could very easily influence her. It is an age luring

temptation admixed with fear which dragged her to what she became used to and lived in. This initial dragging and later continued indulgence does not formalise into consensual act either. Thus, the facts as crystalised constrain us to believe that the version of prosecutrix gives truth worth trusting. The blemish which she has suffered or as per the version of accused availed or enjoyed, does not malign the trustworthiness of facts as to what had occurred to her.

66. Since this Court has held the age of prosecutrix below 16 years, the spectrum of applicability of various provisions of PITA play their own role. An omnibus charge is framed against all accused under all Sections of Indian Penal Code and PITA.

67. The classification of different accused has to be done on the basis of actual role attributed to each of these accused.

68. The accused who were involved barely as accused indulging in sexual relationship with prosecutrix for separate group. The accused whose role is limited to doing sexual intercourse with prosecutrix and nothing more are accused No. 2 Hardeek Jaggad, accused No. 4 Aakash Rathi, accused No. 7 Ramesh Barkase, accused No. 8 Ajay Kate, accused No. 10 Aaba @ Dnyandev Gondkar, accused No. 12 Abdul Haq Fakir Mohammad Kureshi, accused No. 13 Chetan Bhalgat, accused No. 14, Rajendra Thorat, accused No. 15, Ravindra Thorat, accused No. 19 Ruchin Mehta, accused No. 21 Raghunath Zolekar and accused No. 22 Vasant Pawara.

69. The accused No. 1 Sheela Bargal (deceased), accused No. 3 Satish Pathare, accused No. 5 Tukaram Misal, accused No. 9 Harjeetsingh Jodhsingh Rajpal, accused No. 11 Ramrav Mohaniraj Dengale, accused No. 16 Ramakant Dengale, accused No. 18 Ashok Kasar and accused No. 20 Vilas Karale and absconding accused Ram Salve stand on different footing than the remaining accused, as their role is not restricted to mere sexual intercourse.

70. The accused in the later category named in foregoing para namely accused No. 1 Sheela Bargal, accused No. 20 Vilas Karale and absconding accused Ram Salve are the abettors and conspirators involved in procuring and using prosecutrix as a prostitute who was a girl below 16 years of age.

71. In addition, the accused No. 1 Sheela Bargal had allowed different persons to use her house for having sexual intercourse against payment. Her conduct would fall under the definition of running a brothel.

72. The hotel owner/occupiers named in foregoing para No. 71, who had let the hotel rooms available for the accused persons as occupiers either on account of ownership or user/occupier of such room, for use of prostitution, would also fall in the definition of "running brothel". Therefore, their acts fall in the category of offence of keeping a brothel and "a person" incharge of any such premises, who knowingly allows any other person, the premises or any part thereof as a brothel insofar as offence u/s 5 of the PITA is concerned.

73. Considering the fact that age of the prosecutrix is proved to be below 16 years, the act of the accused running the brothel becomes punishable under proviso (1) to Section 5(1)(b) of PITA. Considering the minor age of the prosecutrix and that she was moved from one place to the other, though the fact that except Sheelabai's place and the house of accused No. 22, the places where the prosecutrix was taken for prostitution, culpability u/s 6 of PITA is attracted. All accused named in second category are, therefore, held to be guilty of offence punishable under Sections 3, 5 and 7 of the PITA.

74. Insofar as the offence u/s 4 is concerned, from the evidence that has come on record, accused No. 1 Sheela, absconding accused Ram Salve and accused No. 20 Vilas Karale are the persons who are proved to be falling in the mischief contemplated by Section 4 i.e. earning their living on the business of prostitution. As in the present case, since Sheelabai is no more and Ram Salve is absconding, the charge for offence punishable u/s 4 of the PITA is proved insofar as accused No. 20 Vilas Balasaheb Karale @ Vilas Chagan Vani are concerned.

75. Role of accused No. 7 Ramesh Barkase is suggested to be similar having some participation with Sheela Bargal, accused No. 20 Vilas Karale and absconding accused Ram Salve. However, version of the prosecutrix does not adequately describe his role, and the evidence as available does not prove that this accused was involved in earning livelihood on the prostitution.

76. Insofar as aspect of abetment of criminal conspiracy is concerned, it is to be kept in mind that the act by the accused persons named in second group in foregoing para No. 71 are liable to be punished u/s 4 of the PITA for their act committed at different times. Their actions are not likely to be matter of knowledge of the strangers. One amongst the strangers who came before the Court and is criticised is P.W. 23 Sanjay Thanekar.

77. This Court does not choose to totally neglect P.W. 23 Sanjay Thanekar's testimony. Evidence of P.W. 23 has a shape of Vilas Karale's extra judicial confession, however, it is vague. It may prove solitary fact that Vilas Karale is engaged in such business. This witness, however, does not prove conspiracy.

78. The act of criminal conspiracy and abetment may not and are not essentially to be a matter of public knowledge unless revealed by an accomplice.

79. In the case of present nature, primarily from the testimony of prosecutrix, totality of conduct of these accused persons will have to be inferred from what they have done. It would have never happened that these persons never met, never agreed or never worked out the modalities and yet secured the result of procuring the prosecutrix for prostitution, making her a prostitute, and furnished her services as prostitute at different places at different times.

80. It is proved that the prosecutrix moved at different places at different times, was escorted on every occasion by one or the other amongst these accused. These facts lead to solitary inference and conclusion that these persons Sheela

Bargal, Vilas Karale and Ram Salve had a meeting of mind for the act of involving the prosecutrix in the act of prostitution and using her as a prostitute.

81. The act of abetment and conspiracy, therefore, will have to be concluded as an inevitable consequence. It is duly proved from the evidence discussed in foregoing para that, accused No. 1 Sheela Bargal, absconding accused Ram Salve, and accused No. 20 Vilas Karale, had conspired to undertake the activity of procuring the prosecutrix for prostitution. The accused No. 20 Vilas Karale is, therefore, liable to be convicted for offence punishable under Sections 120B, 109 and 114 of the Indian Penal Code along with Sections 3, 4, 5(1)(d) and Section 7 of PITA.

82. Insofar as remaining accused namely the first group of accused persons are concerned, their act is limited to the extent of having sexual relationship with the prosecutrix.

83. Now this Court will have to see whether it was necessary for the prosecution to prove that the accused had knowledge of the fact that the prosecutrix was below 16 years of age. For this purpose, it will be necessary to refer to the submissions advanced by the defence in relation to the establishment of mens rea, and need of knowledge of age. In present case, existence of mens rea and knowledge of age of prosecutrix are two sides of same coin.

84. Relying on the judgment of "B" (A Minor) Vs. Director of Public Prosecutions, a submission is primarily advanced by learned Advocate Mr. Vijay Nahar and adopted by all other Advocates, as follows:-

(a) In criminal law in England as well in India, for convicting any accused for any offence, proof of guilty mind-mens rea is imperative.

(b) Group of primary offences under PITA and under Sections 376 and 363 of the Indian Penal Code are primarily age-based offences.

(c) An act of sexual relationship with woman of any age, notwithstanding ethical or moral aspect is not punishable by any law unless it is a forceful act.

(d) The same act, even when it is done with a girl of age below 16 years by itself becomes an offence, however, prosecution will have to prove that accused had knowledge that the female was below 16 years of age.

(e) If the fact that accused had knowledge that the female was below 16 years of age, it will automatically prove the guilty mind, and such act would be punishable being done with guilty mind.

(f) Thus, according to the submissions, unless and until the knowledge of the accused that the prosecutrix being below the age of 16 years is proved, the penal liability for the said act will not be attracted.

(g) The mens rea is liable to be read in clause sixthly of Section 375 of the Indian Penal Code, by reading phrase "with knowledge of age of the prosecutrix",

in the body of language of Section 375 of the Indian Penal Code.

85. It is not in dispute that the defence was unable to lay hand on any judgment of any High Court or Hon"ble Supreme Court of India supporting that proof of fact that accused had knowledge that the prosecutrix was below 16 years is mandatory.

86. Support is sought by relying on other judgments of various Courts to argue that mens rea is the basic ingredient for punishment for any offence generally.

87. An alternate submission is made by the defence that the customers are not expected to make enquiry or ask for birth certificate from the female rendering her services or offering herself for sexual relationship. It is further submitted that the customers would proceed on the physical appearance of the prosecutrix and representations, if any, made by her; and since it is an age-based offence, proof of age of prosecutrix and need of proof of fact that accused knew that the female was below 14 years of age, are strictly imperative.

88. Submissions of the defence of need to prove knowledge of the accused are answered by the prosecution as noted below:

A) The offence under Sections 363 and 376 of Indian Penal Code and PITA are age-based offences.

B) The scheme of law has to be seen from the way the law has emerged and has been interpreted by various judgments of the Hon"ble Supreme Court.

C) Necessity of protecting children from abuse on account of various inbuilt risk are well recognized by law over the century before. In the matter of policy, the object of the enactment is of primary importance and, therefore, the inclusion of mens rea as a condition of conviction cannot be read to be included by interpretation, lest it will defeat the whole purpose of scheme of statute designed for protecting the children who are readily susceptible to the rampant child abuse.

D) This Court may take a judicial note of the fact of trauma a girl child would meet and consequent trauma to the family members, pains and sufferings and even danger of uncalled pregnancy due to sexual act. The last eventuality is possible in case of female alone. Any further dilation of issue as to why female children need protection from the State with a strong and heavy hand does not need any further elucidation.

E) The scheme of Section 376 of Indian Penal Code is a policy legislation. Words such as "knowledge" not found in the Section cannot be infused therein by judicial act.

89. In this background, the learned A.P.P. Mrs. Shinde as well Mr. Javed R. Shaikh, amicus curiae have quoted before us the judgments where it is shown that even in the English judgment i.e. "B" (A Minor) Vs. Director of Public Prosecutions, it was not a case of offence involving rape but it was a case of an offence of an abuse, which was not as grave as rape and the sentence provided

by relevant law was of two years. Either in English Law or in United States as well in India, the offence of rape is considered to be statutory, thereby mandating that the "act" of the accused is punishable and the intention or guilty mind is irrelevant, rather it is not liable to be considered.

90. We, therefore, hold relying on the judgment in case of B (A Minor) Vs. Director of Public Prosecutions (2002 Appeal Cases), that the phrase "with knowledge that prosecutrix is below 16 years of age" cannot be read as if present in clause sixth of Section 376 of the Indian Penal Code. If any such attempt is made, it shall amount to tinkering with the scheme of statute.

91. In the case of present nature where law provides strict liability, the defences are limited. One amongst those is impeaching the trustworthiness of the prosecutrix, and second and best is to impeach the evidence as to the age of prosecutrix.

92. In the present case, the statement of prosecutrix is sufficiently strong on facts and firmly rooted in law in view of Section 114A of Evidence Act to spell out culpability of the accused.

93. Insofar as aspect of age is concerned, it is proved by documentary evidence. To the misfortune of accused persons, it is not a case solely based on medical evidence which could admit difference of opinion to their benefit. Thus, on facts, the accused are rendered with no defence at all. On facts of present case, as age of the prosecutrix is proved to be below 16 years, the aspect of consent, therefore, becomes totally irrelevant.

94. In the result, the accused are held guilty of different offences as below:

95. Insofar as aspect of Section 376(2)(g) is concerned, the acts of the accused of having sexual relations with prosecutrix are individual and, therefore, do not spell out a case of gang rape. We, therefore, modify the impugned order to the extent of setting aside the conviction of all accused u/s 376(2)(g) of the Indian Penal Code.

96. In the result, appeals partly succeed as follows:-

(A) The impugned judgment and order of conviction of all the accused and consequent sentences u/s 376(2)(g) is set aside.

(B) The conviction and sentences of:-

(1) Accused No. 2 Hardeek Lakhamchand Jaggad;

(2) Accused No. 4 Aakash Subhash Rathi;

(3) Accused No. 6 Balkishan Premraj Goel,

(4) Accused No. 8 Ajay Sudhakar Kate;

(5) Accused No. 10 Aaba @ Dnyandeo Bhagchand Gondkar;

- (6) Accused No. 12 Abdul Haq Fakir Mohammad Kureshi;
- (7) Accused No. 13 Chetan Popatlal Bhalgat;
- (8) Accused No. 14 Rajendra Shivajirao Thorat;
- (9) Accused No. 15 Ravindra Shivajirao Thorat;
- (10) Accused No. 19 Ruchin Sharad Mehta;
- (11) Accused No. 21 Raghunath Ramnath Zolekar and
- (12) Accused No. 22 Vasant Mangu Pawara in relation to Sections 120B read with Section 366A and 109 of the Indian Penal Code and under all Sections of Immoral Traffic (Prevention) Act, 1956 are set aside.
- (C) Rest of the convictions of these accused are maintained.

97. Further order deferred for hearing on the point of sentence.

98. Heard Advocates for the appellants as well as learned A.P.P. and learned Special P.P. on the point of sentence. We have classified the accused into four categories in the body of judgment and at the time of conviction. We shall now deal with the second category of all accused who are convicted for the offence u/s 376 of the Indian Penal Code.

99. Accused No. 7 Ramesh @ Ramakant Rajaram Barkase has undergone seven years imprisonment and remaining accused have undergone actual sentence which is less than three years because either they were on bail or they have availed parole and did not return to jail. We have noted many accused who were on parole were required to surrender as the hearing of this appeal had to commence, and this Court had declined to proceed with the hearing unless the accused persons surrender.

100. All Advocates have prayed for leniency considering that the conduct of the accused persons could be considered barely as customers and it is not a case where it is a case of brutal sexual assault by force on a girl below the age of 16 years. They have prayed for lenience on one or the other grounds. Those grounds are, tender age of accused, those who are grown up, those who are older and too old and cannot sustain rigour of jail.

101. In the offence of present nature, the age would not really weigh in the mind of the Court, but for the fact that jail alone is the place recognized by law to lodge any one to punish more than to chastise and improve.

102. We, consider that the case of:-

- (1) Accused No. 2 Hardeek Lakhamichand Jaggad;
- (2) Accused No. 4 Aakash Subhash Rathi,
- (3) Accused No. 17 Aatmaram Ramrao Dengale and

(4) Accused No. 16 Ramakant Ramrao Dengale,
stands on slightly different plane.

All these five accused were between 22 to 25 years of age on the date of commission of offence. By virtue of the fact that they are in the stream of bay flouring between adolescence and maturity. Therefore, they may stand slightly on a different footing than those who have been convicted for the same offence like all other accused.

103. We, therefore, modify the sentence for these five accused named in foregoing para and direct that they shall undergo the sentence of rigorous imprisonment for eight years. The imposition of fine amount by the Sessions Court and the default sentence in payment of fine are maintained.

104. (1) Accused No. 6 Balkishan Premraj Goel;
(2) Accused No. 8 Ajay Sudhakar Kate;
(3) Accused No. 10 Aaba @ Dnyandev Bhagchand Gondkar;
(4) Accused No. 12 Abdul Haq Fakir Mohammad Kureshi;
(5) Accused No. 14 Rajendra Shivajirao Thorat;
(6) Accused No. 15 Ravindra Shivajirao Thorat;
(7) Accused No. 21 Raghunath Ramnath Zolekar; and
(8) Accused No. 22 Vasant Mangu Pawara

were men of fully grown up age having maturity and having family and their dereliction to fall in the illicit relations cannot be conceded to be an act of fallibility due to accident or adolescence. Even they cannot be considered to be totally oblivious to the tender age of the prosecutrix. The culpability of their act undoubtedly falls on graver pedestal.

Therefore, all the accused named in foregoing sub-para do not deserve any latitude. All these accused shall undergo rigorous imprisonment for ten years. The imposition of fine amount by the Sessions Court and the default sentence in payment of fine are maintained.

105. We confirm the sentences as ordered by the Sessions Court on all other accused namely

- (1) Accused No. 5 Tukaram Gena Misal;
(2) Accused No. 7 Ramesh @ Ramakant Rajaram Barkase;
(3) Accused No. 9 Harjeetsingh Jodhsingh Rajpal;
(4) Accused No. 11 Ramrav Mohaniraj Dengale;
(5) accused No. 18 Ashok Babasaheb Kasar; and

(6) Accused No. 20 Vilas Balasaheb Karale @ Vilas Chagan Vani for the offences charged for.

106. We also confirm the sentence to accused No. 20 Vilas Balasaheb Karale @ Vilas Chagan Vani for offences under Sections 120B, 109, 114, 376, 363 of the Indian Penal Code and Sections 3, 4, 5(1)(d) and 7 of the PITA.

107. At the instance of learned Advocate Mr. S.N. Patil holding for learned Advocate Mr. N.V. Gaware for accused No. 13 Chetan Popatlal Bhalgat who is appellant in Criminal Appeal No. 412/2010, a pause is taken to hear the accused No. 13 Chetan Popatlal Bhalgat on sentence.

4th February, 2013.

108. On sentence, learned Advocate Mr. Gaware for the accused Chetan Popatlal Bhalgat prayed for less than minimum sentence prescribed with reference to developments in the case as revealed from affidavits of Yogesh Popatlal Bhalgat, dated 23.11.2012 and 6.12.2012 as well as from the affidavits of the accused Chetan Bhalgat himself. In support of his plea for less than minimum sentence, he placed reliance on judgments of the Hon'ble Apex Court reported as under:

(1) Sukhwinder Singh v. State of Punjab, (2000) 9 SCC 204

Sukhwinder Singh Vs. State of Punjab

(2) State of Punjab Vs. Rakesh Kumar,

(State of Punjab Vs. Rakesh Kumar)

(3) AIR 1988 2111 (SC)

(Mahesh Chand Vs. State of Rajasthan)

(4) Ram Lal and Another Vs. State of Jammu and Kashmir,

(Ram Lal Vs. State of Jammu & Kashmir)

as well as the judgments delivered by this Court in:-

(1) Suresh Balkrishna Nakhava Vs. State of Maharashtra,

(2) Rafik Taksir Vs. State of Maharashtra (Criminal Appeal No. 6/2001 (Goa Bench)

(3) 2005 Bom.C.R. (Cri.) 1332 (Nisha Sanjay Goswami Vs. State of Maharashtra & anr.)

109. Learned Advocate submitted that the marriage of the prosecutrix with accused coupled with conveyance of immovable properties namely, residential premises-Row House No. 4, admeasuring 1100 sq. ft., situate in Vaibhav Royal Co-operative Housing Society Ltd., Village Darale, Nasik Road, Taluka and District Nasik, totally worth Rs. 13,30,000/-; Shopping Premises-Eastern Portion of Shop No. 1, admeasuring 10.29 sq. mtrs. in Mirachandra Apartment, Final Plot No. 47,

T.P. Scheme No. 4, Mouze Savedi, Taluka and District Ahmednagar in favour of the prosecutrix mitigates the malevolence of the crime in question and provides not only hope but assurance to the prosecutrix to lead a respectful life of a housewife. According to him, the release of the accused Chetan Bhalgat on the sentence undergone due to detention in prison during the pendency of this case i.e. about 31/2 years period would meet the ends of justice as it would not only make the accused suffer the imprisonment for the crime but also give him opportunity to rehabilitate the prosecutrix as a housewife.

110. Learned Special P.P. Mr. Sawant for the State did not dispute the facts disclosed through the affidavits. However, he submitted that the marriage of the accused Chetan Bhalgat with the prosecutrix need not be construed as a mitigating factor for awarding punishment less than the minimum prescribed by law. He placed reliance on the judgment delivered by the Hon"ble Apex Court in State of M.P. Vs. Bablu Natt,

111. Affidavit of the accused Chetan Bhalgat dated 7.1.2013 reveals that on 19.5.2011 he was duly married to prosecutrix as per Hindu rites in presence of family members, close relatives and friends at village Dongargan Sitache, Taluka and District Ahmednagar and this marriage was duly registered at Sr. No. 29 of Volume II on 7.6.2011 with Registrar of Marriages, Ahmednagar vide certificate of registration of Marriage dated 7.6.2011, issued by the Registrar of Marriage, Ahmednagar Municipal Corporation, Ahmednagar.

112. Affidavit dated 6.12.2012 of Yogesh Popatlal Bhalgat, brother of the accused Chetan Bhalgat speaks of registered gift deed dated 5.12.2012 transferring Shop No. 1, situate in Mirachandra Apartment Final Plot No. 47, T.P. Scheme No. 4, Savedi, Ahmednagar in favour of the prosecutrix executed by him as a duly constituted attorney of the accused Chetan Bhalgat in favour of the prosecutrix. Another affidavit of Yogesh Bhalgat, dated 23.11.2012 places on record the fact of willingness of the family members of the accused Cheten i.e. his brother, the deponent, his mother Aruna and his sister Anupama to part with the properties or the share therein of the appellant/accused Cheten in favour of the prosecutrix. It also brought forth the fact of payment of Rs. 21,30,000/- made to the prosecutrix by the appellant/accused Cheten by Cheque/Demand Draft/Cash.

113. A question would, therefore, arise whether all that is done by the appellant/accused Chetan would earn him the benefit of proviso to Section 376 of the Indian Penal Code, which permits the Court to impose a sentence of imprisonment for a term less than minimum prescribed by law for adequate and special reasons. Reading of the words of law and its interpretation as revealed through the judgments cited by the rival parties does reveal that the law permits imposition of a sentence in the case of rape for a term less than minimum prescribed only when there are adequate and special reasons available through the facts of the case to do so.

114. Needless to state that each criminal case has a unique factual matrix and

interpretation and application of law for dispensation of justice in every criminal case is vis-a-vis such factual matrix and, therefore, there cannot be any straitjacket formula for imposing sentence in the crimes affecting human bodies particularly affecting women. However, it can be seen that law takes stern view in the crimes concerning rape not only for the reason of the physical harm that it causes to a woman but also for she being left destitute to suffer life long mental trauma. From wider perspective, rape is an offence which affects a social fabric by playing affront to human dignity and also at times encouraging criminality. Keeping in mind such consequences on personal and social life the rape has, it is necessary to answer the question raised in the present controversy.

115. In Bablu Natt's case (supra), the Hon''ble Apex Court reversed the High Court's verdict of imposition of less than minimum sentence on the ground of misreading of the facts viz.

- (1) prosecutrix mutely moving with the accused from place to place and living with the accused for several days,
- (2) prosecutrix swearing an affidavit mentioning her age to be 18 years and living with accused as his wife.

116. In Rakesh Kumar's case, the grounds:-

- (1) love affair between the victim of rape-a minor below 16 years of age and the accused.

(2) victim having settled in life, did not find favour with the Hon''ble Apex Court for maintaining the lesser than minimum sentence-reduction of sentence to the period undergone. The Hon''ble Apex Court sentenced the accused to undergo three years rigorous imprisonment and fine of Rs. 10,000/- with further direction to pay sum of Rs. 3000/- out of the fine amount to the victim. However, in Sukhwinder Singh's case (supra), the Hon''ble Apex Court saw adequate and special reason to invoke the proviso to Section 376 of the Indian Penal Code in the given facts:

- (i) the prosecutrix, not more than 16 years of age, had willingly left her parent's house to be with the accused from neighbouring village and was consenting party to the act of sexual intercourse,
- (ii) Since then had got married to the accused and did not want the matter to be carried any further so as to lead happy and healthy married life. Interest of the prosecutrix weighed in the mind of the Hon''ble Apex Court heavily in imposing the sentence less than minimum prescribed.

117. The evidence points out that the genesis of the culpability of the accused No. 13 Chetan Popatlal Bhalgat did not spring from the insanity of lover, but was a plain lust supported by pecuniary ability namely he could pay for what he had craved for. Whatever has happened after the pronouncement of the guilt of the accused No. 13 Chetan Bhalgat by the trial Court appears to be born out of the

compulsions of circumstances, both for the accused No. 13 Chetan Bhalgat and a preferred option than to opt for misery to be chosen by the prosecutrix, the victim of the crime. This can only force us to think more or arouse some sympathies. At the same time, due care needs to be taken to avoid such sympathies being misinterpreted as a ticket for freedom purchased with economic might. Now, the provision for sustenance and consequent rehabilitation of the victim of the crime has been made and it is also her test to remain faithful to the matrimonial obligations while her husband continues to remain in jail for some more time to undergo the sentence for wrong he did to the society at large.

118. The plea for the appellant/accused No. 13 Chetan Popatlal Bhalgat on the lenience in sentence undergone does not carry same weight of facts as was in existence as to the facts of the cases revealed in the precedents cited in that regard. In criminal cases, each case has its own face, posture and portray. None could be a clone of other. However, as a token of having done something restitutive to her for material life to the prosecutrix, the sentence imposed on accused No. 13 Chetan Popatlal Bhalgat may be reduced a little.

119. We accordingly reduce the sentence of accused No. 13 Chetan Popatlal Bhalgat to eight years rigorous imprisonment with fine amount and in default sentence remaining the same.

120. The operative order in this appeal shall be in terms of para Nos. 97, 104, 105, 106, 107, 120. Before parting with the judgment, we must and we do record our deep appreciation towards the commandable efforts and assistance rendered to the Court by Advocate Mr. Javed R. Shaikh as amicus as well as by Mrs. Vaishali A. Shinde, A.P.P. by analysing the facts and citing appropriate precedents and information. The act of well studied submissions advanced by learned Advocate Mr. Javed R. Shaikh as amicus deserves special recognition and we, therefore, record our whole-hearted appreciation.

Insofar as the efforts of lawyers on defence as well as prosecution side are concerned, those too are also equally commendable. All concerned lawyers have put in their efforts and rendered the best possible assistance.