Presented on :- 28-06-2019,
Registered on :- 28-06-2019,
Decided on :- 07-02-2020,
Duration :- ***00-Y.07-M:*** 09-D

Exh.:

IN THE COURT OF SPECIAL JUDGE, GONDIA.
(Presided over by Suhas V. Mane)

SPECIAL (POCSO) CASE NO.45/2019.
CNR NO.MHGO010007082019.

The State of Maharashtra through
Police Station Officer, Deori,
Tah. Deori, Distt. Gondia. ***PROSECUTION***

- ***VERSUS***-

Sonu @ Ashwin S/o Vitthal Meshram, Aged about 29 years,
Occu. Agriculturist,
R/o- Ward No.9, Surabhi Chowk,
Deori, Distt. Gondia. ***ACCUSED***

CHARGE FOR THE OFFENCE UNDER SECTION 376 (AB) OF THE INDIAN PENAL CODE AND SECTION 6 AND 10 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.

Ld. DGP Shri. Chandwani for the State.
Ld. Advocate Shri. Gayakwad for accused.

JUDGMENT

(Delivered on this 07th day of February, 2020)

1] Accused is facing trial for having committed the alleged offences punishable under Section 376 (AB) of the Indian Penal Code and under Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012.

2] Brief facts of the prosecution case are as under:-

That, Pushpa Meghraj Turkar, her husband Meghraj Turkar, son Rajat aged about 7 years and daughter Himanshi aged about 4½ years were staying at Surabhi Chowk, Ward No.9, Deori. Brother-in-law of Pushpa Turkar namely Santosh is also residing in the vicinity of the house. At a distance of about 50 to 60 feet from the house of Pushpa Turkar, there is house of Sonu @ Ashwin Vitthal Meshram. In between the house of Pushpa Turkar and Sonu @ Ashwin Meshram, there is house of Santosh Turkar. Sonu @ Ashwin Meshram is known as 'Sonu Kaka' by the family of Pushpa Turkar.

3] On 01/06/2019 at about 5:30 a.m. Meghraj Turkar left the home for milling of paddy. Pushpa Turkar was present in the house. Both of her children i.e. Rajat and Himanshi were playing in the courtyard of the house in between 6:00 a.m. to 6:30 a.m. and Pushpa Turkar was busy in household work. After 10-15 minutes of 6:00 a.m. Sonu @ Ashwin Meshram called Himanshi towards his house. Himanshi did not went to his house. Again Sonu @ Ashwin Meshram gave call to Himanshi-the daughter of Pushpa. That time Himanshi asked her mother and told that Sonu Kaka @ Ashwin is calling her. That time Pushpa Turkar has prohibited Himanshi from going to the house of Sonu @ Ashwin Meshram and asked her to play in the courtyard. By that time she went for taking bath. At about 7:35 a.m. when she completed bath, her daughter Himanshi came towards home. She was crying and told that Sonu Kaka gave chocolate to her and made her panty dirty (माझी पॅंटी गंदी गंदी केली). Pushpa Turkar took Himanshi for bath and noticed that something sticky (चिकट चिकट) was found on the panty and therefore she asked Himanshi what has happened.

Himanshi told her that Sonu Kaka slept on her person. When Pushpa Turkar verified the panty of Himanshi, she noticed that semen was lying on the panty. Himanshi was complaining of burning sensations at her private part, therefore Pushpa Turkar saw private part of Himanshi and found that there was semen and blood. Blood was oozing from the private part of Himanshi, therefore Pushpa Turkar immediately gave phone call her husband and called him. After arrival of her husband, she went to the police station and filed report at about 12:00 noon.

4] On the basis of said report, crime was registered for the offence punishable under Section 376 (2)(j) of the Indian Penal Code read with Section 4, 8, 12 of the Protection of Children from Sexual Offences Act, 2012 at Cr. No.116/2019.

5] During the course of investigation, the Investigating Officer visited the spot, effected spot panchnama, seized the clothes of victim in the presence of panchas, sent the victim for medical examination alongwith letter, arrested the accused, got

the examination of accused to ascertain the capacity of performing sexual intercourse, recorded statements of witnesses, obtained blood samples of accused and victim, samples of vaginal swab, nail clippings, semen and sent it for analysis and after completion of investigation, filed charge-sheet in the Court of Sessions Judge, Gondia.

6] Accused appeared in this Court. Charge Exh.06 was read over and explained to the accused in vernacular. He understood it and pleaded not guilty. His plea is recorded at Exh.07.

7] To bring home the guilt of accused, prosecution has examined in all fifteen witnesses and has relied on the contents of complaint Exh.13, FIR Exh.14, spot panchnama Exh.25, panchnama regarding seizure of clothes of the accused Exh.26, panchnama regarding seizure of clothes of the victim Exh.30, panchnama regarding seizure of two blood samples, one vaginal swab, urine sample and nails produced by LPC Pandhare at Exh.42, five samples of blood, nail, swab, pubic hair of the accused seized under

panchnama Exh.43, examination report of doctor at Exh.46, final opinion of the doctor Exh.50, certificate about nails scratching over the cheeks of victim Exh.54, map of the spot of incident Exh.56, report of examination of accused Exh.63, date of birth certificate of the victim Exh.65, tax receipts of house No.1489 and 1487 of village Deori Exh.74 and 75, statements of witnesses recorded under Section 164 of the Code of Criminal Procedure, DNA report and C.A. reports Exh.95, 96, 97, 98, 99, 100, 101, 102, 103, 104.

8] Defence of accused is that there was dispute between complainant Pushpa Turkar and the accused. Therefore their relations were strained due to the sewage water and storing of waste material of the house of accused before the house of complainant. Therefore he is falsely implicated in the crime. In short, the defence of accused is of total denial.

9] Considering the facts of prosecution case and defence of accused, following points arise for my determination, and I have recorded my findings against it for the reasons recorded below:-

POINTS	FINDINGS
1] Does prosecution prove that on 1st June, 2019 at about 7:30 a.m. in the house of accused at Surbhi Chowk, Deori under the pretext of giving chocolate, accused called victim Himanshi aged about 4 years 6 months to his house and committed rape on her against her will and thereby committed an offence punishable under Section 376 (A)(B) of the Indian Penal Code ?	In the affirmative.
2] Does prosecution prove that on 1st June, 2019 at about 7:30 a.m. in the house of accused at Surbhi Chowk, Deori, accused committed aggravated sexual intercourse on victim Himanshi aged about 4 years and 6 months who is below 12 years of age and committed an offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 ?	In the affirmative.

3]	Does prosecution prove that on 1st June, 2019 at about 7:30 a.m. in the house of accused at Surbhi Chowk, Deori, accused committed aggravated penetrative sexual assault on a minor girl Himanshi aged about 4 years and 6 months thereby committed an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ?	In the affirmative.
4]	What offence is proved against the accused?	Offences under Section 376 (AB) of the Indian Penal Code and under Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 are proved against the accused.
5]	What order?	As per final order.

R E A S O N S

10] **AS TO ALL POINTS**:- PW-1 Pushpa Turkar is

the mother of victim. She has stated on oath at Exh.12 that date of birth of her daughter Himanshi-the victim is 13/11/2014. The date of birth certificate issued by Registrar, Birth and Deaths, Nagar Parishad, Bhandara about the date of birth of victim Himanshi discloses that date of birth of Himanshi is 13/11/2014. In the entire evidence and the defence of accused, it is not denied that date of birth of victim Himanshi is 13/11/2014. It is nowhere denied that age of victim Himanshi on the date of alleged incident was 4 years and 6 months. It is clear that on the date of alleged incident victim Himanshi was girl below 12 years of age. As per the provisions of Protection of Children from Sexual Offences Act, 2012, Himanshi was a child as per Section 2(d) of the Protection of Children from Sexual Offences Act, 2012 as her age is less than 12 years.

11] It is the prosecution case that on 1st June 2019 around 7:30 a.m., accused Sonu @ Ashwin called Himanshi-the victim on the pretext of giving chocolate and took her to his house, made her to lie on the bed, removed his towel and pant and removed the panty

(चड्डी) of Himanshi and inserted his private part in the private part of Himanshi. After getting pains, Himanshi started crying and went to her house. There her mother made inquiry and after getting information from Himanshi, complaint is filed. The admitted facts are like this, Pushpa Turkar-the complainant, her husband, daughter Himanshi and son Rajat were staying in the house at Surbhi Chowk, Deori which is at a distance of 50 to 60 feet from the house of accused Sonu @ Ashwin Meshram. In between the house of accused and complainant Pushpa, there is house of brother-in-law of the complainant namely Santosh Turkar. Accused Sonu @ Ashwin is known as 'Sonu Kaka' by the family of complainant including the victim.

12] It has come in the evidence of PW-1 Pushpa at Exh.12 that on 1st June 2019 her husband left house at about 5:30 a.m. for milling of paddy. She was present in the house. In the morning her two children Himanshi and Rajat were playing in the courtyard of the house. She was busy in the household work. Himanshi came to her and told her that Sonu Kaka is

calling her, whether she should go with him. She told that Himanshi should not go and play in the courtyard till she completes her bath. When she was taking water for bath, she heard Sonu @ Ashwin calling Himanshi by saying "हिमांशी इकडे ये". She has not paid any attention and went for taking bath. When she completed bath, Himanshi came. She was crying. Himanshi's pant was half removed. When she asked Himanshi, Himanshi told "सोनू काकाने गंदा गंदा चिकट चिकट केले" (Sonu Kaka made dirty dirty and sticky sticky). Thereon Pushpa said to Himanshi "तू गंदी झालीस तर इकडे ये बेटा मी तुला आंघोळ घालते". Himanshi removed her pant and came for bath. When water was showered on her for bath, Himanshi started shouting and cried loudly. Himanshi said she is having burning sensations and pains (मला आग होते, दुखते). When she asked "कुठे दुखते", Himanshi showed her private part by putting her hand.

13] When she saw her private place, there was blood and thicky white liquid. She realized something wrong has happened with her daughter. She also noticed Himanshi's pant. On Himanshi's pant, there were stains of white thicky liquid and nails scratching

over the cheek of Himanshi. Himanshi told her that Sonu Kaka called her for eating chocolate to his house, Sonu Kaka took her on bed and he removed his towel and pant and removed her pant and "आपली सू ची जागा माझ्या सू च्या जागेला लावली" and "त्याची सू ची जागा लावून चिकट चिकट आणि गंदा गंदा केले". When she asked Himanshi whether you have not cried or shouted, Himanshi told that she shouted but Sonu Kaka pushed her mouth. Thereafter PW-1 Pushpa called her husband, informed him about the incident and the complaint was filed. Himanshi was taken to the Rural Hospital Deori first. As the facilities were not available at Rural Hospital, Deori, she was taken to BGW Hospital, Gondia for medical examination. Medical check-up was made. After medical examination, complainant Pushpa, her husband and victim Himanshi went to Deori Police Station. Spot panchnama was effected etc.

14] In the lengthy cross-examination of PW-1, it was tried to suggest that the house of accused is not at a distance of 25 to 30 feet, but it is at a distance of 50 to 60 feet. Her evidence is challenged on the ground of delay and concoction due to dispute between accused

and complainant on account of sewage water and storing of waste material of the accused infront of the house of complainant. The defence of accused that there is delay of about 5 hours in filing FIR and it is not explained properly, cannot be accepted. It is true that the alleged incident took place at about 7:30 a.m. and the FIR is lodged in the afternoon at about 12:30 hours i.e. after 5 hours, but the reason for delay is explained by the complainant in her complaint as well as in her oral evidence before the Court. Her husband was out of station. She gave phone call to her husband and after arrival of husband, inquiry was made with the accused and thereafter the complaint was lodged.

15] It is the arguments of learned advocate for accused that as there is delay of 5 hours, the complaint is false and is concocted one. On the contrary, learned DGP submits that in India women are slow and hesitant to complain of sexual assaults. If the prosecutrix is married woman, she will not do anything without informing her husband. Therefore, merely because the complaint is lodged after 5 hours, does not raise the inference that the complaint is false. To

support this contention, learned DGP relied on the observations of Hon'ble Supreme Court in the case of ***Karnel Singh Vs. The State of M.P.*** reported in ***1995 AIR 2472***. I have gone through the said case law. The Lordships of Hon'ble Supreme Court observed that there is no merit in the contention that there was considerable delay and sufficient time for tutoring and therefore evidence of prosecutrix could not be believed. It is observed that the submission overlooks the fact that in India women are slow and hesitant to complain of such assaults (sexual) and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint is false. By considering the facts of the case that the husband of complainant was out of station and immediately after arrival of husband, complainant has filed report in the police station, I am of the opinion that the objection of the defence that because of delay in filing FIR, the evidence of complainant is not believable.

16] It is not mere delay which is to be considered

while assessing the credibility of the witness. It is necessary to consider many other aspects such as whether there was any reason for false implication, whether there are any circumstances pointing out that the conduct of the complainant is very unnatural and prejudice against the accused.

17] In the present case, the accused and complainant are residing at a distance of 50 to 60 feet. There is no complaint between accused and complainant prior to the incident. On the day of incident also the behaviour of complainant was very plain. Initially she prevented her daughter from going to the house of Sonu Kaka and started taking water for the bath. That time she heard that Sonu Kaka i.e. accused calling her daughter Himanshi. But she has not paid any attention or rushed in the courtyard to prevent Himanshi from going to the house of accused Sonu @ Ashwin nor she has made any grievance with accused Sonu @ Ashwin as to why he is calling her daughter Himanshi. It might be that complainant has thought that being a neighbour Sonu @ Ashwin might be calling Himanshi and she neglected the act of calling

Himanshi by accused. If at all there was any grievance or any prejudice against the accused, the complainant would not have acted in such a simple manner and would not have neglected the act of accused calling her daughter. Certainly she would have made grievance with accused and quarreled with accused as to why he is calling her daughter, but such things did not happen. Further when Himanshi-the victim came to the house and she was crying and told her mother PW-1 Pushpa that "सोनू काका ने गंदा गंदा चिकट चिकट केले", still she has given full bath to her daughter Himanshi. If at all there was any intention to create evidence against the accused, complainant Pushpa would not have given full bath to her daughter, but she would have refrained from giving bath and she would have kept the evidence in-tact. But these things have also not happened. Therefore in the facts, it cannot be said that there was any grudge or grievance or prejudice of the complainant Pushpa against accused. It is not disputed even by the accused that on 01/06/2019 husband of Pushpa has gone out of station early in the morning. There is delay in filing FIR only because

husband of the complainant was not present in the town. After seeing Himanshi crying and observing some red marks and white discharge near private part of Himanshi, complainant has immediately given phone call to her husband which is consistent to the observations of Hon'ble Supreme Court in Karnel Singh's case (Cited Supra) that in India women are slow and hesitant to complain about the assaults and if she is a married woman, she will not do anything without informing her husband. Merely because she waited till arrival of her husband, does not make her evidence false and unreliable.

18] Learned advocate for accused pointed out from the evidence of PW-1 Pushpa that she noticed some blood and thicky white liquid on the private part of Himanshi. Whereas, PW-8 Dr. Sweta Madanlalji Maskare has admitted in the cross-examination that there was no bleeding from vulva. Therefore according to learned advocate for accused, the complainant is speaking lie and her evidence is not acceptable. It is to be noted that in the evidence of PW-1, she has stated that “I saw her private place, there was blood and

thicky white liquid". Thereafter she has stated that she gave her complete bath. PW-1 has never stated that blood was oozing from the vulva or the private part of Himanshi. She has just seen the presence of blood and thicky white liquid and she has reason to see this private part because Himanshi was complaining of pains and burning sensations. PW-8 was asked question that there was no bleeding from vulva and she has answered in the affirmative. That doesn't mean that PW-1 is speaking lie. Learned advocate for accused further submitted that according to PW-8 Dr. Sweta Madanlalji Maskare at Exh.44, there is evidence of possibility of attempt of sexual intercourse or assault on the girl. Learned advocate for accused has heavily relied on this certificate Exh.50 issued by PW-8 about the evidence of possibility of attempt of sexual intercourse. Learned advocate for accused relied on the judgment of Hon'ble Karnataka High Court in the case of ***Mr. Mahalesh G. Goudar Vs. The State of Karnataka*** reported in **Indian Kanoon** which is the judgment of Criminal Appeal No.100189 of 2016 decided by Hon'ble Single Bench of Karnataka High Court on

13th August, 2018. According to learned advocate for accused, in the case of ***Mr. Mahalesh G. Goudar Vs. The State of Karnataka*** (Cited Supra) the evidence of doctor that attempt to penetrate cannot be ruled out. That means, there was evidence of attempt made by accused to penetrate assault on the victim. Still it was not accepted by the Hon'ble High Court of Karnataka that it proves ingredients relating to offence under Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 and in that case, instead of Section 3(a) of the Protection of Children from Sexual Offences Act, 2012, the offence under Section 7 of the Protection of Children from Sexual Offences Act, 2012 was held to be proved and the sentence accordingly was changed. I have gone through the said case law. In the facts of the said case, the doctor has not specifically stated in his opinion that attempt to penetrate sexual assault on the victim cannot be ruled out. It is observed by His Lordship of Hon'ble Karnataka High Court that in that case the prosecution has not putforth the cogent, corroborative and consistent evidence to probabilize, as that the accused has penetrative sexual assault on the

victim. Therefore it was observed that sexual assault attracts offence under Section 7 of the Protection of Children from Sexual Offences Act, 2012 and not under Section 3 (a) of the Protection of Children from Sexual Offences Act, 2012.

19] Learned advocate for accused has also contended that the evidence of doctor is not sufficient to prove the penetrative sexual assault. Therefore there is no sexual assault at all. There is no penetration and no offence under Section 376 of the Indian Penal Code has been committed. In support of this contention, learned advocate for accused has relied on the observations of Hon'ble Supreme Court in the case of ***Prahlad Vs. State of Rajasthan*** reported in ***2018 STPL 13046 SC***. I have gone through the said case law. In the facts of the said case, there was no evidence relating to penetration into vagina, mouth, urethra or anus of a child or any part of the body and the doctor has opined that there is no other reliable evidence to prove the charge and in the facts of the said case, Their Lordships of Hon'ble Supreme Court has observed that there is no penetration and no offence is committed,

therefore the conviction for the offence under Section 3 and 4 of the Protection of Children from Sexual Offences Act was set-aside.

20] In the present facts, there is direct evidence of victim Himanshi at Exh.64. This Court has taken care before recording the evidence of Himanshi and asked several questions whether Himanshi is in position to give rational answers to the questions put to her and after coming to the conclusion that Himanshi is able to give rational answers to the questions put to her, her evidence was recorded without administering oath. It was in the question-answer form. Himanshi has answered in reply to the question;

Relevant portion of evidence of PW-13 is reproduced here.

"Que. What Sonu had done with you ?

Ans.: Sonu removed his pant, my pant and put his private part in my private part.

In the cross-examination by learned advocate for accused, further question was asked to Himanshi;

Que. Did you come home crying because Sonu Kaka has beaten ?

Ans.: No. गंदा केले.

In further question;

Que. Did your mother tell you that Sonu Kaka made you dirt ?

she has answered in the negative.

Another question was put to the victim Himanshi;

"Que. Do you tell at the instance of mother that सोनु काकाने त्याची सु ची जागा माझया सु च्या जागी लावली व गंदा गंदा केले?

she has answered in the negative."

Further she was asked the question "Whether she is telling false at the instance of her mother ?", she has denied and asserted that she is telling correctly.

In further question;

Qu. Whether she was telling lie to the police on the say of Mummy and Papa ?

she answered in the negative and replied assertively that I am telling truth."

21] The evidence of Himanshi directly proves that accused has inserted his private part in her

private part and there is penetration. Conduct of Himanshi that she was crying when water was poured at the time of bath and she complained of pains and burning sensations to her mother sufficiently proves that there was penetration. If the definition of penetrative sexual assault as given in Section 3 of the Protection of Children from Sexual Offences Act is considered, the evidence of PW-13 the victim supported by the evidence of PW-1 and PW-8 proves the ingredients of Section 3(a) of the Protection of Children from Sexual Offences Act. Under Section 375 of the Indian Penal Code penetration is sufficient to cause offence of rape. The evidence of PW-13 the victim supported by the evidence of PW-1 and PW-8 proves the penetration and ingredients of offence of rape.

22] The contention of learned advocate for accused that there was no penetration and doctor has given opinion that there was only possibility of penetration and therefore no offence is made out, cannot be accepted.

23] It is to be noted that PW-8 is not the witness

on facts. She is expert witness. Her evidence is in the form of opinion and not conclusive. The observations of Hon'ble Karnataka High Court in the case of Mr. Mahalesh G. Goudar (Cited Supra) will not be helpful to the accused in the present facts because in that case, there was no cogent, corroborative and consistent evidence about the penetrative sexual assault on the victim. In the present case, the evidence of PW-13 Himanshi-the victim of the crime is clear and unambiguous on the point of penetration. Therefore with due respect to the observations of Hon'ble Karnataka High Court, I am of the opinion that, that case law will not be helpful to the accused in the present facts.

24] Further the judgment in the case of ***Prahlad Vs. State of Rajasthan*** reported in ***2018 STPL 13046 SC*** will not be helpful to the accused as it differs from the facts. In that case, there was no evidence about penetration and in the evidence of doctor, there was observation that no other reliable evidence was found about penetrative sexual assault, but in the present case, though the evidence of doctor is different, still the

evidence of victim herself is sufficient to prove the penetration.

25] There is no reason to discard the evidence of PW-13 the victim. There is no material on record to suggest that PW-13 is a tutored witness. There is no evidence on record that why a small girl of 4 ½ years will depose against her neighbour to whom she was calling as Sonu Kaka. There is no reason for the complainant PW-1 to file false complaint of such a severe nature which will affect the future of her daughter. If the evidence of PW-8 is considered, she has stated that she was unable to tell whether the hymen is in tack or otherwise because there was much swelling. Doctor has noticed swelling and redness and this fact is clarified by the questions put by the advocate for accused to the witness PW-8. Those are;

"Que. Is it correct to suggest that hymen was in tact?

Ans.- I am not able to see the hymen because there was so much swelling.

Que Dr. you have not mentioned about the swelling in your certificate?

Ans.- Hyperemic means swelling plus redness."

26] In Para 2 of the evidence of PW-8, it has come on record that there was redness and hyperamic reason around the vulva. There was swelling on the vulva. (vaginal part but as victim is very small it is called as vulva). There were abrasions on the right cheek of the girl. Victim was referred to Forensic Medicine Department. She (victim) was also referred to Pediatric Department. PW-8 has given final opinion that there is evidence of possibility of attempt of sexual intercourse or assault on the girl. It was suggested to the doctor by accused that medical report of the victim and final opinion is not in accordance with medical jurisprudence. But during the course of arguments, nothing is put-forth on record to suggest that there is any mistake in the report of C.A. reports of the victim and final opinion according to medical jurisprudence. The witness has vehemently denied that initially she has not noticed the attempt of sexual intercourse, therefore she reserved opinion. But has answered that "I was not confirmed about the attempt of sexual intercourse initially because the girl is very small and it was necessary to obtain the report, therefore she

reserved her opinion." This evidence of PW-8 supports the prosecution case that victim was subjected to penetrative sexual assault and therefore the doctor found redness, swelling on the vagina.

27] The evidence of doctor is in the nature of opinion and it is not binding and conclusive. Merely because the doctor has opined that there is possibility of attempt of sexual intercourse, it cannot be said that the opinion is true and acceptable. When the doctor observes that there is swelling and redness on the private part on the vagina which is called as vulva in the medical terms because of the tender age of the victim if compared with the evidence of PW-13 that accused inserted his private part in her private part and " गंदा गंदा केले" and evidence of PW-1 that when water was poured for bath on Himanshi, she started shouting and cried loudly and complained of having burning sensations and pains, if all these parts of evidence are considered together, the opinion of the doctor that there is possibility of attempt of sexual intercourse, is not correct. It all proves that there was sexual intercourse by penetrating penis into vagina. The

doctor may not be knowing the provisions of law and therefore she might have opined that there was possibility of attempt of sexual assault. But in fact it is an opinion supporting to the prosecution case that there was sexual assault and penetrative assault as defined in Section 3(a) of the Protection of Children from Sexual Offences Act and which is sufficient to prove ingredients of rape under Section 375 of the Indian Penal Code.

28] Learned advocate for accused vehemently argued that there are many reasons for having swelling and redness on the vagina. Doctor has admitted in Para 5 of the cross-examination that the redness and swelling may cause due to unhygienic condition, disease and etching by own nails. It is true that sometimes rough undergarments may cause redness and swelling to the vulva. Technically it may be true that there are many reasons for having redness and swelling, but in the facts of this particular case, there is no suggestion given to PW-1 Pushpa by the accused that Himanshi was in unhygienic condition or was suffering from disease, etching by her own nails or her

undergarments were rough. Merely because there are many possibilities of having redness and swelling on the vulva and those possibilities are admitted by the Medical Officer, does not mean that the redness and swelling on the vulva of the victim was not due to sexual penetrative assault. The evidence of victim on these points cannot be brushed aside. The victim was firmed in stating that she is not deposing on the say of her parents and her mother has not taught her to tell about "सोनू काकाने त्याची सू ची जागा माझया सू च्या जागेला लावून चिकट चिकट आणि गंदा गंदा केले". Therefore, the arguments of learned advocate for accused that there are many reasons for swelling and redness as admitted by PW-8 will not be helpful to him in the present case to discard and disprove the evidence of PW-1 Pushpa and PW-13 Himanshi.

29] The evidence of PW-13 and PW-8 is not contradictory to each other. Even PW-8 has noticed swelling and redness over the private part (vagina/vulva) of the victim. The reason for such redness and swelling is the penetration caused by the insertion of penis of the accused in the vaginal part of

the victim. The oral evidence of PW-8, her final opinion Exh.50 and DNA report Exh.103 proves that there was penetrative sexual assault on the victim.

30] Learned advocate for accused challenged the DNA report Exh.103 and other CA reports by pointing out the evidence of PW-15 the Investigating Officer on the point of DNA kit. PW-15 has deposed that on 04/06/2019 he issued letter to Medical Officer, Rural Hospital, Deori for obtaining nail clippings of the accused. When the letter was issued, Medical Officer was not available on 04/06/2019, therefore the letter was issued on the next date. Medical Officer orally informed that for taking nail clippings of the accused, DNA kit be required which is to be obtained from FSL, Nagpur. Therefore correspondence was made to the office of FSL, Nagpur for getting DNA kit. The samples and nail clippings were directly sent to the office of FSL, Nagpur without taking entries of the samples and nail scraping in the property register of the police station. The property register number was not given to the blood samples and nail scrapping and those were forwarded to the office of FSL, Nagpur without any

number.

31] By pointing out this evidence of PW-15, it is the contention of learned advocate for accused that on the basis of which PW-8 has given her opinion that document itself is doubtful. There is possibility of tampering the nail scrapping and blood samples of the accused at the time of DNA analysis. Therefore DNA report is not free from doubt. It cannot be relied upon for the purpose of conviction. On the contrary, it is the contention of learned DGP for State that PW-15 has stated on oath that he received nail clippings of the accused and blood samples of the victim on 07/06/2019 in the morning at about 2:30 a.m. Samples and nail clippings were sent directly to FSL, Nagpur through Police Constable Kamlesh Raut. Duty pass was issued to Kamlesh Raut and letter was issued to FSL, Nagpur. The letter is at Exh.93.

32] On perusal of DNA report Exh.103, it is clear that the DNA profile matches with the semen of the accused and semen found on the knicker of the victim. Vaginal swab matches with the blood samples of

Himanshi. Merely because the samples and nail clippings were not registered in the property register at the police station, it cannot be said that those are not the nail clippings and blood samples of victim and accused. It is lapsed in the investigation on the part of Investigating Officer. He should have registered those parcels in the property register of the police station and then should have forwarded it to the office of FSL, Nagpur. Therefore, I do not find any substance in the arguments of learned advocate for accused that the final opinion of PW-8 is based on DNA profile Exh.103 and Exh.103 is not acceptable as true and correct one. Irrespective of all these facts, the opinion of Medical Officer is not binding on the Court. Court has to decide whether it should be accepted or not, after considering the other evidence on record.

33] As discussed earlier, the evidence of PW-13 the victim Himanshi coupled with the observations of doctor that she found swelling and redness over the private part of the victim, the observations of mother that Himanshi cried after water was showered and complained of burning sensations and pains, if

considered together, there is no discrepancy in the evidence of PW-13 and the observations of PW-8. The evidence of PW-13 is free from any tutoring. It is genuine and corroborated by the evidence of PW-8. Therefore, I am of the opinion that the arguments of learned advocate for accused in this regard are not acceptable.

34] There is corroboration to the evidence of PW-1 and PW-3 on the point that accused Sonu Kaka called Himanshi to his house and after the alleged incident, Himanshi came to house and she was crying. PW-3 Ikbalkhan Sultankhan Pathan is resident of Deori. He knows accused as well as parents of the victim and victim. He is residing in the same mohalla where the accused and complainant are residing. His house is situated at a distance of 100 feet from the house of accused. He has deposed that on 01/06/2019 at about 7:30 a.m. he delivered Gas Cylinder in the house of Santosh Turkar because on the last day of month of May, Santosh Turkar has given phone call that his Gas Cylinder is empty and requested to supply Gas Cylinder. He further deposed that at about 7:30

a.m. on 01/06/2019 he delivered Gas Cylinder in the house of Santosh Turkar. Delivery was accepted by the wife of Santosh. That time he saw Himanshi crying and coming from the house of accused Sonu and going towards her house. He also saw pant of Himanshi was half removed. He thought that Himanshi might have fallen, therefore might have crying and after delivering of Gas Cylinder, he left that place. His statement was also recorded under Section 164 of the Code of Criminal Procedure by the Judicial Magistrate, First Class, Deori on 11/06/2019. In that evidence also he has deposed that on 01/06/2019 at about 7:30 a.m. he went to the house of Santosh for delivering Gas Cylinder. He saw Himanshi Turkar aged about 4 years 6 months was crying and coming from the house of Sonu @ Ashwin. It was tried to suggest in the cross-examination that he has not stated before police that he saw Himanshi was coming from the house of Sonu. In the statement under Section 161, "घर के तरफ से आयी" (came from the side of house) is written and it is not written that she came from the house of Sonu. I think there is mistake in writing while recording statement of

the witness. Witness intended to say that he saw Himanshi coming from the house of accused Sonu. He is firm in stating these facts before Magistrate when his statement under Section 164 of the Code of Criminal Procedure was recorded. This is minor omission and does not amount to contradiction. Therefore, it needs to be ignored. The fact remains that witness is residing in the same area and on the request of Santosh Turkar, he delivered Gas Cylinder on 01/06/2019 in between 7:00 a.m. to 7:30 a.m. and that time he saw Himanshi was crying and coming from the house of accused. This evidence of PW-3 supports the evidence of victim Himanshi and PW-1 Pushpa.

35] The conduct of accused immediately after the incident is brought on record from the evidence of PW-5 Amol Sukhdev Pendurkar who knows the accused and he is neighbour of accused. He also knows Meghraj Turkar, the family of victim. As per his evidence, on 01/06/2019 in the morning he was cleaning his house upto the courtyard. He saw Himanshi and her brother Rajat were playing near the gate of their house. Himanshi and Rajat were coming towards the shop of

Kotangale. When he asked them where they are going, they returned to their house. Thereafter he went to Maskarya Chowk for purchasing Dal and sat near the Pan shop of Raju Kalsarpe. Thereafter returned to his house. When he came near house, he saw crowd in his area. Crowd was discussing that Sonu Meshram committed rape on Himanshi. Himanshi's father Meghraj Turkar was shouting and saying that why he did this acts with his daughter. Meghraj Turkar was having the piece of Baniyan of white colour. They were standing infront of the house of accused Sonu Meshram. Meghraj Turkar and his family members started going towards police station. Ashwin @ Sonu Meshram was peeping from the window of his house whether the crowd has disbursed. Ashwin @ Sonu Meshram came out of the house and flee on his motorcycle in the high speed. This evidence of PW-5 supports the evidence of PW-2 Meghraj on the point that he visited the house of accused and made inquiry as to why he committed such an act with his daughter. He has deposed that “Then I had talk with my wife and then came out with shouting and went towards the

house of accused Sonu. Sonu's sister Pinky was present on the gate and made inquiry with me. Sonu was present in the house. I requested Pinky the sister of accused Sonu to call Sonu, but she said as should inform her what is the matter. Sonu came out of house with Agarbatti. I caught-hold his baniyan and tried to bring him on road. He gave a jerk and ran away. People in the Mohalla gathered there. I told the mob of the Mohalla about the incident. After 10-15 minutes, I went to police station alongwith my daughter and wife". Meghraj Turkar was having piece of Baniyan in his hand is corroborated by the evidence of PW-5. Further conduct of the accused that he flee away after seeing that the mob is disbursed, is doubtful.

36] Prosecution has examined PW-4 the panch witness, is a government servant. He was called upon by the Investigating Officer by giving letter to the Tahsildar. In the presence of PW-4, panchnama of the spot of incident was prepared. The map is also drawn. The spot panchnama was recorded in the videography and videographer has signed spot panchnama. The spot was shown by Himanshi the victim and her

mother. As per the evidence of PW-4 Vikas Hanpa Mundhare Exh.24, there were three rooms of the house. They entered the porch and then in the hall. Then entered in the bedroom. In the bedroom, there was bed and one chadar. There was bed-sheet. Bed-sheet was seized and wrapped in the paper and sealed. Signatures were obtained on the paper and the panchnama was prepared. Police made video shooting about it. After completion of videography, the memory card was inserted in the computer and its hash value was taken and panchnama was prepared about it.

37] The clothes of the accused were also seized in the police station in the presence of this witness PW-4. One half pant of wooden colour with black strips having black colour elastic, one short towel of yellow colour having yellow and purple colour strips, one blue colour knicker, one white Sando baniyan in torn condition were seized and sealed and kept in the pocket and panchnama about it was effected. In the cross-examination, it is tried to bring on record that the contents of panchnama that house of accused is adjacent to the house of complainant from Northern

side, is incorrect. However the factual position that the houses of accused and complainant and the brother-in-law of complainant are in the same area and are at a distance of around 50 to 60 feet from the house of complainant. This factual position is not disputed rather this position is brought on record by accused in the cross-examination of PW-1. Therefore, if at all there is any wrong writing in the panchnama about the situation of houses, it does not affect the merits of the case in any manner and it is not a material contradiction or omission. Therefore, it needs to be ignored.

38] As per the evidence of PW-1, she noticed nail scratching over the cheek of Himanshi. If the evidence of PW-1 to the effect that when she asked Himanshi whether you have not cried or shouted, Himanshi told her that she shouted but Sonu Kaka pushed her mouth. In this context, the presence of nail scratching over the cheek of Himanshi, is material. In the evidence of Himanshi, she has not stated about nail scratching over the cheek. But on the day of incident, nail scratchings were appeared and the mother has

noticed nail scratching. In the cross-examination of PW-2 in Para 4, it is admitted by the accused by putting question that "It is true that there was scratch mark on the cheek of daughter Himanshi." This mean accused has admitted scratch mark on the cheek of Himanshi. Therefore, the Investigating Officer has referred victim Himanshi to Medical Officer PW-9 Dr. Dipak Dhumankhede.

39] On 03/06/2019 Dr. Dipak Dhumankheede has examined victim. As per the evidence of PW-9 Dr. Dipak Dhumankhede at Exh.52, Police Constable Chaudhari Bakkal No.1606 brought the victim Himanshi on 03/06/2019 at about 3:30 p.m. Accordingly at about 3:30 p.m. he examined Himanshi. On examination, he found small abrasion over right cheek. It was in the healing process. Its size was ½ cm x ¼ cm. On general examination, it was found that general condition was fair and she was conscious and pulse were normal. In his opinion, the injury on the cheek of girl Himanshi may be caused due to human nails. Accordingly he has issued certificate Exh.54. In the cross-examination, it was tried to suggest that

human nails and teeth causes incised wounds. It was also suggested that nail marks are usually in the curving nature and the corresponding injury caused by nails is in the shape of curve. But the witness has denied it and stated that it depends on the force of the injury. The age of injury is not mentioned. The size of injury depends on the size of nail with which it is caused, is not disputed. Nail clippings were not sent to the doctor PW-9. Doctor has also admitted that the injuries may be possible by any other reason other than the nail marks. Himanshi has not disclosed about the nail marks on the cheek to PW-1, but she has noticed it and after investigation, it was found that there is possibility of causing such injury by nail marks.

40] Though PW-13 Himanshi has not disclosed anything about the nail marks on the cheek in her evidence before the Court, she has disclosed to her mother that “Sonu Kaka pushed her mouth when she tried to shout. In this context, the probability that accused may be the author of injury on the right cheek of the victim. Mere absence of any specific evidence by PW-13, will not be a circumstance to neglect the nail

marks on the right cheek of the victim which was caused on the day of incident. PW-13 is a small child. In her evidence before the Court, she might not have remembered about the injury on her right cheek and has not stated anything about it, but she has disclosed it to her mother PW-1. The small kids generally disclose the facts to the near and dear once and not before the public at large. Merely because the age of injury is not mentioned in the certificate or there is possibility of causing injury by any other reason, does not mean that the accused is not the author of the injury. But the mother has noticed it for the first time. The injury was not present earlier. It was noticed after Himanshi has disclosed about the incident. Accused has not brought any circumstance on record that by any other reason the victim might have sustained injury on the right cheek. It cannot be said that PW-1 is speaking lie because whatever PW-1 has noticed is verified by the doctor and found to be correct. In all these circumstances, except the inference that accused has caused such injury on the right cheek of the victim, no other inference is possible. Therefore, it can

be said that the accused has caused injury to the victim on the right cheek.

41] To ascertain whether accused is capable of having sexual intercourse, he was referred to Medical Officer, Rural Hospital, Deori. PW-12 Dr. Bhagyash Gulhani has examined the accused on 01/06/2019.

42] As per the evidence of PW-12 at Exh.61, he examined accused Sonu @ Ashwin Vitthal Meshram on 01/06/2019. He noted his identification mark that he was having mole on the right side neck. He took history. He examined him thoroughly and given opinion that accused is able to have normal sexual intercourse. He obtained urethral swab, blood, pubic hair and nail clippings of the accused and given his opinion. Before examination, he obtained the consent of accused by obtaining his thumb impression and signature. The samples were packed and sealed then handed over to police. In the cross-examination, it was suggested that doctor has not mentioned that his private part was able to erect. Doctor has answered that it is not necessary to mention such things. It is

also not necessary to mention about the ejaculation of semen. It is denied that nail clippings of the accused were not obtained. But he admits that he has not removed the nail clippings. The other employees in the hospital might have obtained nail clippings. That doesn't matter who has removed the nail clippings. Those were collected and sealed and then handed over to the police, is material. This evidence of PW-12 supports the prosecution case that accused was able to have normal sexual intercourse. It is not the case of accused that he is having any partial impotency. He has not produced any documentary evidence about it on record. Mere asking hypothetical questions in the cross-examination, will not be a part of consideration for the Court unless it is supported by documentary evidence. Therefore, in the absence of any documentary evidence tendered by accused about his partial impotency, I accept the evidence of PW-12 that accused is able to have normal sexual intercourse.

43] Learned advocate for accused further raised objection to the production of clothes of the victim. According to learned advocate for accused, the knicker

of the child was not produced by the father or mother, but it was produced by the uncle. The tampering of evidence cannot be ruled out because of delayed production of the clothes is the arguments of learned advocate for accused. PW-2 Meghraj Turkar has explained in his evidence that he carried the chaddi of Himanshi while going to the police station. He handed over the pant/chaddi of Himanshi to his brother Santosh when they were in the police station. Police sent his daughter for medical examination to Rural Hospital, Deori. From Deori Hospital, police sent them to Government Hospital at Gondia. In the cross-examination, PW-2 has specifically denied that he has not handed over the pant of his daughter to his brother Santosh on 01/06/2019 and therefore he has not stated about it before police.

44] PW-6 Santosh Turkar has corroborated the evidence of PW-2 on the point that chaddi/pant of Himanshi was handed over to him and then Meghraj Turkar went for medical examination. He handed over the clothes of Himanshi to Police Officer Bachhav. The chaddi/knicker of the victim is produced in the police

station on the day of incident itself. It was handed over to PW-6 Santosh the brother of Meghraj Turkar because the victim, Meghraj Turkar and PW-1 Pushpa were required to go to Gondia as police referred victim to Gondia for medical examination. Therefore to avoid delay in production of chaddi/pant of the victim, PW-2 has handed over it to his brother PW-6 Santosh and there is no reason to look this fact in any otherwise manner. It is in the natural course of event that when he was required to go to various hospitals, PW-2 Meghraj has handed over the pant to PW-6 Santosh and PW-6 has immediately produced it before the police.

45] It is further objection of learned advocate for accused that as per the evidence of victim herself, the sister and parents of the accused were present in the house. Learned advocate for accused pointed out the cross-examination of PW-13 victim Himanshi. The questions were put like this;

Que. Who lives in the house of Sonu uncle ?
Ans. Mother, father and sister residing there.

Que. How is his house ?

Ans. His house is down and up.

Que. What is the name of sister of Sonu Kaka (uncle) ?

Ans. Pinki.

Pinkitai talks with me. It is true to say that when I went to the house of Sonu uncle, that time his mother, father and Pinkitai were present.

By pointing this evidence, learned advocate for accused submits that it is not possible to have sexual intercourse when the sister and parents are present in the house. This is mere hypothetical thinking that when the sister and parents are present in the house, there is no possibility of any sexual intercourse. It depends on the mind set of the person who intends to have sexual intercourse.

Further it is to be noted that the house of accused is in up and down i.e. is double storied as per the evidence of PW-13. In the spot panchnama also it is clear that the house is facing West having three rooms and one cement staircase for going up on the first floor. The age of victim is such that nobody will

even imagine that she is brought in the house for the purpose of sexual intercourse.

Victim is so small that the parents of accused and the sister might not have thought of any intention of the accused to have intercourse and therefore they might not have paid any attention of coming of Himanshi alongwith the accused and they might be busy in their routine work of morning such as taking bath, answering natures call, cleaning teeth etc. and therefore though they were present in the house, they had no reason to observe or keep watch on the accused so that in their presence the accused would not have committed such offence. Parents and sister of accused might have thought that Himanshi might have came in the house as a routine course and they have neglected her presence in the house, but when the accused has strong desire to have intercourse with victim, he called her on many occasions.

If the evidence of PW-1 is considered in this regard, she has deposed that when she was busy in household work, Himanshi came to her and told her that Sonu Kaka is calling her. That time she asked

whether she should go with Sonu Kaka. But PW-1 has told her that she should not go and play in the courtyard till she complete her bath. From the further evidence of PW-1, it is clear that again accused called by saying "हिमांशी इकडे ये". When PW-1 was taking water for bath, that time she has neglected. It means, Himanshi was called by the accused frequently.

From the evidence of Himanshi (PW-13) it is clear that "Sonu called me for chocolate. Sonu gave me chocolate in his house". It means, the accused was have strong desire to have sexual intercourse and he has not bothered whether parents and sister are present in the house or otherwise. The chocolate was given in the house, that may be in the presence of sister and parents. The arguments of learned advocate for accused that when the parents and sister were present in the house, it is not possible that accused will commit rape on victim Himanshi, cannot be accepted.

46] The probability that the parents and sister might be in some other room or might be busy in the day to day activities and therefore they have not paid

any heed, cannot be ruled out. It is the case of accused that he slapped Himanshi and therefore Himanshi was crying and not because of the intercourse she was crying. Accused has put such question to PW-1 in the cross-examination in Para 11 i.e. "It is not true to say that my daughter Himanshi came crying by saying that "मारले मारले". This question was also asked to PW-13 the victim Himanshi in the cross-examination-

Que. Did you come home crying because Sonu Kaka has beaten ?

Ans. No. गंदा केले.

The theory that accused has beaten Himanshi the victim, is not acceptable. In the cross-examination of Himanshi, it is not suggested that Sonu has not called her to his house. In the entire cross-examination of PW-13, it is denied that Himanshi had been to the house of accused and was crying. The fact that Himanshi was crying in the house is rather admitted by the accused. If at all, the parents and sister were present in the house and they noticed that Himanshi was crying, certainly they would have made

inquiry with Himanshi and accused could have examined sister and parents as witnesses to prove that at the relevant time Himanshi entered the house and left the house while crying. But accused has not examined his father, mother or sister as a witness.

47] When the prosecution evidence proves that accused has committed penetrative sexual assault as per the provisions of Protection of Children from Sexual Offences Act, it is for the accused to lead evidence in rebuttal. Accused would have very good opportunity to examine his parents and sister to prove the fact that nothing has happened on 01/06/2019 when Himanshi entered the house and left the house because they were present and they have observed Himanshi. But such evidence is not adduced by the accused. Under Indian Penal Code such examination of witness is not expected. But when the accused is charged under the provisions of Protection of Children from Sexual Offences Act, Section 29 of the Protection of Children from Sexual Offences Act which raises the presumption of committal of offences under Section 3, 5, 7 and 9 and the presumption is rebutable. It means, it is for

the accused to give evidence in rebuttal and such presumption under Section 29 is to be drawn when the child is below the age of sixteen years.

The evidence of PW-1 that Himanshi told her that Sonu Kaka called her under the pretext of giving chocolate, took her on the bed, removed his towel and pant and removed her pant and "आपली सू ची जागा माझ्या सू च्या जागेला लावली आणि चिकट चिकट गंदा गंदा केले". The evidence of PW-13 Himanshi that;

Que. Did you come home crying because Sonu Kaka has beaten?

Ans. No. गंदा केले.

Que. Did your mother tell you that Sonu Kaka made you dirt?

Ans. No.

Que. Do you tell at the instance of mother that सोनू काकाने त्याची सु ची जागा माझ्या सु च्या जागी लावली व गंदा गंदा केले?

Ans. No.

She has given evidence in examination-in-chief that;

Que. What Sonu had done with you ?

Ans. Sonu removed his pant, my pant and put his private part in my private part.

The evidence of these two witnesses is sufficient to raise presumption under Section 29 of the Protection of Children from Sexual Offences Act and therefore it is for the accused to lead evidence in rebuttal that because of the presence of his parents and sister, it was not possible for him to have sexual intercourse with victim and he is not guilty. But he has not availed this opportunity. Therefore presumption under Section 29 of the Protection of Children from Sexual Offences Act is required to be drawn.

48] The evidence of PW-1 is true, acceptable and genuine. The objection of learned advocate for accused that PW-1 has noticed blood and semen on the private part, but doctor has not noticed it and doctor has admitted that there was no bleeding from the vagina/vulva of Himanshi, therefore the evidence of PW-1 is not true and is not acceptable.

49] PW-1 has given bath before Himanshi was examined by doctor (PW-8). Therefore whatever PW-1 has noticed immediately after the incident might not have been noticed by the doctor (PW-8) because

Himanshi was given bath. PW-1 has never stated that there was bleeding from the vagina/vulva. Therefore, the admission of doctor that there was no bleeding from vulva/vagina of Himanshi has no relevance to suspect or doubt the evidence of PW-1 on this point.

50] As explained earlier, PW-1 is not having any grudge, malice or prejudice against the accused otherwise she would not have neglected when she heard accused calling Himanshi even after she has prevented Himanshi from going to accused. PW-1 should not have given bath to the victim Himanshi and should have reserved the evidence against the accused if she has any malice against the accused. But simply she gave bath to the victim Himanshi and whatever she has stated in the examination-in-chief is supported by medical evidence. PW-8 the doctor has noticed redness and swelling on the private part of Himanshi. PW-9 the doctor has noticed nail scratching on the cheek and those are nail marks of human being. Himanshi being a daughter of PW-1, immediate disclosure by Himanshi before mother is in the natural course of event. It is not that on seeing Himanshi coming to home crying

PW-1 has immediately rushed to accused for quarreling. If she had any malice or prejudice against the accused, such things would have taken place that when she prevented Himanshi from going alongwith accused, still accused called frequently and took Himanshi to his house and Himanshi came crying from the house of accused. Therefore, I accept the evidence of PW-1 Pushpa as true, believable and genuine.

51] So far as PW-13 is concerned, she is a child witness. The evidence of child witness is required to be considered very cautiously because there are chances of tutoring the child witness. If the entire evidence of PW-13 is considered, whatever questions were put by the accused suggesting tutoring have been vehemently denied by the witness such as;

Que. Did your mother tell you that Sonu Kaka made you dirt ?

Ans. No.

Que. Do you tell at the instance of mother that सोनु काकाने त्याची सु ची जागा माझ्या सु च्या जागी लावली व गंदा गंदा केले?

Ans. No.

Que. Did you say all the facts at the instance of your mother?

Ans. No. I am telling correct.

Que. Did you telling lie to the police on the say of Mummy, Papa?

Ans. No. I am telling truth.

Que. Did Mummy, Papa say you to tell truth to the police?

Ans. Yes.

If at all there was any tutoring to PW-13, she would not have answered the question that mother, father and Pinkitai were present in the house of accused. Because of tutoring she would have simply stated "No". But she fairly told about the presence of mother, father and Pinkitai in the house of accused. But her evidence that "Sonu removed his pant, my pant and put his private part in my private part" is supported by the medical evidence when PW-8 doctor finds that there were redness and swelling on the private part of Himanshi.

52] There is no reason for either PW-1 or PW-13 to implicate the accused in the false case as is

suggested by the accused. According to accused, there was dispute between father and mother of Himanshi and himself on account of sewage water and keeping waste material infront of the house of complainant PW-1. But both PW-1 and PW-2 have denied these suggestions. If the admitted position of situation of house is considered, it is not that immediately after the house of complainant, there is house of accused. In between the house of accused and complainant, there is house of PW-6 Santosh and there is lane in between the house of accused and house of Santosh. There is no reasons that sewage water from the house of accused will go towards the house of complainant. There is no reason for accused to keep his waste material infront of the house of complainant as there is lane between his house and house of Santosh. The accused could store waste material of his house in that lane. There was no dispute between the parties prior to the incident. Therefore, the defence of accused that relations between parents of the victim and accused were strained. He is falsely implicated in the crime, is not acceptable. The defence of accused is not probable

at all.

53] Learned advocate for accused has relied on the observations of Hon'ble Bombay High Court in the case of ***Sunil Soma Bhamble Vs. State of Maharashtra*** reported in ***2017 STPL 4416 Bombay*** to support his contention that mere presence of semen stains on the private part of the victim cannot be considered as a clinching material. I have gone through the said case law. In the facts of the said case, the victim was giving answers by nodding head and has not spoken in the words but in the present case, the victim has given evidence by speaking unambiguously. In that case, there were no injuries at all to the private part of the child. But in the present case, PW-8 doctor has noticed redness and swelling on the private part of the victim as well as PW-9 has noticed nail marks of human nails on the cheek of the victim. Therefore on the facts, this case law will not be helpful to the accused to support his contention that the evidence of prosecution does not establish any offence against him and he be acquitted.

54] Learned advocate for accused has also relied on the observations of Hon'ble Bombay High Court, Bench at Nagpur in which many criminal appeals were deciding by the common judgment. Learned advocate for accused has relied on the observations in Para No.28, 30, 32, 34 of the judgment. In Para 28 of the judgment, it is observed that in the clinical examination of the prosecutrix there was nothing to suggest that sexual assault had taken place. There was no bleeding injury. There was no injury on the hymen. The medical evidence does not support the case of the prosecution. Although the DNA report and its interpretation are incriminating on the face of it, but there is lack of evidence regarding proper sampling and quality control leading to the DNA report. In Para 30, 31 and 32 of the judgment, Hon'ble High Court has discussed about quality control about the DNA report analysis. In Para 34 of the judgment, it is discussed about the collection of blood samples etc. In that case, the age of prosecutrix was 16 years and the hymen was developed. In the present case, as per the evidence of PW-8, “there was swelling on the vulva (vaginal part

but as victim is very small it is called as vulva) (in Para 2 of the examination-in-chief)".

Que. Is it correct to suggest that hymen was in tack?

Ans. I am not able to see the hymen because there was so much swelling.

In the facts of the case, there was admission in the evidence of prosecutrix that appellant was falsely implicated and that he was identified by the prosecutrix in the Test Identification Parade. In that case, the evidence about penetrative sexual intercourse was not sufficient. It was ambiguous. Therefore, it was necessary for the prosecution to prove it by DNA test. In the present facts, the evidence of PW-13 is so clear and unambiguous that it proves the penetrative sexual assault without help of any other evidence. The evidence of Medical Officer is secondary evidence. It is not a conclusive evidence. It is in the form of opinion and opinion is not binding on this Court. The Court has to consider the opinion of the doctor or expert in the light of other evidence on record and decide whether to accept it or not. Evidence of PW-8 on the point that she noticed redness and swelling on the

private part of the victim, she has not noticed any bleeding, she is unable to tell whether hymen was in tack or otherwise because of the swelling, is acceptable as it supports the factual evidence of PW-1 and PW-13. The opinion of doctor about the possibility of attempt of sexual intercourse, is not acceptable because it is not an attempt/the complete act when it is proved that there were injuries on the private part of the victim in the nature of swelling and redness. Therefore why doctor has used the words possibility of attempt of sexual intercourse is a big question and therefore her opinion cannot be accepted. But the evidence on the point of position of the private part having injuries such as redness marks and swelling is acceptable. If the fact of this case are considered with the facts in the case of ***Jitendra Suresh Gabhane Vs. The State of Maharashtra*** and other criminal appeals is considered, I am of the opinion that the facts of the both cases are different and ratio in the case of ***Atul Vishvanath Hatwar Vs. The State of Maharashtra*** and other criminal appeals is not helpful to the accused in the present case. Learned advocate for accused has also

relied on the observations of Division Bench of Hon'ble Bombay High Court in the case of ***State of Maharashtra and Ors. Vs. Krushna and Ors.*** reported in ***2017 STPL 12472 Bombay*** in support of his contention that the prosecution evidence on the point of collection of blood samples, taking entries of the muddemal property in the property register, is not reliable and medical evidence does not support the prosecution case because doctor has opined that there is possibility of attempt of sexual intercourse and has not stated that there is attempt of sexual intercourse. Therefore, in this case, there may be attempt or may not be attempt of sexual intercourse and two views are possible in such cases. A view favourable to the accused should be taken. I have gone through the said case law. That case was based on circumstantial evidence. Therefore the other supporting evidence was necessary in that case. But in the present case, there is direct evidence of victim. The other supporting evidence is not much important. In the present case, the opinion of the doctor that there is possibility of attempt of sexual intercourse, cannot be interpreted as

there may not be any attempt of sexual intercourse because there is ample evidence on record about the penetrative sexual assault by the accused in the form of evidence of PW-1, PW-13 and the evidence of PW-8. Therefore with due respect to the ratio laid down by the Lordship of Hon'ble Bombay High Court, I am of the opinion that this is not a case where from the record two views are possible and the case law will be applicable to the fact being different. In this case, the facts from the case reported in 2017 STPL 12472 Bombay are different and therefore the case law is not helpful to the accused in the present case.

55] There is no reason to discard the evidence of PW-3 who is independent witness and has observed that Himanshi came crying from the house of accused. The evidence of PW-9, PW-12 is also acceptable and genuine. The evidence of other witnesses except witness No.1, 8, 9, 12 and 13 is not direct evidence on the point involved in the case. I rely upon the evidence of PW-1, PW-8, PW-9, PW-12 and PW-13 and hold that prosecution has proved beyond reasonable doubt that accused has committed penetrative sexual assault on

minor girl of 4½ years. The prosecution has proved the offence under Section 375 of the Indian Penal Code which is punishable under Section 376 of the Indian Penal Code in which case the penetration is sufficient. The consent is not material as the victim is below 12 years of age. Therefore, in my opinion, the prosecution has proved the offence under Section 376(AB) of the Indian Penal Code. By the direct evidence of PW-13, it is proved that there was penetrative sexual assault as accused has inserted his private part into the private part of victim. As per Section 3(a) of the Protection of Children from Sexual Offences Act, there is ample evidence about penetrative sexual assault. The age of the victim is not disputed. She is below 12 years of age. Here date of birth is not challenged. Therefore, offence against victim is aggravated penetrative assault as defined in Section 5(m) i.e. whoever commits penetrative sexual assault on a child below 12 years. The arguments of accused that the offence is not in the nature of penetrative sexual assault. But it is merely sexual assault as defined in Section 7 of the Protection of Children from Sexual Offences Act cannot be

accepted because there is direct evidence of PW-13 that accused has inserted his penis into her private part and it has caused penetration. Therefore there was swelling and redness. Prosecution has proved the guilt of accused under Section 6 and 10 of the Protection of Children from Sexual Offences Act. I, therefore held accused guilty for the offences punishable under Section 376(AB) of the Indian Penal Code and Section 6 and 10 of the Protection of Children from Sexual Offences Act.

56] I stop here for hearing accused on the point of quantum of sentence.

57] Accused is present in the Court. His advocate Shri Gayakwad is not present. Even after making questions to the accused for two occasions, accused has not replied what he wants to say about the quantum of sentence. Therefore, it is in the interest of justice to give him time to tell about the quantum of sentence. Therefore the matter is adjourned to 7th February, 2020.

Gondia. (Suhas V. Mane)
Date:- 06/02/2020. Special Judge, Gondia.

58] On 07/02/2020 I heard accused on the point of quantum of sentence. He submits that charge against him is false. He submits that he is of young age. He is improving his conduct and in the Jail he has obtained certain certificates the copies of which he producing today. Therefore, he request that minimum punishment may be awarded to him by taking lenient view against him.

59] Learned DGP submits that prosecution has proved the guilt of accused beyond reasonable doubt for the offence under Section 376(AB) and under Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012. The accused does not deserve any leniency as the section itself restricts the punishment of imprisonment which shall not be less than 20 years. He further submits that considering the age of victim and manner in which the accused has committed the offence in his own house in the presence of his parents and sister, maximum punishment be awarded.

60] The offence under Section 376(AB) of the

Indian Penal Code and the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 are punishable with identical punishment of imprisonment which shall not be less than 20 years which may extend to life, which shall mean imprisonment for the remainder of that person's natural life and with fine or with death. There is no question of showing any leniency to the accused when once it is proved that the victim is below 12 years of age and accused has penetrated his penis in the vagina of the victim and the ingredients of section 375 of the Indian Penal Code and Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 are proved. Therefore, the request of accused to award less punishment as he is of young age and he is improving his conduct, cannot be considered.

61] Prosecution has proved the guilt of accused under Section 376(AB) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act as well as Section 10 of the Protection of Children from Sexual Offences Act. The punishment for the offence under Section 376(AB) of the Indian

Penal Code and Section 6 of the Protection of Children from Sexual Offences Act is the same. Therefore, it will not be proper to award two different sentences to the accused for the same offences when it is an offence falling within two or more definitions of any law in force for the time being by which offences are defined or punished. So far as offence under Section 10 of the Protection of Children from Sexual Offences Act is concerned, it is less severe as compared to the offence under Section 6 of the the Protection of Children from Sexual Offences Act, therefore no separate punishment for the offence under Section 10 of the Protection of Children from Sexual Offences Act is required to be awarded.

62] It is necessary in the facts of present case to award compensation to the victim out of the fine amount. Considering all these aspects, in my opinion following order will be just and proper. Hence, the order:-

ORDER

1] Accused Sonu @ Ashwin S/o Vitthal Meshram,

Aged about 29 years, Occu. Agriculturist, R/o-Ward No.9, Surabhi Chowk, Deori, Distt. Gondia is convicted vide Section 235(2) of Code of Criminal Procedure for the offence punishable under Section 376 (AB) of the Indian Penal Code and for the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer Rigorous Imprisonment for **TWENTY ONE YEARS** and to pay fine of Rs.75,000/- (Rs. Seventy Five Thousand). In default of payment of fine, he shall undergo further Rigorous Imprisonment for **THREE YEARS**.

2] Out of the fine amount, Rs.50,000/- be paid to the victim Himanshi Meghraj Turkar and the same be invested in fix deposit in the name of victim through her guardian for a period till she attains the age of majority in any Nationalized Bank of the choice of her guardian.

3] Accused shall surrender his bail bonds.

4] Accused is in custody from 1st June, 2019. He is entitled to set off under Section 428 of the Code of Criminal Procedure for the period of his detention from 01/06/2019 till today (both days inclusive).

5] Muddemal property being worthless, be destroyed after expiry of period of appeal.

6] The copy of judgment be supplied to the accused free of costs in compliance of Section 353 of the

Code of Criminal Procedure.

Judgment dictated and pronounced in the open Court.

Digitally signed by Suhas Vyankatrao Mane
Date: 2020.02.07 10:49:44 +0530

Gondia. (Suhas V. Mane)
Date:- 07/02/2020. Special Judge, **Gondia**.