

POCSO SPL.184/15

: 1 :

Judgment

MHCC050025172015



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Exh.44

**IN THE COURT OF SPECIAL JUDGE UNDER THE PROTECTION OF
CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AT BORIVALI
DIVISION, DINDOSHI, MUMBAI
POCSO SPECIAL CASE NO.184 OF 2015
CNR NO. : MHCC05-002517-2015
(C.R.No.131/2015)**

THE STATE OF MAHARASHTRA,
At the instance of Aarey Police Station
vide C.R. No.131/2015

...Complainant
(Prosecution)

Versus

1. Nilesh Walya Urade
Age : 28 Years, Occ.: Labour.
R/o. : Maroshi Pada, Unit No.26,
Aarey Colony, Goregaon (E),
Mumbai-400 065.

...Accused No.1

2. Risha Soma Hadal
(deceased).

...Accused No.2

Mrs. Geeta Malankar, Spl.A.P.P. for the State.
Advocate Mrs. Sunita Nandewar (Legal Aid) for the Accused No.1.

**CORAM : H.H.THE SPECIAL JUDGE
SMT. H.C.SHENDE (C.R.NO.11)
DATE : 1st April, 2022**

: JUDGMENT :

(Delivered and pronounced in open Court on 01/04/2022)

The accused **Nilesh Walya Urade** is facing trial for the charge U/Sec.376-D of Indian Penal Code, 1860 (Hereinafter referred to as “IPC” for the sake of brevity) and U/sec.4, 5(k) punishable u/s.6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (Hereinafter referred to as “POCSO Act” for the sake of brevity).

2. **The abbreviated facts are that :**

(The names of the victim girl and her family members are not mentioned in the Judgment to maintain the confidentiality about their identity as per the rule 33(7) of POCSO Act).

The informant is the mother of the victim girl. The victim girl (slow witted since birth) aged 15 years is residing at address given in the FIR with her mother and siblings. The victim was not going in the school. However, her brothers are taking education. At the relevant time the informant was working as gardener at Powai, Hiranandani, Mumbai and maintaining her family.

On 04/09/15 as usual at about 8.00 a.m. the informant left her house for work and came back at about 7.30 p.m. in the evening. The

informant noticed difference in the walk of the victim but she thought her menarche started prior one day and it may be a reason behind it. Later the informant noticed some difference in her behaviour also. The victim then was asked reason about it by the informant. The victim was taken in confidence. She then told that the present accused Nilesh and deceased accused Risa took her in forest near Royal Palms. They lured her by saying that they will give her Rs.10/-. They unrobbed her. Thereafter Risa and then Nilesh had committed rape/aggravated penetrative sexual assault on her (who is a minor slow witted victim girl). The victim further added that even prior to it also they both had assaulted her in the same way. The informant inquired with her mother i.e. grand mother of the victim. She also corroborated it by saying that since last two days the victim was coming back to home at about 14.30 to 15.00 in the afternoon. The informant then realized that both the accused had taken disadvantage of the minority and the slow witted condition of the victim and raped her.

First Information Report :

3. The informant then approached to Aarey Police Station and lodged the report. On the basis of her statement, the FIR was taken and Crime No.131/15 u/s.376-D of IPC and u/s.4, 8 and 12 of POCSO Act was registered.

Investigation :

4. The victim was sent for medical examination. Her IQ test was carried out. Ossification test was also carried out for determining her

biological age. The statement of the victim girl was recorded u/s.164 of Cr.P.C. before the Learned Metropolitan Magistrate, Railway Mobile Court, Andheri, Mumbai. The accused Nilesh was arrested on 05/09/15. The accused Risa was arrested on 13/09/15. They both were sent for medical examination. The clothes of the accused were seized which they worn at the time of crime. The medical samples were collected during the medical examination of the victim and the clothes of the victim and accused persons seized under the panchnama were sent to the Chemical Analyser, C.F.S.L., Kalina, Mumbai with forwarding letters which were carried to FSL Kalina by PHC 23183. The statements of the witnesses were recorded. As it revealed through the medical test of the victim and inquiry made by the Superintendent CWC that the victim is a slow witted girl so the offence u/s.6 of POCSO Act was added. The finger prints of the accused were taken and were sent to the finger print expert for calling the report of the same.

Chargesheet :

5. At last on completion of investigation, the Charge-sheet is filed u/s.376-D of IPC and u/s.4, 6, 8 and 12 of POCSO Act.

The accused were in custody. The accused Risa Hadal died in custody. Hence, the case against him was abated.

Charge :

6. The accused Nilesh Walya Urade was produced before the Court. On appearance of accused No.1, Learned Predecessor of this Court Smt.

A. D. Deo framed the Charge u/s.376-D of IPC and u/s.4, 5(k) punishable u/s.6, 8 and 12 of POCSO Act against him on 24/12/2019 as per **Exh.6**. The contents of the Charge were read over and explained to him in vernacular. He understood the same. He abjured the Charge and claimed to be tried.

His defence is of total denial and of false implication only because he was friend of deceased co-accused Risa with whom the victim girl was having a love affair so he is falsely implicated by the informant out of avenge.

Evidence adduced by the prosecution :-

7. The prosecution has examined 7 witnesses as under :-

Witness No.	Name of witness	Exh. No.	Document if any proved its Exhibit number
1.	First informant / mother of the victim girl.	Exh.15	Exh.16-FIR dated 04/03/15. Exh.17-Statement of victim u/s.164 of Cr.P.C. dated 07/09/15. Article 1 – One top of mustard colour with floral design. Article 2 – One dark purple colour salwar. Article 3 – Another top having geometrical design with floral design on sleeves and at the lower side of the top i.e. on border. Article 4 – One red colour half inner (shorts) of victim girl.

2.	Victim girl.	Exh.18	
3.	Dr. Siddhant Gorakhnath Savardekar (medical officer).	Exh.20	Exh.21-Medical report of victim girl.
4.	Grandmother of the victim girl.	Exh.23	
5.	PI Mr. Gajanan Rajaram Saragar (First investigating officer).	Exh.29	<p>Exh.26-Spot panchnama (admitted by defence).</p> <p>Exh.27-Panchnama of seizure of clothes of victim (admitted by defence).</p> <p>Exh.28-Panchnama of seizure of clothes of accused (admitted by defence).</p> <p>Exh.30-Acknowledged copy of letter dated 05/09/15 with OW No.5432/15.</p> <p>Exh.31-Arrest-cum-surrender panchnama.</p> <p>Exh.32(colly.)-Four labels affixed on the seized clothes of victim.</p> <p>Article 5-one light green colour barmuda.</p> <p>Article 6-One brown colour underwear.</p> <p>Article 7-clothes of accused No.2 including one black colour half T-shirt.</p> <p>Article 8-One grey colour half pant.</p> <p>Article 9-One Macho brand maroon colour underwear.</p> <p>Exh.33(colly.)-Five labels affixed on the seized clothes of accused.</p>

6.	PI Mr. Diwakar Atmaram Sawant (Second Investigating officer).	Exh.34	Exh.35 - Acknowledged copy of letter to FSL dated 15/09/15 in respect of clothes of accused Risha Hadal. Exh.36-Acknowledged copy of letter to FSL dated 15/09/15 in respect of report of blood samples of accused Risha Hadal. Exh.37-Copy of letter dated 29/09/15 sent to Sion Hospital. Exh.38-Copy of letter dated 02/10/15 to sent to Sion Hospital.
7.	Dr. Sushma Sanjeev Sonawane (Medical officer of Nair Hospital) who referred the victim for IQ test to Sion Hospital).	Exh.40	Exh.41 (colly.)-Medical papers from page Nos.52 to 56 of Charge-sheet.

8. The prosecution has filed list of documents at **Exh.8** viz. :-

Sr.No.	Name of document	Exh.No.
1.	FIR dated 04/03/15.	Exh.16
2.	Statement of victim u/s.164 of Cr.P.C. dated 07/09/15.	Exh.17
3.	Medical report of victim girl.	Exh.21
4.	Spot panchnama (admitted by defence).	Exh.26
5.	Panchnama of seizure of clothes of victim (admitted by defence).	Exh.27

6.	Panchnama of seizure of clothes of accused (admitted by defence).	Exh.28
7.	Acknowledged copy of letter dated 05/09/15 with OW No.5432/15.	Exh.30
8.	Arrest-cum-surrender panchnama.	Exh.31
9.	Four labels affixed on the seized clothes of victim.	Exh.32(colly.)
10.	Five labels affixed on the seized clothes of accused.	Exh.33(colly.)
11.	Acknowledged copy of letter to FSL dated 15/09/15 in respect of clothes of accused Risha Hadal.	Exh.35
12.	Acknowledged copy of letter to FSL dated 15/09/15 in respect of report of blood samples of accused Risha Hadal.	Exh.36
13.	Copy of letter dated 29/09/15 sent to Sion Hospital.	Exh.37
14.	Copy of letter dated 02/10/15 to sent to Sion Hospital.	Exh.38
15.	Medical papers from page Nos.52 to 56 of Charge-sheet.	Exh.41(colly.)

9. The prosecution has filed list of articles at **Exh.11** viz. :-

Sr.No.	Description of articles	Article No.
1.	One top of mustard colour with floral design.	Article 1

2.	One dark purple colour salwar.	Article 2
3.	Another top having geometrical design with floral design on sleeves and at the lower side of the top i.e. on border.	Article 3
4.	One red colour half inner (shorts) of victim girl.	Article 4
5.	One light green colour barmuda.	Article 5
6.	One brown colour underwear.	Article 6
7.	Clothes of accused No.2 including one black colour half T-shirt.	Article 7
8.	One grey colour half pant.	Article 8
9.	One Macho brand maroon colour underwear.	Article 9

10. The prosecution closed its evidence by filing evidence closure pursis at **Exh.42**.

Statement of accused under section 313 of Cr.P.C. :-

11. The statement u/s.313 of Cr.P.C. of accused was recorded at **Exh.43**. He reiterated that he is falsely implicated in the matter.

12. The defence has not adduced any evidence.

13. Heard the Learned APP Mrs. Geeta Malankar for State and Learned Advocate Mrs.Sunita Nandewar (Legal Aid) for the accused at length.

Arguments of Learned APP Mrs. Geeta Malankar for State :

14. The Learned APP Mrs. Malankar for State submitted that the prosecution has examined 7 witnesses including the informant, victim, both medical officers, investigating officer and grandmother of the victim girl.

15. The informant gave details of incident of rape and corroborates the testimony of the victim about committing rape on the minor victim girl who is mentally abnormal girl. Because of her abnormality, she was not sent to the school and so her birth proof is also not available. She is from weaker section. They do not have documentary proof to show her exact date of birth and so the age determination test of the victim girl was carried out. Even though the plus minus error of two years in calculating the exact age or fixing age of any person is there, still the doctor after medical examination of the victim girl, arrived at the conclusion that the victim is aged about 15 years only. The Learned APP, therefore, placed her reliance on the Judgment in case of **Sunil Ganpat Suryawanshi V. The State of Maharashtra and Anr. (Criminal Appeal No.366/17 in POCSO Spl.322/15)** and submitted that if the doctor is saying that the victim was 15 years old and even if the direction given by the Hon'ble Supreme Court in case of **Jaya Mala V. Home Secretary, Government of J ANA K [1982 LawSuit (SC) 125]**, that error should be calculated as plus minor two years still the victim is aged below 18 years or of 13 years at the relevant time. She was raped by two persons at a time. PW 7 the medical officer

was examined by the prosecution who gave opinion that the IQ level of the victim is average and in between 40 to 45. She is having less intellectual capacity and also having difficulty in memorizing the things. Such persons are having difficulty in reading, writing, identifying the articles, colours, mathematic accuracy and they can do work under observation. The victim is mentally abnormal girl, was raped by the present accused and the other who lately died in custody.

16. The testimony of the victim, her explanation about rape on her and identification of the accused is reliable and truthful, needs to be relied upon. Her evidence is corroborated by the medical evidence and the evidence of other witnesses. She was twice raped by the accused in furtherance of their common intention. It is a gang rape. The accused needs to be punished with the maximum punishment.

Arguments of Learned Advocate Mrs. Nandewar for accused (Legal Aid) :

17. The Learned Advocate for accused submitted that the prosecution failed to prove the age of the victim. There is no documentary proof to show that the victim was child at the relevant time. The evidence of PW 7 is also not reliable. She has not examined the victim so her evidence cannot be accepted in the eyes of law to conclude that the victim is having less IQ level. The evidence of PW 1 is of hearsay evidence. She is not an eye witness, nor she or any other witness saw the victim coming or going with the accused. If the victim is saying that there are many persons in

nearby area where the victim was taken by the accused, then it is impossible to rape a girl by the accused at such place. The incident cannot happen near residential area in the daylight. It is concocted story. The victim even has not disclosed anywhere that the accused raped her at a time. She remained silent about happening of rape on her throughout the investigation i.e. before the police, before the Learned Metropolitan Magistrate Court and lastly told it before the Court while it was asked to her by the Court as to what is meant by 'balatkar' according to her ? She said that they took out part from the Kamiz but she did not disclose actual act of penetration by penis in her private part.

18. During the course of arguments, the Learned Advocate for the accused gave more stress on it and submitted that at the most it may be an attempt. She in support of her submission pointed out the medical evidence came on record through the testimony of PW 3 who accepted that there were no injuries on the private part of the victim, her hymen was intact. As per the Learned Advocate for accused, if the victim was raped by two adult males at a time, then why no injuries were caused. As defined in section 375 of IPC, then there must be penetration of penis or other object in the private part of the victim and in such case there is every possibility of having injury to such a delicate part of the body of a girl who is unmarried. The medical evidence is not supporting to the version of the victim. It cannot be said that the victim was raped. It may be at the most an attempt but the present accused is not guilty because he did not have any such relation with the victim and is not at fault. The accused who died during trial was friend of victim. The victim and deceased accused both

were in love. The victim was roaming with said deceased accused. The informant under fear that the victim may elope with the said accused, has prepared false case and the present accused was implicated by her falsely in the present case without having any fault on his part. He is in custody since last 7 years. It must be taken in consideration because it is a long span and actually a pre-trial punishment.

19. The Learned Advocate for the accused in concluding her arguments, submitted that the accused is not involved in crime. The evidence of the victim and informant is unreliable, not corroborated in material aspects by the medical evidence. The prosecution failed to prove the age and any mental abnormality of the victim and that she was raped by the accused with deceased accused so the accused needs to be acquitted of the offences with which he is charged and tried.

Points for determination :

20. In the light of the charge framed against the accused, evidence on record, the statement U/Sec.313 of the Cr.P.C. and the submission made across the bar by the Learned Counsel of both sides, following points arise for my determination to which I have recorded my findings against each of them for the reasons to follow :

SR.NO.	POINTS	FINDINGS
1.	Does the prosecution prove that the victim girl was minor at time of the incident as per the provision of POCSO Act ?	In the affirmative.

2.	Does the prosecution prove that the victim girl is slow witted (having restricted mental growth) girl at the relevant time ?	In the affirmative.
3.	Does the prosecution prove that on 03/09/15 at around 13.00 to 15.00 hours near the forest, to the wall adjacent of Royal Palms, Aarey Colony, Goregaon (E), Mumbai and again on 04/09/15 at around 13.00 to 15.00 hours at compound of bungalow of Royal Palms, Aarey Colony, Goregaon (E), Mumbai the accused Nilesh Walya Urade alongwith the deceased accused No.2 in furtherance of their common intention removed the clothes of the minor victim girl aged 15 years old and committed rape on her knowing that she is suffering from mental disability on the pretext of giving money to her for snacks and thereby committed an offence punishable u/s.376-D of IPC ?	Not proved u/s.376-D but the offence u/s.376-D r/w.511 of IPC is proved.
4.	Does the prosecution prove that on the above mentioned dates, time and place, the accused No.1 along with deceased accused No.2, removed clothes of the minor victim girl aged 15 years and committed penetrative sexual assault on her inspite of knowing that she is suffering from mental disability and he thereby committed an offence punishable u/s.4 of POCSO Act ?	Not proved u/s.4 of POCSO Act but the offence u/s.4 r/w.18 of POCSO Act is proved.
5.	Does the prosecution prove that on the above mentioned dates, time and place, the accused No.1 along with deceased accused, by taking disadvantage of the victim's mental disability aged 15 years, committed aggravated penetrative sexual assault on her by removing her clothes on the pretext of giving her money for snacks and he thereby	Not proved u/s.5(k) r/w.6 of POCSO Act but the offence u/s. 5(k) r/w.6 r/w.18 of POCSO Act is proved.

	committed an offence punishable u/s.5(k) r/w.6 of POCSO Act, 2012 ?	
6.	Does the prosecution prove that on the above mentioned dates, time and place, the accused No.1 along with deceased accused, with sexual intent, disrobed the minor victim girl aged 15 years and he thereby committed an offence punishable u/s.8 of POCSO Act, 2012 ?	In the affirmative.
7.	Does the prosecution prove that on the above mentioned dates, time and place, the accused No.1 along with deceased accused, with sexual intent committed sexual harassment on the minor victim girl aged 15 years and disrobed her and her body was seen by both of you and he thereby committed an offence punishable u/s.12 of POCSO Act, 2012 ?	In the affirmative.
8.	What order ?	Accused is punished as per the final order.

:: REASONS ::

As to Point Nos.1 to 7 :

21. As the facts are interlinked to each other, it would be appropriate to determine the Point Nos.1 to 7 with common reasoning with distinct observation wherever necessary.

The victim was child below 18 years of age on the date of incident :-

22. The prosecution came with the theory that the victim girl was about 15 years old at the time of the incident. She is a slow witted girl, not

attended school, does not have birth date proof. The prosecution is relying on the medical examination report (ossification test) of the victim.

23. The prosecution if wants the Court to rely on their claim that the victim is 'child', at the time when she was assaulted sexually by the accused, then it is incumbent for the prosecution to prove beyond doubt that the victim was child i.e. below 18 years of age on the date of the incident.

Child as defined u/s.2(d) of POCSO Act :

“child” means any person below the age of eighteen years.”

The object of POCSO Act is to protect the child from being sexually abused, assaulted. It is special enactment and it gives special protection to the child victim. It has some special provisions in it.

“Section 29 of POCSO Act gives Presumption as to certain offences. It speaks that “Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved”.

24. This clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating the provision under clauses 3, 5, 7 and 9 of the said act, and where the victim is a child

below the age of sixteen years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

25. The presumption available in section 29 of the POCSO Act needs to be kept in mind while appreciating the evidence in cases under the POCSO Act. This provision is contrary to the basic principle of criminal jurisprudence that the accused is presumed to be innocent unless his guilt is proved beyond all reasonable doubts. In cases under POCSO Act as per section 29 of the POCSO Act, it is for the accused to prove that he has not committed any offence as alleged and that too beyond doubt not only on the basis of preponderance of probabilities. Otherwise the Court shall presume that he has committed assault on the victim. The provision u/s.29 of the POCSO Act would add strength to the prosecution evidence.

26. In the case of *Deepak S/o. Jitendra Sawant V/s. The State of Maharashtra, Criminal Appeal No.246 of 2015*), the Hon'ble Bombay High Court observed that,

“Needless to state that provisions of PCSO Act are stringent in nature. The degree of proof is heavy and prosecution was under legal obligation to establish age of prosecutrix clearly showing that at the time of incident, prosecutrix was “child” within the meaning of the provisions of PCSO Act. If there is nothing remains on record to show the age of prosecutrix exactly and in such a situation, accused could not have been convicted for the offences punishable under the PCSO Act, 2012.”

27. *In the Judgments of Ravindra s/o Laxman Pendor V/s The State of Maharashtra reported in 2015 ALL MR (Cri.) 4490 and Deepak s/o Jitendra Sawant V/s The State of Maharashtra, reported in 2017 ALL MR (Cri) 2058, it is made clear that,*

“The prosecution is duty bound to give on record the exact birth date of the victim and establish that she was a child at the relevant time. It is needless to say that the provision of POCSO Act is stringent in nature. The degree of proof is high on the prosecution and, hence, the prosecution is under obligation to establish the legal fact that the victim was minor i.e. child as contemplated in the provision of POCSO Act.”

28. In the present matter the victim girl because of her mental abnormality, not admitted to the school and so neither her birth record nor school record is available to show her exact date of birth to ascertain as to whether on the date of the incident, the victim was child i.e. below 18 years of age. The prosecution in present circumstances relied on the medical evidence to support their theory that the victim was child on the date of the incident.

29. In case of **Jaya Mala V. Home Secretary, Government of J ANA K [1982 LawSuit (SC) 125]**, the Hon'ble Supreme Court observed that, “**Evidence Act, 1872 - Section 45 - Expert evidence - Medical opinion as to age of a person-Margin of error can two years on each side.**”

30. On the backdrop of this Judgment, if we peruse the evidence of expert brought on record by the prosecution, it reveals that the Medical officer PW 3 carried out dental examination, taken X-ray and they have prepared separate report about age of the victim. On the basis of said report, they have formed their opinion that the victim was of 15 years old only and plus minus error of six months.

31. As per the Judgment in the case of **Hari Ram V/s. State of Rajasthan reported in 2009(3) GLH 723**, the Hon'ble Supreme Court reiterated that when question of age of the child of juvenile in conflict with law arises, we should follow the procedure laid down in Rule 12 and Rule 19 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Hon'ble Apex Court and the Hon'ble High Court while deciding the question of age of the victim or a child guided to the Court below that, "when the matriculation or equivalent school certificate, leaving certificate is available, birth certificate given by the Municipal office, Gram Panchayat is available, then the Court relied upon it to determine the age of the victim and if the documents are not made available, this Court can take recourse of medical examination for determining the age of the minor.

32. As the prosecution did not have any documentary proof to put up exact date of birth of the victim, the prosecution relied on the age determination test of the victim girl and the prosecution with the help of it and with the help of Judgment of **Jaymala (cited supra)**, requested the Court to accept that the victim girl was of 15 years old only.

33. The Learned APP Mrs. Malankar vehemently argued that even if we accept the observation made by the Hon'ble Supreme Court in case of **Jaymala (cited supra)** and held that medical opinion as to age of any person margin of error can be two years on each side. Still the victim girl was of 17 years only on one side on the date of the incident or 13 years on the other side. In any condition as per the Learned APP, the victim girl was minor below 18 years of age on the date of incident. Unfortunately the victim has not attended school so the prosecution was not in a position to give documentary proof as to her date of birth and as per provisions under Rule 12 and 19 of J. J. Act, in absence of age proof, the opinion of an expert needs to be considered to arrive at the conclusion about age of the victim.

34. If as per the evidence of PW 3 Medical officer, the age of victim was 15 years only on the date of examination, then her age needs to be accepted as 13 years on one side or 17 years on the other side. Even we accept the age of the victim as 17 years, the victim was below 18 years on the date of incident.

35. The Learned Advocate Smt. Nandewar for accused during cross-examination of PW 3, gave suggestion to the Medical officer PW 3 and she answered that,

“It is true to say that, the WPC came alongwith victim and her mother. WPC brought police papers and gave it to me.

It is the combine examination of the victim done by with the team of Doctors. The menses of victim girl was not continue at that time and last mensuration period was 29-08-2015 as stated by me above.

We took half an hour for inquiry with the victim. I can't comment what was the exact mental condition of the said victim but I made reference to the psychiatric. The history taken according to the say of victim. It is true to say that, the victim was saying everything so I have taken the history and she was in position to tell.

It is true to say that, as per medical jurisprudence the age of any person if determined with the medical examination including teeth, growth of bone then it is always calculated as age plus-minus 2 years.

It is not true to say that, no such history were given by the victim and her mother about incident but we have prepared it on the basis of police papers.

It is not true to say that, I am deposing false that, we have examined the victim, collected samples during medical examination and prepared this report.

We had given provisional opinion after examination of the victim.

It is not true to say that, we have not examined this victim at any time.”

36. The Learned Advocate for the accused during course of arguments, submitted that the victim was aged about 17 years old. As per the medical evidence, she was matured enough to understand what was going on with her. She was in love with the deceased accused. They were meeting to each other so the present accused who was a friend of the deceased accused was falsely implicated by the informant in present crime. The ossification test and the medical though not conclusive proof and always having marginal error of plus minus two years, still the age of the victim was below 18 years as it comes out from the evidence on record.

37. This Court, therefore, arrived at the conclusion that the victim was child (below 18 years of age) on the date of offence. This Court accordingly record its findings to Point No.1 in the affirmative.

Victim is slow witted girl having IQ below 40 to 45.

38. The prosecution came with another theory that the victim girl is having restricted mental growth. The informant disclosed it in FIR Exh.16 wherein she made it clear that the victim is slow witted girl so she was not sent to the school. PW 3 actually made reference to take the victim girl for

IQ test. The victim girl was sent to Psychiatrist at the relevant time on 02/10/15. The mental condition of the victim girl was examined by the team of doctors in Sion Hospital. Later the Clinical Psychologist gave report that IQ level of the victim is between 40 to 45 and she is having Moderate Intellectual Disability.

39. PW 7 in her evidence categorically put up that according to the report, the victim is having IQ levelled of 40 to 45 and having Moderate Intellectual Disability. It means that, 'they have difficulty in schooling so they barely do first or second standard somehow. They have difficulty in reading, writing and mathematics. They also have difficulty into their day to day normal activities in their life and so they need to be supervised by other. Even the interpersonal relationship, living in society, social relationship is difficult for them. Their understanding of safety and danger zone also would get compromised. Even if the said victim is of 15 years old, still she can make tea only as she needs supervision of others in every work. We cannot boost the IQ level. There is no medicine which can increase the IQ level of any person. It is difficult for them to analyse the things even in a normal life and it is difficult for them to think logically even if asked by others to do according to their diction'.

40. The medical officer PW 7 sticks up to her version even in cross-examination taken by the Learned defence Counsel. The testimony of the PW 7 has not shaken at all in so far as the restricted mental growth, low IQ level and delay growth of said victim girl. The medical papers

Exh.41(colly.) speaks about the mental condition and low IQ level of the victim.

41. Even during trial when the present victim came in the Court as PW 2 on 25/10/21, the Court has observed that the victim is able to talk though not fluently but she apparently looks of having some mental problem. She was unnecessarily lifting her hands, was doing unnecessary activities while talking. Sometimes she was giving reply, sometimes was not giving reply and was shy in giving reply.

42. The overall record and the evidence of star witness so also the medical evidence clearly speaks that the victim is slow witted girl. The Court, therefore, do not have hesitation to conclude that the victim is mentally abnormal person.

43. Hence, I record my finding to Point No.2 in the affirmative.

44. Rape/penetrative assault on the victim is not proved but attempt to commit rape/penetrative assault on the victim by the accused is proved.

45. As per the FIR Exh.16 and evidence of PW 1 mother of the victim, the victim was taken in the forest by both accused i.e. Risa Hadal (deceased accused) and present accused Nilesh Urade. They removed clothes of the victim. They removed all their clothes and both had committed rape on her.

46. So far as the evidence of the victim recorded in the Court, her statement given by her to the police, before the Learned Metropolitan Magistrate Court which is at Exh.17 is concerned, the victim told to the investigating officer and to the Learned Metropolitan Magistrate Court that Nilesh said her to accompany with them. Risa Hadal was with him. He took her in the forest. He removed his clothes i.e. 'Chaddi and bandi'. He slept on the victim's person by unrobbing her also. Thereafter Risa also removed his 'chaddi and bandi' and he also slept on her person. Thereafter they asked her to go alone by giving threats that if she would tell it to anybody, they will cut her throat. Even prior to that day they did same act with her. She gave information of said incident to her mother and thereafter the FIR came to be lodged.

47. On the backdrop of the statement of the victim given by her before the authorities if we peruse the evidence of the victim, it appears that PW 2 victim in her testimony before the Court, however, added that the accused Nilesh, then Risa unrobbed her, they unrobbed themselves. First of all Nilesh slept on her person and then Risa. She made improvement that 'they both raped her'. Actually on 05/09/15 while she was taken for medical examination wherein the history of assault was given by the victim and her mother to PW 3 medical officer, it is informed by them that the accused after unrobbing her, sexually assaulted to the victim one by one.

48. The victim girl who has undergone a traumatic episode of sexual assault deposed that both the accused took her in the forest. They unrobbed her, unrobbed themselves and had committed assault on her.

The prosecution, therefore, came with the theory of gang rape/aggravated penetrative sexual assault on the victim. Here we have glimpse on legal provision before entering into analyzation of evidence on record with the medical evidence.

Section 376-D of IPC :

376-D. Gang rape - Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine ;

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim :

Provided further that any fine imposed under this section shall be paid to the victim.”

Section 3 of POCSO Act :

“3. Penetrative sexual assault – A person is said to commit “penetrative sexual assault” if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person ; or

(b) he inserts, to any extent, any object or a part of the body not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person ; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person ; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

Section 5 of POCSO Act speaks about aggravated penetrative sexual assault on the child victim in various situations which are punishable u/s.6 of POCSO Act.

49. Here I would like to remind that the prosecution succeeded in proving that the victim girl was child at the relevant time and she is slow witted girl. The case would attract the provisions of POCSO Act.

50. As the victim girl admittedly made improvement in her earlier statement, this Court tried to know whether she knows what is meant by 'balatkar' (rape) to which she said that they took out their part from Kamiz and inserted in for twice, pressed breast. Nilesh did it first, then Risa. She in her vernacular language said "Tyani He kele". She pointed her private parts.

51. No doubt the FIR Exh.16 lodged by the informant PW 1 with categorical statement that the victim was sexually assaulted by the accused

as informed to her by the victim but the victim did not assert it before the police or during her statement recorded by the Learned Metropolitan Magistrate Court which is at Exh.17. The history mentioned in the medical report Exh.21 of the victim which was taken PW 3 medical officer actually was given by the victim and her mother as deposed by PW 3 in her evidence taken before the Court. The history talked about sexual assault. The medical officer PW 3 has examined the victim girl on 05/09/15 i.e. on the very next date of alleged gang rape/aggravated penetrative sexual assault on the victim by the accused and noted findings of the medical examination.

52. I am of the opinion that the evidence of the medical officer PW 3 who is an expert and independent witness is very important. As per the medical officer PW 3, on 05/09/15 the victim was brought to Sion Hospital by WPC Kharat, B. No.569 of Aarey Police Station in present Crime No.33/15. The MLC No. is 27223 and OPD No.11432. They have carried out ossification test to determine the age of the victim and concluded that she was aged about 15 years old with plus minus error of six months. We have discussed it in the beginning when we had discussed about age proof of the victim.

53. PW 3 along with team of the doctor has examined the victim medically and noted the findings that,

“7. On her general physical examination she was well oriented to time, place and person. Her BP, pulse, and respiration was normal. No sign of Intoxication. She has

changed her clothes. No stains or foreign material found on her body. I did not any external surface injuries present on the body of victim.

8. *On local examination of genital, anus and oral cavity-*

1. *Pubic hairs appeared but no matting.*

2. *Labia major, Labia minora and clitoris, healthy, no evidence of injury present.*

3. *Her fourchette and introitus normal and no injuries.*

4. *Her hymen was intact and no bleeding, no edema or injury.*

5. *No evidence of perineal tear.*

6. *Her urethra intact P.V. examination was not done.*

Anus oral cavity was intact. No injury.

9. *As per the dental examination, plus X-ray which was taken of the victim separate report is prepared about her age. Accordingly we gave opinion that, she was of 15 years only plus-minus 6 months.”*

54. As per the evidence of PW 3, the last mensural period of the victim was 29/08/15 and she in her cross-examination clarified that at the time of examination, the victim was not menstruating. However, in the FIR PW 1 stated that she thought prior one day of FIR, the menstruation of the victim

was started so she was not able to walk properly. There is some confusion in mentioning the said period of menses of the victim but as per the testimony of the medical officer, she did not observe bleeding edima to private part of the victim and her hymen was found intact.

55. Here I would like to remind that the victim girl is admittedly a slow witted girl. Her IQ as calculated by the expert is 40 to 45. She was not a normal child. She cannot think logically and cannot be easily tutored as stated on Oath by the medical officer PW 7.

56. Unfortunately, the abnormal girl had undergone such trauma but still the evidence of actual rape with penetration of male organ of accused persons in female organ (private part i.e. vagina) of victim is not on record so it firmly cannot be said to be proved beyond doubt.

57. The victim a slow witted girl for the first time in the Court is saying that she was raped. Prior to it she gave information of assault upto the extent of unrobbing her, accused slept on her in nude condition. The medical report Exh.21 given by PW 3 with the team of the doctors who has examined the victim also not concluded that there were any injuries to the private part of the victim. On the contrary the medical report is silent on having been noted any injury on the person and more particularly on the private part of the victim girl. Her hymen is intact. The prosecution on the other hand is giving explanation that the victim girl for twice raped by both the accused at a time and it is a gang rape.

58. The Learned defence Counsel with the help of the medical evidence and improved version of the victim, tried to put up that this is all false story. The victim and the deceased accused were in love. They both were roaming everywhere and the informant, therefore, lodged false report. No assault was caused to the victim. The present accused was implicated in this case only because he was friend of the deceased accused.

59. In my humble view, any respectable woman cannot put the honour of her family and character of her daughter at stake to lodge false case with the allegations of rape on her own girl just to teach the lesson to the accused person as her daughter is in love with one of the accused who is no more alive.

60. Actually this theory of love affair in between the victim and the deceased accused is put up to the star witness by the Learned Defence Counsel but the informant and the victim straight way denied it. The victim throughout her evidence and in the statement given by her to the authorities during investigation sticks up to her version by saying that she was taken in the forest by them both and was unrobbed by both the accused, they unrobbed themselves and then Nilesh thereafter Risa slept on her body. Her testimony upto the said episode of sexual asault has not been shaken anywhere. She sticks up with her said evidence throughout her evidence. She may not knowing what exactly 'Balatkar' means. The accused persons might have slept on her in a nude condition but they both might not be able to have sex with her. It may be the reason because of

which even after two adult accused allegedly committed rape but no injuries were caused to the private part of the minor victim.

61. The evidence of the victim is reliable, confidence inspiring and needs to be accepted to the extent that the accused in furtherance of their common intention took the victim at lonely place with an intention to commit rape, unrobbed her and by unrobbing her themselves, slept on her. The story in defence put up by the Learned defence Counsel made it clear that the accused are known persons and there is no space or any doubt about the mistaken identity of the accused. The victim though was slow in communicating but she gave true assertion and identified the present accused as an assailant so also deposed that the accused Risa is not alive.

62. The medical report Exh.21 is on record but the final and conclusive opinion about rape/penetrative sexual assault is not given by the medical officer. This ambiguity is remained unanswered.

63. The accused has not put up the defence of impotency but denied all the allegations. The evidence of the victim girl in so far as causing assault to her by the accused by taking in the forest by both the accused is confidence inspiring. No reason to throw away her testimony but it leaves the doubt of happening the incident of rape/penetrative sexual assault on her.

64. The accused persons by luring the victim girl with Rs.10/- took her in the forest, unrobbed her and slept on her. The pre-conduct of the

accused persons showing their common intention and preparation to commit said crime of causing sexual assault on her. They in furtherance of their common intention took the victim in the forest, unrobbed her, they both became nude and slept on her person and assaulted her, molested her as mentioned earlier. They both have made positive attempt to commit rape/penetrative sexual assault on the minor slow witted poor girl. As per the victim, even prior one day to 04/09/15, they did same acts with her. She positively asserted that both the accused took her in the forest and assaulted her one by one.

65. It is thus clear that the accused acted in furtherance of their common intention, in assaulting the victim. Though as per the prosecution, two adult persons assaulted the victim by committing rape/penetrative assault on the victim but no injuries to her private part. No doubt not causing injury to the private part of female of sexual assault or even accused cannot lead to presumption that no case of sexual assault is made out. If continuously for two days two adults have committed rape on the minor victim, then there is every possibility of causing injury. As per the prosecution, the victim was assaulted on 03/09/15 and 04/09/15 and was taken for medical examination on 05/09/15 so there was no huge time gap in happening of the incident and the medical examination of the victim. Still no injuries to her private part were noted by the medical officer so it would be unjust and improper to arrive at the conclusion that it is the case of actual penetrative sexual assault on the minor victim. At the most it can be a case of an attempt. The statement of the victim before the police and the Learned Metropolitan Magistrate Court actually is in

support of the probability of attempt of rape on the victim by the accused as argued fairly by the Learned defence Counsel.

66. Needless to say that the Court must be conscious while dealing with such matters. The Court should not ramble with the facts that only because it is a matter of sexual assault on the minor victim particularly on the victim having restricted mental growth as like the victim girl of this matter. The accused is guilty of rape. The Court cannot and should not punish the accused for the offence which cannot be said to be proved against the accused beyond doubt. At the same time the Court should not set the assailant free if the offence with which he is charged though it is not proved but the facts succinct made it clear that the accused with their common intention made an attempt to commit penetrative sexual assault/rape on the child victim who is slow witted girl. They both in furtherance of their common intention assaulted the victim for two days by taking her to the forest is proved with the help of the evidence on record. Section 511 of IPC and Section 18 of POCSO Act are there to help in such circumstances when the offence though is not proved but the acts of the assailant proving attempt and hence, the accused needs to be punished as per the law.

67. This Court, therefore, has no hesitation to arrive at the conclusion that though actual rape/penetrative sexual assault is not proved against the accused but the accused with the deceased accused had committed positive acts to commit rape/penetrative sexual assault on the victim.

68. As mentioned above, there is no specific provision in the IPC to impose the punishment for an attempt to commit rape/penetrative assault but there is provision u/s.511 of IPC to punish the accused when an attempt to commit crime is proved. Section 18 of POCSO Act also comes to help when the offence of sexual assault/penetrative sexual assault on the victim is not proved but the acts did by the assailant to commit said offence if proves that the positive act of attempt committed by the accused, then the accused can be punished by invoking said provision u/s.511 of IPC and or provision u/s.18 of POCSO Act.

69. In addition to it, the provision u/s.222 of Cr.P.C. is there to help in present circumstances.

Section 222 Cr.P.C. speaks as :

“222. When offence proved included in offence charged. - (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit it such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.”

This provision empowers the Court in the circumstances when the attempt to commit the offences with which the accused is charged is not proved and though such attempt is not separately charged.

70. Hence, by answering the Point Nos.1, 2, 6 and 7 in the affirmative and Point Nos.3, 4 and 5 accordingly, the Court stops to hear the accused on the point of quantum of sentence.

Date : 30.03.2022

(H. C. SHENDE)
Special Judge under P.O.C.S.O. Act,
Sessions Court, Borivali Division,
Dindoshi, Goregaon, Mumbai

71. The Learned APP argued that the victim girl was minor when the accused persons in furtherance of their common intention, has committed the crime. She is having mental abnormality and they have misused the mental condition of said victim girl. They lured her by saying that they will give Rs.10/- to her self-suggesting that they prepared their mind of ravishing minor girl and committed said offence so they be punished with maximum punishment for the offence proved and compensation for rehabilitation of victim must be given by imposing fine on the accused.

72. The Learned Advocate for the accused and the accused in person, however, submitted that the accused is also from very poor background. He is in custody since arrest i.e. since last about 6 and 1/2 years he is in custody. He is not having capacity to pay any fine. The offence is not completed and it is proved against the accused that he has attempted to commit the said crime so lenient view be taken while punishing the accused.

73. It is added by the accused that he is in custody since last six and half years or more and it is sufficient punishment for him. He is from poor family. Nobody is there to help him financially even to pay fine. His health is not supporting to him. He is suffering with so many health issues. Rigorous punishment may affect on his life so he be punished by taking lenient view.

74. This leads to consider the quantum of punishment. The offences proved against the accused are u/s.376-D r/w.511 of IPC, 4 r/w.18 of POCSO Act, 6 r/w.18 of POCSO Act and sections 8 and 12 of POCSO Act.

“Section 511 of IPC runs as :

Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.

Whoever attempts to commit an offence punishable by this Code with [imprisonment for life or imprisonment] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.”

“Section 18 of POCSO Act :

18. Punishment for attempt to commit an offence.-Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any Act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.”

75. On the backdrop of legal provisions mentioned, we have to consider the offence proved against the accused, punishment provided to it by law

and the submission made by both sides so also need to give just and proper punishment to the accused, particularly in cases like case in hand. There is the case where the crime has been committed by the accused not only delicts the law but it has a deleterious effect on the civilized society. Ordinarily the offence of rape is grave by its nature. More so when the perpetrator of the crime committed rape on the minor victim who is slow witted girl. In this case though considering the overall effect of evidence, the Court arrived at the conclusion that it is an attempt to commit rape/penetrative sexual assault on the minor victim girl. Still the punishment provided to the offence of rape/penetrative sexual assault and even for attempting to it is higher in degree. Even in ordinary criminal terminology a rape is a crime more heinous than murder as it destroys the very soul of a helpless woman. In this matter the minor victim is slow witted girl. The accused persons are from her area, knowing well about her abnormality. They lured her by showing Rs.10/- and actually tried to ravish her. The gravity of the crime, therefore, is increased.

76. In case of **State of Rajasthan V. N. K. (2000) 5 SCC 30**, it is observed by the Hon'ble Supreme Court that,

“Having heard the learned counsel for the parties, we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty

should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women.”

77. On the backdrop of above submissions made at bar by both sides and the observations made by the Hon'ble Apex Court so also considering the nature of crime and overall facts, this Court is of the view that as the offence proved is u/s.376-D r/w.511 of IPC and u/s.4 and 6 r/w.18 of POCSO Act are the offences grave in nature. The accused needs to be punished for said offence. The accused unrobed the victim, slept on her with an intent to commit rape on her by following her and by taking her to lonely place so the offence u/s.8 and 12 of POCSO Act are also proved

against the accused but as the Court is going to punish the accused for the offence having higher punishment than provided for the offences u/s.4, 8 and 12 of POCSO Act so this Court is of the opinion that there is no need to give separate punishment for that offence.

78. Now here the question arises as to whether the accused needs to be punished for the offences u/s.376-D r/w.511 of IPC and u/s.6 r/w.18 of POCSO Act ? This question finds its answer in provision u/s.42 of POCSO Act.

Section 42 of POCSO Act :

“42. Alternate punishment - Where an act or omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-C, 376-D, 376-E or section 509 of the Indian Penal Code, then notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

79. Here we have to look into the punishment provided to the offence u/s.376-D of IPC.

As per section 376-D. Gang rape - Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years,

but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine ;

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim :

Provided further that any fine imposed under this section shall be paid to the victim.”

80. At this juncture, we have to keep in the mind as to what is the provision of punishment u/s.6 of POCSO Act and provision u/s.511 of IPC and section 18 of POCSO Act which is described above.

“Section 6 of POCSO Act Punishment for aggravated penetrative sexual assault - Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

Section 511 of IPC and section 18 of POCSO Act speaks that whoever attempts to commit any offence and does any act towards the commission of the offence shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-half of the imprisonment for life or as the case may be one-half of the longest term of imprisonment provided for that offence or with fine or with both.

81. The victim of this matter was minor, slow witted girl. The accused tried to commit rape on her so the gravity of the offence is increased. The

Learned Advocate for the accused and accused in person though requested to show leniency in imposing sentence to the accused but I am of the view that there is no need to show leniency to the accused. It is out of consideration. In my considered view, there is no need to give consideration to the age, time span for which the perpetrator had undergone in jail during trial or his poor financial background. More particularly when the offence involving the allegations of sexual assault/rape on the minor victim girls that too when the victims are abnormal girls, easily trusting the person nearby to whom they know. The accused by betraying the trust has taken undue advantage of the abnormal mental condition of the victim. In so far as my judicial conscience is concerned, I do not find any reason to go against the legislative mandate and show any leniency in awarding the punishment to the present accused.

82. Having said so regarding the sentence, I am tempted to quote the observation of Hon'ble Justice Shri Pandian in case of **Madan Gopal Kakkad V. Naval Dubey [3 (1992) 3 SCC 204 : 1992 SCC (Cri) 598 wherein it has been observed that,**

“(SCC p.226, para 57) “Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.”

83. The victim's condition needs to be considered at this stage while we are determining the question of punishment to be awarded to the accused. There is a need to give support to the victim also. More particularly the

victims of rape and sexual assault. Actually their sufferings, injuries caused to their mind and life cannot be compensated in terms of money. Still we must try to hearten them and to feel them that they are not neglected in all this judicial process.

84. Here we came to legal provisions again. In the light of provision of Section 42 of POCSO Act, I am of the view that the punishment provided for the offence u/s.376-D r/w.511 of IPC is greater in degree. So it would be just, legal to connect the accused for the offence u/s.376-D r/w.511 of IPC instead of offences punishable u/s.4, 6 r/w.18 and for the offences u/s.8 and 12 of POCSO Act.

85. Hence, the Court answers Point Nos.1, 2, 6 and 7 in the affirmative and Point Nos.3, 4 and 5 accordingly and proceeds to pass the following order :

ORDER

1. The accused No.1 **Nilesh Walya Urade, age 28 Years, residing at Maroshi Pada, Unit No.26, Aarey Colony, Goregaon (E), Mumbai-400 065** is convicted for the offences punishable **under section 376-D read with section 511 of Indian Penal Code, 1860 and under sections 4 and 6 read with section 18 of Protection of Children from Sexual Offences Act, 2012 and under sections 8 and 12 of Protection of Children from Sexual Offences Act, 2012** vide Section 235(2) of Code of Criminal Procedure.

He is sentenced to suffer Rigorous Imprisonment for ten years and to pay fine of Rs.15,000/- (Rupees Fifteen Thousand Only), in default of payment of fine, he shall suffer Rigorous Imprisonment for one year.

2. Accused is in custody since his arrest i.e. since 05/09/2015. Set off be given to the accused for the period which he has already undergone in custody in this matter as per the provision under section 428 of Criminal Procedure Code.
3. Out of amount of fine, (if paid by the accused/realized), the amount of Rs.10,000/- (Rupees Ten Thousand Only) be given to the victim girl on due verification, towards compensation as per section 357 of Code of Criminal Procedure, after appeal period is over.
4. This Court is recommending to the District Legal Authority to award compensation to the present victim girl by deciding the quantum of compensation to be awarded under the scheme referred to in Sub-section 1 of Section 357-A of Cr.P.C.
5. Muddemal Articles as per the List of Articles **Exh.11** (MPR No.21/2020), **Article 1**-One top of mustard colour with floral design, **Article 2** - One dark purple colour salwar, **Article 3** - Another top having geometrical design with floral design on sleeves and at the lower side of the top i.e. on border, **Article 4** - One red

colour half inner (shorts) of victim girl, **Article 5** - One light green colour barmuda, **Article 6** - One brown colour underwear, **Article 7** - One black colour half T-shirt, **Article 8** - One grey colour half pant, **Article 9** - One Macho brand maroon colour underwear and other unmarked articles, labels and wrappers, if any, being worthless, be disposed of by following due process of law after appeal period is over.

Exh.32(colly.) - Four labels affixed on the seized clothes of victim and **Exh.33(colly.)** - Five labels affixed on the seized clothes of accused be kept with "C" file.

6. The Sr.P.I. of the concerned Police Station is directed to help the victim girl of this matter to get the compensation amount under the Manodharya Scheme from the the State Government/as directed in Clause No.4 of the Judgment by the Court.
7. Copy of Judgment be given to the accused free of cost.
8. The Judgment is pronounced in the open Court in presence of the Learned Spl. APP, Learned Advocate for the accused (Legal Aid) and the accused.

Date : 01.04.2022

(H. C. SHENDE)
Special Judge under P.O.C.S.O. Act,
Sessions Court, Borivali Division,
Dindoshi, Goregaon, Mumbai

POCSO SPL.184/15

: 47 :

Judgment

Handwritten order given on : 29, 30/03/2022 and 01/04/22
Typed on : 29, 30/03/2022 and 01/04/22
Corrected on : 06/04/2022
Signed on : 06/04/2022
Sent to Dept. on :

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE

AND TIME : 08/04/22 at 3.57 p.m.

Mrs. Vidya Pendharkar

NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ Smt. H. C. Shende (Court Room No.11)
Date of Pronouncement of Judgment/Order	01/04/2022
Judgment/Order signed by P.O. on	06/04/2022
Judgment/Order uploaded on	08/04/2022

POCSO SPL.184/15

: 48 :

Judgment