



Directorate of Technical Education

નિયામકશ્રી, ટેકનીકલ શિક્ષણની કચેરી

છઠ્ઠો માળ, બ્લોક નં.-૨, કર્મયોગી ભવન,
સેક્ટર-૧૦ એ, ગાંધીનગર-૩૮૨૦૧૦

6th Floor, Block No: 2, Karmyogi Bhavan,
Sector-10 A, Gandhinagar – 382 010

Phone : (079) 232 53546
URL : <http://dte.gswan.gov.in>

FAX : (079) 232 53539
E-MAIL : dteguj@gujarat.gov.in, dire-dte@gujarat.gov.in

ક્રમાંક:ડીટીઈ- POSCO ACT/18/ધ-૯/

17012

તારીખ:

19 NOV 2018

વંચાણમાં લીધા :-

(1) શિક્ષણ વિભાગનો તા.15-9-18 નો પત્રાંક- મશબ-1118-1367-છ

(2) નામ. ગુજરાત હાઈકોર્ટનો તા.13-6-18 નો CAV JUDGEMENT

પરિપત્ર :-

ઉપરોક્ત સંદર્ભ (1) ના પત્રની સાથે સામેલ નામ. ગુજરાત હાઈકોર્ટ દ્વારા CRA NO.1153/2017 with CRA NO.394/2018 તા.13-6-18 ના રોજ CAV JUDGEMENT આવેલ છે. અને સદરહુ બાબતમાં નામ. ગુજરાત હાઈકોર્ટનાં ચુકાદા મુજબ શાળા /કોલેજોમાં અભ્યાસ કરતા વિદ્યાર્થીઓમાં જાગૃતિ લાવવા માટે POSCO ACT અને તેની શિક્ષણની જોગવાઈઓ સંદર્ભે બહોળી પ્રસિધ્ધિ મળે તે રીતની કાર્યવાહી કરવા જણાવેલ છે. જેની નકલ આ સાથે સામેલ છે.

વિદ્યાર્થીઓમાં જાગૃતિ લાવવા માટે POSCO ACT અને તેની શિક્ષાની જોગવાઈઓ સંદર્ભે બહોળી પ્રસિધ્ધિ મળે તે રીતની કાર્યવાહી કરવા સર્વે ડીગ્રી/ડીપ્લોમા, ફાર્મસી કોલેજોના આચાર્યશ્રીઓને જણાવવામાં આવે છે.



સંયુક્ત ટેકનીકલ શિક્ષણ નિયામક.

બિડાણ-ઉપર મુજબ

નકલ રવાના જાણ અને જરૂરી કાર્યવાહી સારું.

આ ખાતા હસ્તકની સર્વે સરકારી/ બિનસરકારી ડીગ્રી/ડીપ્લોમા, ફાર્મસી કોલેજોના આચાર્યશ્રીઓને જરૂરી કાર્યવાહી માટે રવાના.

for the offences punishable under Section 363, 366 and 376 of the Indian Penal Code and under Sections 3(a) and 4 of the POCSO Act, however has been pleased to sentence the respondent- original accused as under:

Offence	Imprisonment	Fine	In default of Fine
U/s. 363 of the IPC	2 years	Rs.2000	2 months
U/s. 366 of the IPC	3 years	Rs.3000	6 months
U/s. 3(a) and 4 of the POCSO Act	7 years	Rs.5000	One year

No separate sentence has been imposed by the learned Special Court for the offences punishable under Section 376 of the Indian Penal Code though the original accused has also been held guilty for the offences punishable under Section 376 of the Indian Penal Code.

4.0. The facts leading to the present Appeals in nutshell are as under:

4.1. The First Information Report being I-C.R. No.36/2014 came to be filed at Jamkhambaliya Police Station by the informant - Sanjaybhai Govindbhai Parmar on 22.03.2014 for the offences under Section 363 and 366 of the Indian Penal Code alleging that his daughter (hereinafter referred to in short as 'the prosecutrix') who was to attend the SSC Board Examination at a Centre had left the house at 9.00 am for her examination Centre and was supposed to return after the Exam at around 2.30 pm. As she did not return, the informant made an enquiry at the Exam Centre, where he was informed that his daughter had remained absent in the

examination. The informant made an enquiry with the neighbours as well as with the relatives. He came to know that the accused – Ashok Mavjibhai who was residing in the neighborhood was also missing at around the same time. Enquiry was also made about him from the relatives and neighbours and ultimately, it was found that the prosecutrix had eloped with Ashok.

4.2. In the meantime, on 25.03.2014, at around 11.45 pm, the prosecutrix called up the informant and told him that she was with Ashok and immediately disconnected. It is in these facts and situation, the First Information Report came to be registered.

4.3. The investigation was undertaken and upon recording of the statement of the witnesses, it was disclosed that other offences have also been committed, as a result of which, the report invoking in separate the provisions of the POCSO was submitted and upon the arrest of the accused, medical examination of the prosecutrix as well as the accused were performed. On 21.06.2014, the chargesheet came to be filed.

4.4. After due compliance with the provisions of the Code, the POCSO case came to be committed. Vide Exhibit 8, the charge came to be framed for the offences under Section 363, 366 and 376 of the Indian Penal Code and Sections 3(a) and 4 of the POCSO Act. The plea came to be recorded vide Exhibit 9 wherein the accused pleaded not guilty and claimed to be tried.

4.5. During the course of the trial, the oral and documentary evidence was led in the nature as follows :-

Oral Evidence

Sl.No	Name of the Witness	Exhibit
1	PW-1 Dr. Nitaben Hirabhai Radani (Doctor)	10
2	PW-2 Hardikbhai Hareshbhai Jadav (Panchwitness of the clothes of the prosecutrix)	22
3	PW-3 Balubhai Nathabhai Bhojani (Panchwitness of the arrest of the accused)	24
4	PW-4 Manojbhai Ramniklal Shukal	27
5	PW-5 Hitendrabhai Dharmendrabhai Acharya (School Principal)	30
6	PW-6 Sanjaybhai Govindbhai Parmar (Complainant)	37
7	PW-7 Lakshmiben Ramjibhai Chopda (Witness – Clerk at V.H. High School, Harshadpur)	39
8	PW-8 Prosecutrix	40
9	PW-9 Dr. Satyajit Birendrakumar Rajan	47
10	PW-10 Sukhdevsinh Juvansinh Jadeja (ASI)	49
11	PW-11 Prabhatbhai Ratnabhai Ramani (Investigating Officer)	53

Documentary Evidence

Sl.No.	Name of the Witness	Exhibit
1	Confidential Report of the prosecutrix/Original Certificate	11
2	Original papers of MLC No.2063/14	14
3	Original Sample Collection form of the prosecutrix	14
4	Original Letter regarding the discharge of patient from M.P. Shah Government Colege, Jamnagar	15
5	Yadi written by the PSI, Khambhaliya regarding the physical examination of the prosecutrix	16
6	Yadi written by the PSI, Khambhaliya regarding the physical examination of the prosecutrix	17

7	Pathology Report	18
8	Original Examination Report of the Microbiology Department	19
9	OPD Case Papers	20
10	Original Sonography Report	21
11	Original Panchnama of the seizure of clothes of the accused	23
12	Original Panchnama of the arrest of the accused and the position of body	25
13	Extract of the Birth and Death Register, Khambhaliya Nagar Palika	28
14	Original Certificate of the Date of birth of the prosecutrix	29
15	Extract of the General Register of Harshadpur High School	31
16	Yadi written by PSI, Khambhaliya to the Principal of VN & VM High School asking for the Birth Certificate	32
17	Original Birth Certificate of the prosecutrix given by Harshadpur High School	33
18	Original Complaint	38
19	Admission letter of the prosecutrix	41
20	Yadi regarding the physical examination of the prosecutrix, MLC No.298/2014, Collection Form, MLC Certificate, Yadi regarding the physical examination of the accused, MLC No.299/2014, Form regarding the collection of samples of the accused etc.	48
21	Extract of Station Diary	50
22	Original Yadi regarding the registration of offences	54
23	Yadi regarding medical examination	55
24	Yadi regarding medical examination of the accused	56

25	Yadi written to the Gynecological Department of GG Hospital regarding medical examination of the prosecutrix	57
26	Original MLC Certificate of the accused at General Hospital, Jamkhambaliya	58
27	Yadi regarding the arrest of the accused and entry made in the Station Diary thereof	59
28	Yadi regarding addition of Sections of the Indian penal Code	60-61
29	Yadi regarding the certificate pertaining to the medical certificate of the prosecutrix	62
30	Forwarding letter to FSL Rajkot, Forwarding Form, Certificate, Receipt, Forwarding letter and Original Analysis Report	63-68

4.6. Considering the evidence on record, the Court came to the conclusion that the prosecutrix at the time of the incident was aged 15 years, 11 months and 22 days and therefore, below the age of 18 years and would therefore, fall in the definition of a 'child' as described under the provisions of the POCSO Act and that the evidence of the witnesses and the medical evidence was sufficient to establish sexual intercourse by the accused. Therefore, the Court proceeded to convict the accused under Sections 363, 366 and 376 of the Indian Penal Code and under Sections 3(a) and 4 of the POCSO Act. The Special Court awarded rigorous imprisonment of 2 years and a fine of Rs.2,000/= under Section 363 of the Indian Penal Code, rigorous imprisonment of 3 years and a fine of Rs.3,000/= under Section 366 of the Indian Penal Code and rigorous imprisonment of 7 years and a fine of Rs.4,000/= under Sections 3(a) and 4 under the POCSO Act. However, the learned Special Court has not imposed any separate sentence for the offences punishable under Section 376 of the Indian Penal Code, though the original accused is held guilty for the offence punishable under Section 376 of the Indian Penal Code also, by

observing that as the original accused is already sentenced to undergo 7 years for the offence punishable under Section 3(a) and 4 of the POCSO Act, to impose the separate punishment / sentence for the offences punishable under Section 376 of the Indian Penal Code would tantamount to double jeopardy or to sentence the accused twice for the same offence.

4.7. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the original accused has preferred Criminal Appeal No. 394 of 2018. The State has also preferred appeal against the impugned judgment and order passed by the learned Special Court in so far as not imposing the separate sentence for the offences punishable under Section 376 of the Indian Penal Code and also to enhance the punishment under the POCSO Act imposed by the learned trial Court for rest of the offences.

5.0. Shri Prakash Jani, learned Additional Advocate General has appeared on behalf of State with Shri Mitesh Amin, learned Public Prosecutor and with C.M. Shah, learned Additional Public Prosecutor and Shri Nikunj Kanara, learned advocate for the original accused.

Criminal Appeal No.394 of 2018

6.0. Shri Nikunj Kanara, learned advocate for the appellant has vehemently submitted that the learned trial Court has materially erred in not properly appreciating the fact that as such there was inordinate and unexplained delay in lodging the complaint / FIR which is fatal to the case of the prosecution inasmuch as it is clearly indicate that initiation of criminal proceedings was an afterthought

and step in retaliation. It is submitted by Shri Kanara, learned advocate for the appellant that even according to the complainant himself the victim was not found since 22.03.2014 till the date of her surrender i.e. 27.03.2014 and even the complainant himself has stated in the FIR that complainant had knowledge of the victim eloping with the appellant but for the reasons best known to him till 25.03.2014, he did not choose to inform the police by filing a missing report of his daughter who was allegedly 15 years and 11 months.

6.1. Shri Nikunj Kanara, learned advocate for the appellant has vehemently submitted that the appellant himself is aged 19 years. The appellant himself being of young age was unaware of the consequences of law when he actually eloped with the prosecutrix. It is submitted that the convict was having a love affair with the prosecutrix and such an affair was a two way affair, as both of them knew each other and were neighbors. It is submitted that there was no reason for filing the First Information Report as both the convict and the prosecutrix were to lead their life together as husband and wife. It is submitted that the prosecutrix had eloped with the convict on her own will and had traveled with many places which included public spaces like the State Transport Bus Stand from Ahmedabad to Valsad. It is submitted that from the statement of the prosecutrix given during the course of the investigation, there is nothing to suggest that force was unduly exercised. It is submitted that the age of the prosecutrix as shown by the prosecutrix is also highly doubtful as it took a period of three months for the investigation to place on record the Birth Certificate

and such delay in placing the birth certificate on record by the investigation creates doubt. It is submitted that in such doubtful case, the prosecution ought to have carried out the ossification test or other medical tests to ascertain her age.

Making above submission, it is requested to admit / allow the present appeal and quash and set aside the impugned judgment and order dated 28.04.2017 passed by the learned Additional Sessions Judge (Special Judge), POCSO, Dev Bhoomi Dwarka at Khambhaliya passed in Special POCSO Case No.2/2016 (Old Special Case No.28/2014).

7.0. Ms. C.M. Shah, learned Additional Public Prosecutor has opposed the appeal preferred by the accused. It is vehemently submitted that in the facts and circumstances of the case and considering the material on record and on appreciation of evidence, the learned trial Court has rightly held the accused guilty for the offence punishable under Sections 363, 366 and 376 of the IPC and Sections 3(a) and 4 of the POCSO Act .

7.1. It is vehemently submitted that in the present case prosecutrix was aged less than 18 years i.e. 15 years and 11 months at the time of committing the offence and therefore, the learned trial Court has rightly held the accused guilty for the offence under Sections 363, 366 and 376 of the IPC and Sections 3(a) and 4 of the POCSO Act.

7.2. It is further submitted by Ms. Shah, learned Additional Public Prosecutor that as such the age of the prosecutrix has been proved by the prosecution by leading cogent evidence, more particularly,

birth certificate which was recovered during the course of the investigation. It is submitted that therefore, as the prosecutrix at the time of incident was aged less than 16 years (less than 18 years) and therefore, even if assuming that the accused had sexually intercourse with the prosecutrix with consent, in that case also, as the prosecutrix was aged less than 18 years (in the present case less than 16 years) her consent was irrelevant and therefore, considering the provision of Section 376 of the IPC and Section 4 of the POCSO Act, the learned trial Court has rightly held the accused guilty for the offences punishable under Sections 363, 366 and 376 of the IPC and Sections 3(a) and 4 of the POCSO Act.

Making above submission, it is requested to dismiss the present appeal preferred by the accused.

Criminal Appeal No. 1153 of 2017

8.0. Now, so far as Criminal Appeal No.1153 of 2017 preferred by the appellant - State of Gujarat for enhancement of sentence imposed by the learned trial Court as well as challenging the impugned judgment and order passed by the learned trial Court in so far as not awarding any separate sentence / punishment for the offence punishable under Section 376 of the IPC is concerned, Shri P.K. Jani, learned Additional Advocate General appearing on behalf of the State has vehemently submitted that in the facts and circumstances of the case the learned trial Court has materially erred in not imposing any separate sentence for the offence punishable under Section 376 of the IPC.

8.1. It is further submitted by Shri Jani, learned Additional

Advocate General that as such the learned trial Court has held the accused guilty for the offences punishable under Section 376 of the IPC also and therefore, once the accused has been held guilty for the offence punishable under Section 376 of the IPC, the learned trial Court ought to have imposed the separate punishment for the said offence also. It is submitted that as such there cannot be any offence without any punishment / sentence and therefore, once the accused is held to be guilty for an offence (in the present case offence punishable under Section 376 of the IPC), the learned trial Court ought to have imposed the separate punishment / sentence for the said offence also. It is submitted by Shri Jani, learned Additional Advocate General that in such situation the proper course for the learned trial Court would be to award sentence / punishment provided for the offence under IPC as well as under the POCSO Act, however may observe that sentence shall run concurrently. It is submitted that if such a course is adopted, the same shall be taking care of Section 42 of the POCSO Act.

8.2. In the alternative, it is submitted by Shri Jani, learned Additional Advocate General appearing on behalf of the State that in any case considering Section 42 of the POCSO Act, the learned trial Court ought to have sentence the accused for minimum of 10 year RI as provided for the offence punishable under Section 376 of the IPC. It is submitted by Shri Jani, learned Additional Advocate General that in the present case, the learned trial Court has imposed the sentence / punishment of 7 years RI for the offence punishable under Section 4 of the POCSO Act, which is minimum sentence provided under the POCSO Act. It is submitted that the

learned trial Court is not properly appreciated and considered the fact that minimum sentence provided under the IPC for the offence punishable under Section 376 of the IPC is 10 years RI and therefore, considering Section 42 of the POCSO Act which provides that where an act or omission constitutes an offence punishable under POCSO Act and under sections 375 and 376 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 POCSO Act and / or under the IPC as provided for punishment which is greater in degree than the punishment provided (minimum punishment provided) under the POCSO Act. In support of his above submission, Shri Jani, learned Additional Advocate General appearing on behalf of the State has relied upon the following decision.

- (1). Independent Thought vs. Union of India reported in (2017) 10 SCC 800.
- (2). Decision of the Division Bench of the Delhi High Court in the case of Gaya Prasad Pal @ Mukesh vs. State reported in 2016 Law Suit (Del) 6427.
- (3). Decision of the High Court of Sikkim -Gangtok dated 1.4.2016 in Criminal Appeal No. 05 of 2016 in the case of Bishal Lamgadey vs. State of Sikkim.
- (4) Decision of the Bombay High Court in Criminal Appeal No. 195 of 2016 dated 24.08.2017 in the case of Siddharth Dagadu Sonde vs. The State of Maharashtra.

Making above submission and relying upon the above decisions, it is requested to modify the impugned judgment and

order passed by the learned trial Court and to impose the appropriate suitable punishment which shall be in consonance with Section 42 of the POCSO Act.

9.0. Shri Kanara, learned advocate for the original accused has vehemently submitted that in the facts and circumstances of the case, the learned trial Court has rightly imposed the punishment / sentence of 7 years RI which is minimum sentence provided under the POCSO Act. It is vehemently submitted by Shri Kanara, learned advocate for the original accused that it is cardinal principle of criminal jurisprudence that two punishments are provided, then the benefit of the lower punishment should be given to the offender. It is submitted that therefore, in the facts and circumstances of the case the sentence awarded by the learned trial Court of 7 years RI for the offence under the POCSO Act is not required to be interfered with.

Criminal Appeal No. 394 of 2018

10. Heard the learned advocates for the respective parties at length. We have perused the impugned judgment and order passed by the learned trial Court holding the accused guilty for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and under Sections 3(A) and 4 of the Posco Act. We have re-appreciated the entire evidence on record.

10.1. Having heard the learned advocates for the respective parties at length and considering the material / evidence on record, in the present case the prosecution has been successful in proving the age of the prosecutrix i.e. less than 16 years of age, more particularly,

by producing the register of birth and death produced at Exh.28. The same has been duly proved by the prosecution. Thus, the prosecution has been successful in proving the age of the prosecutrix at the time of incident / offence. The offence has taken place on 22.03.2014 and complaint came to be lodged on 25.03.2014. Thus, the statement on behalf of the accused is required to be considered, considering the fact that at the time of committing the offence the age of the prosecutrix was less than 16 years of age.

10.2. It is the case on behalf of the accused that as both the accused and the prosecutrix were knowing each other and convict was having love affair with the prosecutrix and such an affair was a two way affair and it is the case of the consent by the prosecutrix, the learned trial Court has erred in convicting the original accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and under Sections 3(a) and 4 of the POCSO Act. It is also the case on behalf of the appellant - original accused that the appellant himself being of young age i.e. 19 years of age was unaware of the consequence of the law when he actually eloped with the prosecutrix, the appellant -accused may not be convicted for the offence under Section 376 of the Indian Penal Code and Section 3 (a) and 4 of the POCSO Act.

10.3 However, considering the provisions of Section 375 and 376 of the Indian Penal Code as well as provisions of Section 2(d) and Sections 3 and 4 of the POCSO Act even if such an act even with the consent is immaterial and the accused can be held guilty for the

offences punishable under Section 376 of the Indian Penal Code and Section 3 and 4 of the POCSO Act, if such an act is with the consent of prosecutrix / victim who is less than 18 years. In so far as consent of the prosecutrix is concerned, the observations made by the Hon'ble Supreme Court in the case of Independent Thought (supra) are required to be considered. While considering the Exception 2 of Section 375 of the original act which provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife, the Hon'ble Supreme Court has observed that there is no question of a girl child given express or implied consent for sexual intercourse. It is observed that the age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Even otherwise, considering Section 375 of the IPC as amended on 3.2.2013, more particularly, clause 16 of the Section 375 if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent is rape. As observed by the Hon'ble Supreme Court that this is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential. Therefore, considering the fact that prosecutrix at the time of offence was aged less than 16 years (less than 18 years) and the offence committed after 2013 amendment to Section 375 of the Indian Penal Code the post amendment to Section 375 of the Indian Penal Code shall be applicable, the learned trial Court has rightly held the accused guilty for the offence punishable under Section 376 of the Indian Penal Code. The sexual intercourse by the accused with the prosecutrix has been established and proved and

as such that does not seem to be in dispute and / or disputed by the accused. However, his only defence was it was with the consent. Under the circumstances, the learned trial Court has rightly held the accused guilty for the offences punishable under Section 376 of the Indian Penal Code as well as Section 3 and 4 of the POCSO Act. Therefore, challenge to the impugned judgment and order passed by the learned Special Court convicting the accused for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and under Sections 3(A) and 4 of the POCSO Act fails. The impugned judgment and order dated 28.04.2017 passed by the learned Additional Sessions Judge (Special Judge), POCSO, Dev Bhoomi Dwarka at Khambhaliya passed in Special POCSO Case No.2/2016 (Old Special Case No.28/2014) is hereby confirmed.

Criminal Appeal No.1153 of 2017

11. Now, so far as the appeal preferred by the State Government for enhancement of the punishment / sentence and / or challenging the impugned judgment and order passed by the learned trial Court in so far as not imposing any punishment / sentence while convicting the accused for the offence punishable under Section 376 of the Indian Penal Code and awarding sentence of 7 years RI only for the offences under the POCSO Act is concerned, on considering the relevant provisions of the POCSO Act, more particularly, Section 42 of the POCSO Act for the reasons stated above, we are of the opinion that the impugned judgment and order passed by the learned trial Court in so far as not awarding appropriate sentence in consonance with Section 42 of the POCSO Act deserves interference.

While considering the issue involved in the appeal preferred by the State viz. Whether in the facts and circumstances of the case, the learned trial Court is justified in not awarding any separate sentence / punishment for the offence punishable under Section 376 of the IPC ? and whether learned trial Court is justified in awarding sentence of 7 years RI only while convicting the original accused for the offences under Section 3 and 4 of the POCSO Act ? The relevant provisions of the Indian Penal Code as well as POCSO Act are required to be referred to, which are as under:

"Section 2(d): child" means any person below the age of eighteen years;

Section 3 : Preventive 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 moun to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4:Punishment For Penetrative Sexual Assault:- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

Section: 42: Alternative Punishment:- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), 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.

Section 42(A): Act Not In Derogation Of Any Other Law:- *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*

Section 43: Public Awareness About Act: *The Central Government and every State Government, shall take all measures to ensure that:-*

(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;
(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act."

11.1. Recently, in the case of Independent Thought (supra), the Hon'ble Supreme Court had occasioned to consider Section 42 of the POCSO Act. In the said decision, the Hon'ble Supreme Court has observed that Section 42 of the POCSO Act makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. The Hon'ble Supreme Court has further observed that same is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The Hon'ble Supreme Court has observed that the legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the

objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. Therefore, considering Section 42 of the POCSO Act where an act or omission constitutes an offence punishable under POCSO Act as well as under 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. Therefore, on fair reading of Section 42 of the Act while imposing punishment for the Act or omission which constitutes an offence under the POCSO Act as well as under the Indian Penal Code, it is the duty caste upon the trial Court / Court to award suitable punishment either under the POCSO Act or under the IPC, however which is greater in degree. Take an example of the present case. In the present case, the accused has been guilty for the offence punishable under Section 375 of the IPC punishable under Section 376(2) of the IPC as well as under Section 3 of the POCSO Act punishable under Section 4 of the POCSO Act.

11.2. As per sub-section(2) of Section 376 as amended by the Act of 13 of 2013 the minimum punishment for having committed the rape under Section 375 of the IPC is with RI for term which shall not be less than 10 years, but which may extend to imprisonment for life and shall also be liable to fine, which shall mean imprisonment for the remainder of that person's natural life and

shall also be liable to fine. The punishment provided under Section 4 of the POCSO Act for the offence punishable under Section 3 of the POCSO Act is imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. As per Section 42 of the POCSO Act, where an act or omission constitutes an offence punishable under the POCSO Act and / or under Sections 375 and 376 of the IPC, 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. Therefore, while imposing the sentence / punishment, while holding the accused guilty for the offence under the IPC as well as POCSO Act and for the act or the omission of the accused which constitute an offence punishable under the POCSO Act as well as IPC, the learned trial Court is first required to determine the punishment / sentence looking to the nature and gravity of the offence and thereafter is required to impose the appropriate sentence / punishment taking into consideration Section 42 of the POCSO Act and is required to impose the punishment / sentence either under the POCSO Act or under the IPC, however which is greater in degree. If such a procedure is adopted, in that case, the same can be said to be awarding suitable punishment / sentence as per Section 42 of the POCSO Act.

11.3 Now, so far as facts of the case on hand are concerned, in the present case, accused is held guilty for the offence under Sections 363, 366 and 376 of the Indian Penal Code and under Sections

3(A) and 4 of the POCSO Act is concerned, however has imposed the punishment / awarded the sentence of only 7 years under Section 4 of the POCSO Act for the offence under Section 3(a) of the POCSO Act with fine of Rs.5000/- and in default to undergo further one year SI only. No sentence has been imposed under Section 376 of the IPC for the offence under Section 375 of the IPC on the ground that if punishment is imposed both under the POCSO Act and under the IPC, it will be double jeopardy. However, it is required to be noted that as the age of prosecutrix was less than 16 years and therefore, considering Section 376 (2) of the IPC as amended by Act 13 of 2013, by which, as per Section 376(2)(i) the minimum punishment is 10 years but which may extend for imprisonment for life which shall mean imprisonment for the remainder of that accused natural life and therefore, punishment provided under the IPC can be said to be greater in degree. The learned trial Court has materially erred in awarding punishment of only 7 years RI for the offence punishable under Section 3 of the POCSO Act. Considering Section 42 of the POCSO Act, while holding the accused guilty for the offence under Section 375 punishable under Section 376 of the IPC and under Section 3 of the POCSO Act punishable under Section 4 of the POCSO Act, the learned trial Court imposed the punishment for the offences under the IPC i.e. 10 years RI which is admittedly greater in degree. Therefore, to the aforesaid extent, the impugned judgment and order passed by the learned trial Court is required to be modified by imposing suitable punishment as provided under Section 376(2) of the IPC i.e. 10 years RI with fine as awarded by the learned trial Court.

12. In view of the above and for the reasons stated above, appeal preferred by the State Government being Criminal Appeal No.1153 of 2017 is hereby partly allowed. The impugned judgment and order dated 28.04.2017 passed by the learned Additional Sessions Judge (Special Judge), POCSO, Dev Bhoomi Dwarka at Khambhaliya passed in Special POCSO Case No.2/2016 (Old Special Case No.28/2014) is hereby modified to the extent imposing punishment of 10 years RI on the accused with fine of Rs.5000/- for the offence punishable under Section 375 of the Indian Penal Code. Considering Section 42 of the POCSO Act, no separate punishment is awarded for the offence under Section 3 of the POCSO Act punishable under Section 4 of the POCSO Act. Appeal preferred by the State is hereby partly allowed to the aforesaid extent. Criminal Appeal No.394 of 2018 stands dismissed. Registry is directed to return the Record and Proceedings of the case to the learned trial Court forthwith.

13.0. Before parting with the present judgment and order, we would like to remind the Central Government and the State Government to the provision of Section 43 of the POCSO Act. Section 43 of the POCSO Act which reads as under:

Section 43: Public Awareness About Act: *The Central Government and every State Government, shall take all measures to ensure that:-*

- (a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;*
- (b) the officers of the Central Government and the State Governments and other concerned persons (including the*

police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act."

13.1 In the case of Independent Thought (supra), the Hon'ble Supreme Court has observed that securing the best interest of the child is an obligation cast upon the Government of India having acceded to the Convention on the Rights of the Child. It is further observed that Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child". It cannot be disputed that keeping in view the mounting crimes against children, regardless of the sex of the victim, Parliament enacted the Protection of Children from Sexual Offences Act, 2012. That Statement of Objects and Reasons of this Act reads as under:

"STATEMENT OF OBJECTS AND REASONS

1. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic

performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation."

13.2. Section 43 of the POCSO Act cast a duty on the Central Government and every State Government to give publicity to the provisions of POCSO Act and the same shall be given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of POCSO Act. The legislature has enacted the POCSO Act keeping in mind the increasing threats on the sexual offence against the child. The provisions of the Act would remain within books if the public do not know about such features of the POCSO Act and therefore, the

responsibility has been entrusted on the Central Government and every State Government to raise public awareness about the provisions of the POCSO Act. The Children, Parents, Guardian and the public in general are to be made aware through fair amount of publicity. For this purpose, the Government may make use of all means of information and broadcasting including newspapers, pamphlets, sign boards, radio and television. Therefore, if the public awareness is created amongst children, parents, guardian and public in general with respect to provisions of POCSO Act it may serve dual purpose. Those who are hardcore criminals and who commit the offence must be told that if they commit such offence, they shall be dealt with strictly and they will have to face dire consequences provided under the POCSO Act and Indian Penal Code, so that it may have deterrent effect. At the same time, it may also prevent the offender namely teenager who is committing such type of offences, more particularly, the statutory offence viz. having sexual intercourse and / or having committed the act which falls within Section 3 of the POCSO Act with a girl aged less than 18 years may be with or without consent. We have come across such number of cases where a boy of young age of approximately between 19 to 21 years, they commit such statutory offence as they are unaware of the consequences of law and when they actually elope and / or have sexual intercourse and / or any act as mentioned in Section 3 of the POCSO Act which may be with the consent of the prosecutrix. However, the law is to be applied. Ignorance of law cannot be an excuse. At this stage, it is required to be noted that Act has drastically changed after 2013 amendment and now minimum sentence is provided for the offence punishable

under Section 376 of the IPC as well as under Section 3 of the POCSO Act, the minimum sentence of 10 years and 7 years respectively is provided, and Court has no discretion whatever to award sentence less than minimum provided under the IPC and POCSO Act, which discretion was available prior to the Amendment Act, 2013. Because of such ignorance of the law and having committed the statutory offence, a young boy has to undergo minimum 10 year RI and after 10 years of imprisonment and when he comes out from the jail one can visualize his position in the life thereafter. Therefore, if awareness is created amongst the Children, Parents, Guardian and Public in general, more particularly, with respect to consequences of committing such an offences (statutory offence) it may reduce of committing such type of offences, more particularly statutory offence. Considered the facts of the present case itself, accused is of 19 years of age. He eloped with the prosecutrix, having love affair with the prosecutrix and under the belief that such an affair was a two way affair. Both of them were knowing each other and were neighbors. However, when Act constitute an offence of rape considering provisions of Section 375 of the IPC and Section 3 of the POCSO Act and therefore, he has been convicted and has to be sentenced appropriately with the minimum sentence provided under the provisions of IPC or POCSO Act which is greater in degree. He will have to undergo minimum 10 years imprisonment for having committed the such offence which can be said to be the statutory offence. Therefore, we may draw the attention of the Central Government and may draw the attention of the State Governments in the present case State of Gujarat, to perform their duty cast under Section 43 of the POCSO

Act which shall be in the larger public interest, which may be in furtherance of achieving the object and purpose of enacting the POCSO Act as well as with a view to see that young generation may not commit such offence due to ignorance of the consequences of such an Act. Therefore, while parting with the present judgment we may observe that all efforts be made by the State Government and State Government take all measures to ensure that the provisions of POCSO Act and even provisions of IPC, more particularly, Sections 375 and 376 as amended are given wide publicity through media etc. as observed herein above. The State Government may also think and create awareness about the above laws in the schools and colleges, more particularly, to make present young generation / future generation to make them aware of consequences of the above laws. Therefore, Registry is directed to send the copy of this order to the Chief Secretary, State of Gujarat, Secretary, Home Department, State of Gujarat, Secretary, Higher Education Department, State of Gujarat and Secretary, Women and Child Development Department, Sachivalay, Gandhinagar to take further steps and measures as observed herein above.

Sd/-

(M.R. SHAH, J)

Sd/-

(A.Y. KOGJE, J)

KAUSHIK J. RATHOD