IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 831 OF 2015

Imran Shabbir Gauri
Age: 39 years r/o. Flat No.14,
Deoashish Building, Near Poornima
Bus Stop, Vaidya Nagar, Dwarka,
Nashik, at present in Nashik
Central Prison, Nashik. ...Appellant

Versus

The State of Maharashtra
Through the Bhadrakali Police Station
Nashik ...Respondent

Mr. Aniket Vagal for the Appellant (Legal Aid).
Mrs. M. M. Deshmukh, APP for the State.

CORAM : PRASANNA B. VARALE &
S.M. MODAK, JJ.

RESERVED ON : 28th JANUARY, 2021
PRONOUNCED ON : 31th MARCH, 2021

JUDGMENT (Per S.M. Modak, J.)

Due to globalization, boundaries of nations have disappeared. During olden days, certain relations were considered as sacrosanct. That is to say relationship in between brother and sister, relationship in between mother and son, relationship in between father and daughter and so on were considered as sacrosanct. However, due to passage of time, these relationships have no more remained sacrosanct and there are various instances of overstepping the sacrosanct relationship by the near relationship.

2. One of such instance took place when the present appellant sexually abused his own daughter/victim. Though there are two views that is to say whether the victim was a real daughter or a step daughter. But the fact remains that she is victim (though her name was referred by the trial court, this court has restrained themselves from referring the victim by her name.)

3. The Special Judge under the The Protection of Children from Sexual Offences (POCSO) Act, 2012 and the Additional Sessions Judge, Nashik had come across the case wherein there was grievance of such sexual abuse by the father/the present appellant. After the trial (that is after examining all the witnesses) Trial Court convicted the appellant for the offence of section 376 (2) (i), 506 of IPC and under section 4 of POCSO. By taking re-course to the provision of section 42 of the said Act, separate sentence was not imposed for the offence under section 4 of the said Act. As the appellant had obtained nude photographs of the victim on his mobile handset on various dates, the trial Court convicted him for the offence punishable under section 67-B of The Information Technology Act, 2000. The trial Court acquitted him for the offence punishable under section 323 of IPC. The correctness of the said judgment is challenged on behalf of the appellant.

4. We have heard Mr. Wagal, the learned Counsel for the appellant and Mrs. Deshmukh, the learned Addl. P.P. for the Respondent. Both of them have assisted us in going through the record.

5. Prosecution has in all examined 8 witnesses. Defence of appellant is that of denial. As the victim has not deposed the actual

incident which took place, the appellant thought it comfortable and he had chosen to take only defense of denial.

6. On the point of actual incident, victim PW-1 was the sole witness. It is but natural. Such incidents always take place in secrecy. Prosecution has not attempted to examine any witness on the point of post incident narration to near and dear ones by the victim. Prosecution thought it fit not to do that futile exercise. No one could have supported. Because during perusal of record we find one affidavit dated 16/9/2011 (Exhibit 13 of the trial Court record) sworn by Smt. Bhuri Imran Gauri, mother of the victim. This was filed at the stage of hearing of bail application of the accused. Trial Court has taken note of the said affidavit and was pleased not to consider it while rejecting bail request on 24/9/2014.

7. On this background, prosecution does its best to prove the offence by adducing legal evidence. The investigating agency was conscious of their responsibilities. Investigating Officer Smt. Naik, PW-7 arranged for recording statement of the victim under section 164 of the Code of Criminal Procedure. During trial also, learned APP in-charge has taken pains in examining the learned Magistrate Smt. Gaikwad, PW-2 who recorded the statement.

8. She has deposed to the fullest extent on the point of compliance of procedure and also about what victim deposed before her. Learned Additional Sessions Judge accepted her evidence on the point of examination of the victim. Prosecution examined medical officer Dr.

Nareshkumar Bagul, PW-6 and lady police constable Smt Chaure, PW-4 (who took victim to medical officer).

9. Prosecution has taken care in examining the mobile vendor of Intex Company mobile Shri Beg Rustam, PW-3. He sold it to accused on 10/5/2013. He also referred to sale invoice. His evidence was not accepted by the trial court. The accused used this mobile for the purpose of recording of pornographic shooting of the victim.

10. To prove seizure of 4 mobile handsets, sim card and pendrive, prosecution examined seizure panch PW-5. He is brother of the accused. He has not supported the seizure.

11. Defence admitted arrest form and spot panchanama carried out about Laxmi bungalow, near Dwarka circle, Nashik (from where sample of stains of dried yellow liquid was taken). Lastly, prosecution examined PW-8, PI Wadile on the point of sending electronic evidence to forensic laboratory. Investigating Officer Smt. Naik (PW-7) was examined on the point of overall investigation carried out.

12. Several contentions are raised on behalf of the appellant. It includes the act of resiling by the victim while giving evidence before the Court. It includes wrong approach of the trial Court in believing the statement of the victim recorded under section 164 of Cr.P.C. It includes not establishing the link in between the conclusion drawn by the Forensic Science Expert (on the basis of examining mobile hand-sets) on one hand and oral testimony of the relevant witnesses on the other

hand. He also relied upon various judgments. As against this, the learned APP also relied upon certain judgments to buttress her submission that few of the facts stated by the victim on one hand and corroborative material on the other hand leads to drawing of conclusion about guilt of the appellant/accused. We are required to decide the appeal by considering the above submissions.

13. So issue involved before us are:-

1. What is the evidentiary value of a statement of victim recorded by learned Magistrate under section 164 of Cr.P.C. particularly when victim has not supported the prosecution (infact her own case) ?
2. Whether learned Additional Sessions Judge was right in accepting the evidence of learned Magistrate (on the basis of facts stated to her by victim) ?
3. Whether learned Sessions Judge was right in concluding about guilt of the accused for the offence punishable under section 376 (2) (i), 506 of IPC on the basis of other corroborative evidence ?
4. Whether learned Additional Sessions Judge was right in convicting the appellant for the offence under section 67-B of IT Act particularly when victim has not supported ?

14. The present case is based on direct and corroborative evidence. Unfortunately, the victim had chosen not to speak about the incident before the Court. So the crucial question is whether we can conclude about guilt of the accused on the basis of all sorts of corroborative

evidence. While arriving at the guilt of the accused, trial Court referred to following circumstances in its judgment.

a) Though the victim has not supported the case of prosecution, the trial Court has considered the evidence of lady Police Constable PW-4-Naman Bhila Chaure and evidence of Medical Officer PW-6-Dr. Nareshkumar Bagul and inferred that why the victim was referred for medical examination (even though she was not sexually abused) ?

b) The trial Court further observed that the accused has not given any explanation. Though the victim has resiled, trial Court has referred to the evidence of Judicial Magistrate PW-2-Janabai Gaikwad (who recorded the statement of the victim under section 164 of Cr.P.C.) and further referred to the dates/ incidents narrated by the victim in such statement.

c) The trial Court was fully aware of the legal provisions pertaining to evidentiary value of Section 164 of Cr. P. C., still while arriving at the final conclusion referred to avernments in such statement.

d) From the 4 mobile handsets seized from the person of accused, the Forensic Expert has opined about pornographic images found in them and the trial Court has relied upon the same even though there is no substantive evidence.

e) Trial Court on the basis of finding that hymen was torn, the trial Court arrived at an opinion that it is but natural for a

Medical Officer to give an opinion about the absence of recent sexual intercourse.

f) Trial Court considered the time gap in between the dates of incidents (lastly on 22/5/2014) and date of examination by the Doctor on 27/5/2014.

EVIDENTIARY VALUE OF STATEMENT UNDER SECTION 164 OF CR.P.C.

15. When we have read the judgment, we find that the trial Court was fully conscious of legal provision about the evidentiary value of the statement under section 164 of Cr.P.C. At more than one place, trial Court observed "*such statement can be used for corroboration or for contradiction*". Use for the purpose of contradiction can be by both the sides that is to say the party who has called witness (only after taking leave of the Court) and the party against whom the witness entered into witness box (for which leave is not required). In this case the attention of the victim is not drawn to Section 164 statement during her evidence before the Court. She was being cross examined on the basis of contents of FIR. Such statement can be used for the purpose of corroboration always by the party who has called the witness. This has not happened in this case. Rightly so question of corroboration has not arisen as the victim has not supported the prosecution case.

16. So when none of the contingency exists, question remains what is the evidentiary value of facts stated under Section 164 statement. It is true that there is difference in between statement under section 161 of Cr.P.C. and statement under section 164 of Cr.P.C. The difference lies in

who are competent to record such statement and in giving oath prior to recording the statement and in obtaining signatures. The authority to record the statement of witness is given to Magistrate, power to administer oath is also given and to obtain signature of the witness makes such statement more reliable than section 161 Statement. Still it is true that such statement given under section 164 is not subject to cross examination at the time when such statement is given. Such witness is generally cross examined when he or she deposes before the Court at the time of trial.

PROVISIONS OF LAW

17. Code of Criminal Procedure can be said to be the parent law wherein there is provision for recording such statement by the Magistrate. In sub-section (1) to sub-section (5) of Section 164 of Code of Criminal Procedure, cross examination is not contempalted. Amendment carried out in the year 2013 by incorporating subsection (5A) (a) mandates the judicial Magistrate to record the statement of a witness under certain prescribed offences. Whereas sub-section (5A) (b) gives status to such statement in lieu of examination in chief as specified under section 137 of the Indian Evidence Act. However, such upgradation is not made universal. It is only when the maker is disable either mentally or physically. This is not a case before us.

18. Whereas section 26 of the Protection of Children from Sexual Offences Act, 2012 says about audio video graphic exercise of recording the statement. There are also safeguards under section 24 and 25 of the said Act. Still we have got no provision wherein the statement under section 164 of Cr.P.C. has been given status of examination in chief. One

does not know how much time it will take for legislatures to bring an amendment in the Act. We say so because Hon'ble Supreme Court in the case of *State of Karnataka by Nonavinakere Police vs. Shivanna @ Tarkari Shivanna*[1] has expressed a wish for giving status to statement as an examination-in- chief.

> *"5. What we wished to emphasize is that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate under section 164 Cr.P.C. and the same be kept in sealed cover to be produced and treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to the defence to cross examine them with further liberty to the accused to lead his defence witness and other evidence with a right to cross examination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast track procedure to the Fast Track Court to resort to."*

19. Still as per our knowledge no such amendment has come into effect. Learned Advocate Vagal for the Appellant relied upon certain judgments on the point of evidentiary value of such statement:

1. *Ram Kishan Singh vs. Harmit Kaur and another*[2]
2. *T. Diwakara & Ors. vs. State of Karnataka*[3]
3. *R. Palaniamy vs. State by Inspector of Police*[4]

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1 (2014) 8 Supreme Court Cases 913

2 AIR 1972 Supreme Court 468

3 2006 Cri. L. J. 4813

4 Criminal Appeal No.158 of 2013

4. Pankaj vs. State of Himachal Pradesh[5]

20. We have perused those situations. On reading them it is clear that the Court has taken a consistent view *"that section 164 Statement can be used only for the purpose of corroboration or contradiction and it cannot be treated as substantive evidence"* Some of the judgments referred above involves commission of offence under section 376 of IPC. Law on the point of *"sole testimony of prosecutrix is sufficient without corroboration"* is well settled. So the Court can rely upon the sole testimony of prosecutrix even without looking for corroboration.

21. It is one thing to say that *"sole testimony without corroboration is sufficient"* and other thing to say that *"section 164 Statement is not substantive evidence and it can be used for contradiction or corroboration"* . We have to understand that the Court gives a verdict on the basis of evidence before the Court. Whatever material is collected during investigation (either in the form of panchanamas or section 164 statement) can be converted into an evidence only when certain witness deposes before the Court. This can be same logic when the maker gives statement before the Magistrate that is the exercise involving the maker and the Magistrate only. Persons against whom such statement is going to be used has no *locus standi* at that time. Even in case of *T. Diwakara (cited supra)*, the High Court at Karnataka has opined about institution of prosecution for forgery if the maker refuses to abide to section 164 Statement.

22. High Court at Madras in case of *R. Palanisamy* (cited supra) has elaborately dealt with various issues about evidentiary value of

5 Criminal Appeal No.251 of 2018

section 164 statement, difference in between section 161 and section 164 statement, summoning of Magistrate, giving of false evidence, evidentiary value of hostile witness. High Court has set aside the conviction for the offence of section 376 (1) of IPC. While convicting the appellant the trial Court has taken into consideration the statement by the victim to the Doctor, Statement made by the victim under section 164 of Cr. P.C., certain answers given by the accused and demeanor of the victim. After scrutinizing the evidence and necessary provisions of law conviction was set aside.

FACTS OF THE CASE

23. So we have to analyze the evidence adduced by the prosecution in totality and to ascertain whether conclusion of the Trial Judge can be said to be legal and proper. Even though morally and legally we can not think of a situation wherein father has raped his minor daughter, but it is correct that Court is bound by rules of law. Even though such instances involving such relationship are on rise, can Court take into account the evidence which is not admissible (as per existing provisions of law and on its interpretation) and convict the wrong doer just for the purpose of sending a message in the society ? Though we agree that such instances are on rise unfortunately we can not take such a view by bypassing the provisions of law. Still we have to wait for the amendment in the law. At the most we can express and direct that the concerned authority may initiate the process for carrying out amendment in the law.

EVIDENCE OF JMFC

24. Trial Court considered the fact of "making preliminary enquiry by PW-2- Janabai Gaikwad with the victim" and got herself satisfied by the voluntariness. Trial Court was conscious about the purpose of recording statement under section 164 of Cr.P.C. There cannot be any dispute about it. "Witness should not change the stand by denying the statement" is one of the purpose and second purpose is to tie over immunity from the prosecution by the witness. Trial Court was conscious of the limited use of such statement. One of that is corroborative use. Trial Court observed "*if legal position is considered, definitely it will corroborate circumstances that pornographic images are found in the mobile phone of the accused which are recovered from his person*" (paragraph No.43).

25. We think certain opinion needs to be expressed about what can be said to be corroborative use. The word "corroboration" is not defined in the Evidence Act. But the word is used in certain Sections of the Evidence Act. Section 156 and 157 of the Evidence Act makes reference to corroboration. Section 156 permits adducing evidence to corroborate a particular fact whereas the previous statement can be used for the purpose of corroboration. It simply implies that apart from the piece of evidence (used by way of corroboration) there exist a fact. In other words there is one principal fact which is in existence and for supporting that fact another evidence is adduced. So evidence given by way of corroboration cannot be said to be the substantive evidence.

CORROBORATION

26. So when the trial Court opined that section 164 statement can be utilized by way of corroboration, we fail to understand what the trial Court mean to say corroboration of which fact? If the evidence of principal fact is not there, the evidence adduced of subsequent fact how it can be used for corroboration. Trial Court has failed to consider this difference and infact has considered section 164 statement as a substantive evidence itself. This is not permissible. We are inclined to set aside that observation.

EVIDENCE ABOUT SEIZURE OF MOBILE PHONES

27. On the point of seizure we have got the evidence of panch witness PW-5-Jifran Shabbir Guari and the Investigating Officer PW-7-Mrudula Manoj Nayik. Panch witness Jifran Shabbir Guari is the brother of the accused. It is but natural for him not to depose against his own brother. The prosecution could have examined another panch witness Tanveer Sayyed who has witnessed the seizure as per form at Exhibit 43. On certain aspects the trial Court has believed the Investigating Officer. It is true that even if the witness has not supported the prosecution case, the evidence of Investigating Officer can be believed upon. The logic is why the Investigating Officer will tell lie. However, this proposition cannot be said to be correct proposition every time. When the Investigating Officer has witnessed the seizure from the person of the accused, what he deposes before the Court is about the facts which he had seen personally. So the trial Court was right in believing the Investigating Officer. Sofar as

seizure of 4 mobiles, one sim card and one pendrive is concerned, now we have to see to what extent this will be useful to the prosecution.

EVIDENCE OF VENDOR

28. Out of these 4 mobiles, the accused purchased Intex Acqua mobile from PW-3-Beg Rayis Rustam. Invoice is at Exhibit 29 and it is proved through him. The trial Court refused to accept it (for the reason that this witness was not present when the phone was sold (paragraph Nos. 35 and 37). On the other hand trial Court has compared the IMEI number appearing on the invoice at Exhibit 29 with the IMEI number appearing in Forensic Science Laboratory report at Exhibit 49. IMEI number tallied. (paragraph 44). For this reason the seizure of that mobile from the accused is said to have been proved by the trial Court. We agree about conclusion of seizure.

EVIDENCE OF FSL REPORT

29. The report is at Exhibit 49. The trial Court was conscious enough to ascertain the proper custody of these electronic articles that is to say right from taking into possession, depositing it in police station and sending it to the Expert. PW-8-Madhavrao Ratan Wadile, PI is the officer who has sent those articles to Forensic Science Laboratory. Report being of an Expert can certainly be read in evidence. Following facts are relevant from that report.

(a) 56 jpeg image files of girl victim were found in two memory cards. They were created in between the dates of crime. Staff has transferred those files into DVD.

(b) 2 video clips between the dates of crime were found in one of the memory cards and it is transferred in DVD. Nothing is said about contents of those clips and whether it pertains to a girl victim.

(c) 754 other pornographic images were found in memory cards and it's DVD is prepared. All were image files (nothing is said whether it pertains to victim girl).

(d) 1232 other pornographic video clips were found in memory cards. DVD prepared (nothing is said whether it pertains to victim girl).

30. On the basis of this evidence, Trial Court concluded that *"the accused is involved in obtaining pornographic images of victim girl and it supports the case of prosecution"* (paragraph 30). Furthermore trial Court held that *"the accused has obtained pornographic clips and recorded video shooting of victim girl"* (paragraph 47). Trial Court held that "*offence under section 67-B of the Information and Technology Act is proved*" (paragraph 48).

31. We have to analyse what are the facts said to be proved. On reading the FSL report no doubt at one place it mentions that 56 jpeg image files were of victim girls and at two places there is reference that 754 and 1232 images and video clips were pornographic. Again there is a need to understand what is its evidentiary value whether it is substantive evidence or whether it is corroborative piece of evidence. There is room for doubt. The person who had seen the incident recorded or who is victim of events recorded can be the proper person and his evidence is

substantive evidence. What is recorded and stored in the memory card when it is produced it becomes corroborative piece of evidence.

32. It would be material to consider the ratio laid down in few relevant cases involving appreciation of electronic evidence.

1. *Bhupesh @ Rinku S/o Vitthalrao Tichkule vs. State of Maharashtra*[6]
2. *Vanita Vasant Patil vs. State of Maharashtra*[7]

33. In the first judgment Nagpur Bench of this Court dealt with appeal against conviction in an offence involving section 302 of IPC wherein most of of the eye witnesses have turned hostile. There was evidence of C.C.T.V. footage and on that basis identity of assailants sought to be proved. This Court considered certain factors " *evidence of an expert who installed the CC TV cameras, display of footage from DVR on LCD TV, seizure of hard-disk and DVR, identifying assailants with the help of CC TV footage when confronted during the evidence to the brother of deceased. On this evidence, this Court has concluded about proof of identity of the assailants and accordingly dismissed the appeal."*

34. Whereas in the second judgment this Court dealt with an appeal against conviction under the provisions of POCSO Act. There was video recording of victim and said evidence was tendered before the Court. This Court considered snapping of the photographs of the private parts of the complainant by accused on his mobile, seizure of mobiles containing obscene photographs, evidence of the victim girl thereby

6 2018 SCC Online Bom 1163
7 2018 SCC Online Bom 4105

deposing the real incident happened as stated before the police, examination of the seizure panch when search of accused No.1 was taken and two mobile phones were found, confirmation of the obscene photographs recorded in the memory card of the mobile phones by restoring the data with the help of a software in the laptop in the police station. On above evidence appeal against conviction was dismissed. Though 15 obscene photographs have not been specifically proved as those of the victim girl or other minor girl, considering the other evidence the conviction was upheld. (paragraph 55)

35. So what we can gather is that electronic evidence also needs to be proved just like any other evidence. Forensic Science Laboratory expert who has viewed the image files and video clips in the laboratory can certainly give information of that. It cannot be considered so far as involvement of the accused for offence under the POCSO Act and IPC is concerned for two reasons :-

(a) The identity of the victim shown in the DVD (wherein the files are transferred) is not proved in the Court (either by showing it to the victim or to any other person knowing the victim).

(b) Said evidence cannot be said to be substantive evidence.

36. Trial Court has accepted it against principles of appreciation of evidence. Even when any article just like weapon, clothes are sent to CA, the Court uses the CA report but at the same time prosecution used to adduce evidence by way of producing those articles. No doubt question of

identification of the articles is not in question. This example is given only for the purpose of understanding under what circumstances the evidence of CA report or FSL report is to be accepted in evidence.

37. So we are not inclined to accept the report of FSL atleast for the purpose of inferring that it is the accused only who has taken those images or done recording. At the most it can only be said that in the articles referred in FSL report some pornographic images were found. Except denial accused has not explained as to how they were found it it.

SPOT PANCHANAMA

38. It is true that the defence has admitted the spot panchanama. It is at Exhibit 21. It is not described as spot panchanama but it is described as Crime Details Form. The contents are more or less just like the spot panchanama. Spot is situated in the Laxmi Bunglow which is situated near Dwarka Circle, Nashik. Trial Court has rightly drawn an inference on the basis of admitted spot panchanama. Police have collected the sample of dried yellow liquid. It would be material to consider the report of CA which is at Exhibit Nos.32, 33 and 34. Exhibit 32 is the report of analysis of blood, pubic hair and nail clips of the accused. No semen was found. However blood group from the sample blood was found to be of "A" group whereas Exhibit 33 belongs to pubic hair, nail clips, vaginal swabs and other articles. Blood group of the victim was found to be of "A" group on the basis of analysis of nail clippings, vulval swabs and vaginal swabs. No semen was detected. Whereas Exhibit 34 is the report of analysis of scrapping of yellow liquid. It was dried semen and of group "A".

39. Trial Court in paragraph No.27 has referred to these CA reports and analysis. Furthermore trial Court has co-related blood group "A" from the dried semen with the place where this yellow liquid was found that is to say in the Laxmi Bunglow (paragraph 35). Trial Court further inferred "*there is no reason for the victim girl to visit Laxmi bungalow as admittedly she was not residing with the accused*" (paragraph 36). We fail to understand on what basis this inference about visit by the victim to the spot is drawn by the trial Court. Even as stated earlier she has not supported the prosecution case. It is no doubt true that we can infer that yellow liquid found at the spot of which blood group is "A". The accused has admitted the spot panchanama. It is also true that blood group from the blood of the accused was found to be of "A" group. However, from all these material how we can infer that the yellow liquid found at the spot was of the accused only ? Prosecution claims that accused was working as watchman in the Laxmi Bungalow. But is there any evidence to show that Laxmi Bungalow was in exclusive custody of the accused ? The answer is no. So what we find is that the analysis done as reflected in three CA reports does not help the prosecution to show the involvement of the accused.

CONTENTS OF FIR AND EVIDENCE OF INVESTIGATING OFFICER

40. The First information report given by the victim was marked as Exhibit 48 through the Investigating Officer PW-7 Nayik. As we know that the contents of FIR are not substantive evidence, it can only be used for the purpose of corroboration or for the purpose of contradiction. The Trial Court in the judgment has opined to believe the Investigating Officer. Said observation cannot be said to be wrong on every occasion. If the

Investigating Officer is witness noticing few facts for example, spot panchanama, plain seizure panchanama, this proposition can be correct. But when it comes to what has been stated by the first informant to him then the evidence of the Investigating Officer cannot be believed upon particularly when the first informant has turned hostile. There is logic behind it. The First informant means the private person, narrates the story and the police records it. So the FIR is nothing but what has been told orally by the first informant to the police. It is cardinal principle that the evidence has to be direct. No doubt the police who records the FIR has heard what the first informant has said. So at the most the evidence of Investigating Officer can be said to be direct evidence about what he has heard. It cannot be a direct evidence of what has happened.

41. So we are not inclined to accept the evidence of Investigating Officer on the point of incident particularly when the first informant has not supported. The first informant was already confronted with the contents of FIR when she had chosen to resile from its contents. So one of the use of FIR that is for the purpose of contradiction has been exhausted. This much can be the use and it cannot be stretched any more. If there is evidence about witnessing the incident through other witness then the Court may think of considering the evidence of Investigating Officer. Unfortunately on the point of incident, there is no other witness other than the victim. Even on the point of narration of the incident by the victim to any person, there is no witness examined.

TRIAL FOR OFFENCES UNDER SECTION 323 AND 506 OF IPC

42. Apart from section 376(2)(i) of IPC accused was also convicted under section 506 of IPC and was acquitted under section 323 of IPC. We can find reasoning in paragraph No.15 and 51 of the impugned judgment. We fail to understand the logic for applying one yard stick for the offence under section 323 and different yard stick for the offence under section 506 of the IPC. While acquitting the accused for the offence under section 323 of IPC, the trial Court observed "*she has left loyalty towards the prosecution and therefore there is no evidence regarding the assault on victim girl by the accused*". Admittedly, she was examined after 7-8 days and therefore there would not be any evidence about the assault.

43. However, while convicting the accused for the offence under section 506 of IPC, trial Court had chosen to take help of recitals in section 164 Statement of Cr.P.C. There is reference of threatening by the accused(Paragraph 51). As said above and even by the trial Court section 164 statement is not a substantive evidence, still the trial Court cannot resist herself from using recitals in the statement and considered it as substantive evidence. We disagree with the approach of the trial Court and conclusion drawn on that basis.

OFFENCE UNDER THE INFORMATION AND TECHNOLOGY ACT

44. On the basis of nude photographs of the victim girl and pornographic images found in the mobile phone, trial Court has convicted the appellant/accused for the offence punishable under section 67-B of the Information Technology Act. We agree to this finding to certain extent. We have already discussed the evidence on the point of seizure of the

mobile phones during personal search of the accused and analysis done of these mobiles by the Forensic Laboratory. We have already referred to pornographic images of victim and certain jpeg. image files of the girl victim found in the memory card. We are not inclined to connect these images to the victim for want of identification. Whatever the Expert has mentioned is on the basis of information given to them by the police. However we are inclined to accept the analysis to certain extent that is to say pornographic images were found in it.

45. Section 67-B of the Information & Technology Act defines and lays down punishment for sexually explicit act depicting children in electronic form. It is true that there is no evidence that these images were uploaded anywhere. There is no evidence that it is transmitted to any other person in any manner. However depicting the children in obscene or indecent or sexually explicit manner in electronic form is punishable under section 67-B (b) of the Information Technology Act. We feel that the act of the accused certainly falls within clause (b).

CONCLUSION

46. Trial Court while arriving at the guilt of the accused was conscious that rape is non compoundable offence and it is the offence against society. Trial Court deprecated compromise attitude of the parties. Trial Court was however cautious of the possibility of pressurizing the victim by the convict. Trial Court in paragraph No.59 and 60 has given reasons for imposing the sentence of life imprisonment.

47. We are also cautious of the relationship in between the victim and the accused (though not real father and real daughter). It is difficult to opine what compelled the victim not to state those facts which she has stated before the police. Certainly this is not a case of filing the FIR by tutoring because there are no such materials. So the situation warrants that there are certain materials suggesting sexual intercourse but the hands of the Court are tied due to provisions of law. We have certain limitations as expressed by us in earlier part of the judgment. Yet the statement of the victim recorded under section 164 of Cr.P.C. has not been given status of examination-in-chief in all circumstances (except in case of disability as provided in clause (b) to sub-section 5A to Section 164 of Cr.P.C.). Though Hon'ble Supreme Court in case of *Shivanna @ Tarkari Shivanna (cited supra)* has expressed desire to consider the statement as examination-in-chief, amendment to that effect is not brought to our notice. So with all pains we have no alternative but to set aside conviction of the appellant for the offence punishable under section 376(2)(i) of IPC and under section 506 of IPC. We are maintaining conviction under section 67-B of the Information & Technology Act.

48. We take this opportunity to opine that the concerned authorities of the State Government or Central Government will take some initiative in incorporating certain amendments under relevant laws so as to give status to section 164 statement as that of examination-in-chief in all eventualities. We hope that legislatures will also consider the practical realities of the life which the victim has to face. The trauma which victim has to undergo, after the incident does not stop there and when it comes to facing the real life issues, there may be occasion for the victim to forego all the trauma which she had undergone and to take U

turn. We feel that similar thing has happened in this case. At the same time we have recognized the accepted principles of appreciation of evidence and in the zeal of protecting the interest of the victim, we cannot give go-bye to these accepted principles. In order to avoid similar situation in future we feel that appropriate authorities will speed up the process of making amendment as mentioned above. Hence the following order is passed:

ORDER

a) Appeal is partly allowed.

b) The judgment dated 15/7/2015 passed by Special Judge & Additional Sessions Judge-3, Nashik in Sessions Case No.207/2014 thereby convicting the appellant for the offence punishable under section 376 (2)(i) and 506 of IPC is set aside.

c) Conviction under section 67-B of the Information & Technology Act is maintained.

d) The accused be set at liberty if he has already undergone the sentence for the offence punishable under section 67-B of the Information & Technology Act and if not required in any other case.

e) Registrar Judicial-I is directed to send a copy of this judgment to the Secretary of Law and Justice Department, Government of Maharashtra and the Central Government for consideration and appropriate action about the views expressed above.

f) Rest of the order is maintained.

(S. M. MODAK, J.) (PRASANNA B. VARALE, J.)