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HIGH COURT AT CALCUTTA
Bench: Partha Sarathi Sen, J. and Chitta Ranjan Dash, J.
Date of Decision: 18 October 2023

Criminal Appellate Jurisdiction
Appellate side
CRA (DB) 14 OF 2023

Probhat Purkait @ Provat .... Appellant

Vs.

The State of West Bengal ....Respondents

Sections, Acts, Rules, and Article:
Sections 363, 365, 366, 376(3) of the Indian Penal Code (IPC)
Section 6 of the POCSO Act
Section 482 of the Code of Criminal Procedure (Cr.P.C)
Article 226 of the Constitution of India

Subject: Criminal appeal related to the conviction under the POCSO Act in a case of non-exploitative consensual sexual relationship between adolescents.

Headnotes:
Criminal Appeal – Conviction under IPC and POCSO Act – Appellant convicted of offences under Section(s) 363, 366 IPC, and Section 6 of the POCSO Act – Rigorous imprisonment for 20 years and fine imposed – Concurrent running of sentences – Nature of appeal necessitates careful consideration – Special leave granted. [Para 1-2]

Personal Liberty – Consideration of victim's destitution and family's penury – Victim and appellant's marriage and birth of a child – Complexity of the case warrants a detailed review – Appellant's plea based on ignorance of the law – Legal context of age of consent laws discussed – Adolescent sexuality and social realities acknowledged – Need for a balanced approach emphasized – Consent laws in relation to rape examined – Conflation of consensual and non-consensual acts highlighted – Applicability of the law to adolescents in non-heteronormative relationships noted – Law disproportionately affecting adolescents in consensual relationships – Vulnerability of adolescents to criminal prosecution under current legal framework discussed – Call for a more nuanced and inclusive approach to adolescent sexuality and consensual relationships – Further consideration of the legal and sociological aspects required. [Para 8-19]

Legal Principle – Ignorance of law is no excuse – Doctrine of "ignorantia juris non excusat" – Applicability to penal law – Ignorance of law does not excuse liability for violating it. [Para 35]

Legal Amendment – Suggestion for a legal amendment to decriminalize consensual sexual acts involving adolescents above 16 years while ensuring protection for all children below 18 years – Emphasis on comprehensive sexual education and access to sexual and reproductive health services for adolescents. [Para 28]

Rights-Based Approach – Emphasis on a rights-based approach for adolescents – Consideration of factors such as best interest, discretion, maturity, and societal impact when conferring rights on adolescents. [Para 29]

Duty/Obligation-Based Approach – Proposal for a duty/obligation-based approach for adolescents – Encouraging responsible behavior, respect for autonomy and dignity, and control over sexual urges. [Para 30]

Education and Awareness – Need for parental guidance, education in schools, and awareness programs to educate adolescents about their rights, responsibilities, and the law – Inclusion of sexuality and life skill education in school curricula. [Para 31]

Balance between protection and evolving autonomy is crucial for adolescents – Current legal framework fails to do so and unjustly conflates consensual acts with sexual abuse – Suggestion for a legal amendment and emphasis on education and awareness programs. [Para 32]

Discretion of Judiciary – Grey area of adolescent consensual sex left to the discretion and wisdom of the judiciary – Acknowledgment of pluralism in judicial decision-making. [Para 33]

Quashing of Offences – Exercise of inherent jurisdiction to quash proceedings or FIRs in cases of non-exploitative consensual sexual relationships between adolescents – Consideration of ground reality, economic conditions, and subsequent developments. [Para 42]
Criminal Appeal – Conviction under POCSO Act – Non-exploitative consensual sexual relationship between adolescents – Lack of evidence to prove kidnapping – Birth of a child during the relationship – Inherent jurisdiction invoked to set aside the conviction – Appeal allowed. [Para 40-47]

Referred Cases:

- K. Dhandapani Vs. State by the Inspector of Police & Ors. (2022 SCC online SC 1056)
- Puttaswamy v. Union of India, (2017) 10 SCC 1
- Navtej Singh Johar v. Union of India, (2018) 10 SCC 1
- Anoop v. State of Kerala (Bail Appl. No. 3273 of 2022 decided by the Kerala High Court on 08.06.2022)
- Motilal Padampat Mills Ltd. Vs. State of Uttar Pradesh [1979 (118) ITR 326 SC]

Representing Advocates:
For the Appellant: Mr. Malay Bhattacharyya, Adv. ,Mr. Subhrajyoti Ghosh, Adv. , Mr. Dibakar Sardar, Adv.

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For the State: Mr. P. K. Datta, ld. APP , Mr. Ashok Das, Adv. Mr. S. D. Roy, Adv.
For the victim girl: Mr. Shibaji Kumar Das, Adv. Mr. Soumyajit Das Mahapatra,Adv. Ms. Rupsa Sreemani, Adv. ,Ms. Madhuraj Sinha, Adv.
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CHITTA RANJAN DASH, J.:-

1. This appeal arises out of judgment dated 19.09.2022 and order of sentence dated 20.09.2022 passed by Additional Sessions Judge cum Special Judge (under POCSO Act), Baruipur, South 24 Parganas in Special Sessions Trial No. 03 of 2022 arising out of Special (CIS) No. 97 of 2018. The appellant has been convicted under Section(s) 363 and 366 IPC and Section 6 of the POCSO Act. The sentence awarded by learned Trial Court is rigorous imprisonment for 20 years and fine of Rs.10,000/- in default to suffer further rigorous imprisonment for 2 months under Section 6 of POCSO Act. Separate sentences have been awarded under Section(s) 363 and 366 IPC with an order for concurrent running of sentences so awarded.

2. Before proceeding to discuss the prosecution case and the evidence, we feel it prudent to mention here that we noticed a rustic lady with a rumpled saree and unkempt hair, looking more aged than her age standing in a corner of the Court with a baby in her arms. She would be present in the Court from the time of sitting of the Court at 10:30 A.M. and she would be there till the rising of the Court sometime even beyond the Court hours. We watched her for two days and on the third day we grew inquisitive about her meticulous presence in Court without fail. Before rising on the third day we asked the learned State Counsel to call her before us. She came, stood up before the microphone and on our query, said that she is in receipt of a notice from the Court and she does not know what is that notice and she has no means to engage a lawyer. On the same day (17.07.2023), we asked Mr. Shibaji Kumar Das present in the Court to assist her and on reading the notice, Mr. Das told us that she is a victim of offence under POCSO Act. We immediately engaged Mr. Das as Amicus Curiae and directed the State Counsel Ms. Z. N. Khan to

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be present on the next day. The case was adjourned to 24.07.2023. However the case was listed on 26.07.2023 with the LCR as the case had already been admitted vide order dated 19.01.2023. On that day it was submitted before us that the victim out of her own volition had married the accused (appellant) in the year 2019 and has given birth to a female child. On being asked by us the victim said that she had an affair with the accused by seeing him somewhere; she out of her own volition joined the accused (appellant) and married him and out of the wedlock, the female child in her arms took birth sometime in 2021. She further stated that her husband is in jail since the date of his arrest and her mother-in-law has suffered from cancer in the meantime; her parents have cut off all ties and relationship with her after her marriage with the accused (appellant); and it is difficult for her to maintain the family consisting of her ailing mother-in-law and the small child by earning herself. Taking into consideration the condition of destitution of the victim, on the same day, we granted bail to the appellant adjourning the appeal for final hearing to 23rd August, 2023. The victim further stated before us that she and her husband belongs to a rural area and they do not have knowledge that their relationship and marriage constitute an offence.

3. Prosecution case as found from the FIR lodged by the victim's mother (P.W.-2) is to the effect that the victim, in the evening of 20.05.2018 was found missing from the house and she had left without informing anybody. On enquiry, she (P.W.-2) came to know that the accused Probhat Purkait (appellant) with the help of her sister, Anima Halder and Asha Lata Halder (Anima's mother-in-law) have managed to take her minor daughter along with her Kanyashri award by enticing her for malicious purpose. The FIR was lodged on 29.05.2018. The investigation was taken up by 3 (three) Investigating Officers i.e. P.W. 5, P.W. 6 and P.W. 7 successively and ultimately P.W. 7 submitted charge-sheet against the appellant, Asha Lata

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Halder and Anima Halder for offence under Sections 363, 365, 366, 376(3) IPC and Section 6 POCSO Act.

Learned Trial Court, however, framed charge against the present appellant only for offence under Section 363, 366, 376(3), 376(2)(n) IPC and Section 6 of POCSO Act and Section 9 of the Prohibition of Child Marriage Act.

4. The defence plea is almost admission of the entire incident regarding marriage etc. with the victim and begetting of the female child though there is denial about kidnapping etc.

5. Learned Trial Court found the appellant guilty under Sections 363, 366, 376(3), 376(2)(n) of IPC and Section 6 of the POCSO Act. However, in view of recordal of sentence against the appellant under Section 6 of the POCSO Act, learned Trial Court did not record any sentence under Section 376(3), 376(2)(n) IPC especially in view of the fact that the sentence provided in Section 6 of the POCSO Act is greater than that of the punishment provided in Section 376(3) and 376(2)(n) IPC. We, however, do not want to comment on this aspect of the order of sentence recorded by learned Trial Court.

6. The basis of conviction of the appellant is deposition of the victim examined as P.W.1, her mother (P.W.2). P.W.3, Medical Officer who found recent tear in the hymen of the victim and P.W.4, Medical Officer who examined the accused (appellant) and found that he is not incapable of sexual intercourse. Learned Trial Court after scrutiny of evidence and submissions advanced by the prosecution and defence come to the aforesaid finding and recorded the sentence as discussed supra.

7. In course of hearing before us, it is submitted by learned Counsel for the appellant that the appellant being a rustic person had no knowledge about the fact that by marrying the victim who volunteered to come to his house, he

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has committed an offence and furthermore the appellant and the victim having married in the meantime and having given birth to a female child and there being no allegation to the effect that the appellant in any way exploited the immature emotion of the victim, he should be acquitted of the charge.

Learned Counsel for the State on the other hand submits that ignorance of law is no excuse and the appellant having committed a serious offence against the victim who is a minor and the society, the judgment under appeal should be affirmed.

Mr. Das, learned Counsel for the victim, however, supports the submission advanced by learned Counsel for the appellant and beseech us to save the victim from the destitution and the family from penury.

8. Coming to the evidence of the witnesses examined by the prosecution, it is found that the victim (P.W. 1) has specifically testified that she loved the appellant and married him in the year 2019 and out of their marriage a daughter has taken birth who is now (date of deposition) aged about 10 months. She has also testified that at the relevant time of occurrence on 20.05.2018 she was aged about 14+. She has proved her birth certificate vide Exhibit-1 and she has further testified that with the consent of her mother she had undergone medical examination. In her cross-examination she has testified that she left her home on her own will and met with appellant. She has further testified that her parents did not approve her marriage with the appellant. She has further testified that she liked to stay in her husband’s house. Same is the evidence of P.W.2, mother of the victim. She has proved the FIR vide Exhibit-3 and her signature etc. in the FIR and seizure list of the birth certificate of the victim. It is further testified by her that her daughter returned to her house (P.W.2’s house) from Narendrapur Sanlaap Home. In her cross-examination she has testified that the victim stayed in her house for

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about one year and thereafter again she went to the house of the appellant. The Medical Officer who examined the victim on 01.06.2018 found recent tear in the hymen of the victim.

9. From the aforesaid evidence on record and especially birth of a child out of the alleged wedlock of the appellant with the victim, it is clear that there has had been sexual relationship between the two throughout till the arrest of the appellant. Further it is found from record (internal page 8 of the impugned judgement) that the date of birth of the daughter of the victim is 16.05.2021 and at that time the victim was aged about 17 years 2 months and 27 days on the basis of her age recorded in the birth certificate (Exhibit-1).

10. Several judgements were cited by learned Counsels for both the parties before the learned Trial Court which were related to quashing of F.I.R. etc. in such offence, but learned Trial Court rightly held that the Trial Court having no inherent power under Section 482 Cr.P.C. it cannot take a different view beyond the evidence on record.

Before us also many judgments were placed by the learned Counsel for both the sides which relates principally to quashing of F.I.R. etc. in case of a romantic relationship between two adolescents or an adolescent girl with a person who has attained majority. From such judgements we find that Hon'ble Meghalaya High Court, Hon'ble Bombay High Court, Hon'ble Madhya Pradesh High Court and this High Court have taken a liberal view so far as quashing of F.I.R. etc. in connection with offence under Section 6 of the POCSO Act and other sections are concerned taking into consideration the peculiar facts in the reported cases. But Hon'ble Delhi High Court and Hon'ble Kerala High Court have taken a strict view in such matter of quashing.

11. On going through the policy behind enactment of POCSO Act, we find that the POCSO Act, 2012 provides a comprehensive framework complete with substantive and some procedural provisions to address sexual offences

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against children. It defines a 'child' to mean a person below the age of 18 years. The 'child' in this Act is gender neutral. It emphasises all forms of sexual acts with a 'child'. The original draft of the Bill recognise the possibility of consensual sexual activity involving adolescents above 16 years as well as the grounds on the basis of which such consent would be vitiated. However, following recommendations of the Parliamentary Standing Committee to remove such exception, the Bill was modified and passed without any regard for adolescent sexuality. We shall discuss on this aspect in more details in our narrative that follows.

12. It has been nearly 11 years now since the POCSO Act has come into force and ground level reports as well as data [(Population Council) https: //www.popcouncil.org/uploads/pdfs/2017PGY_UDAYA-BiharFactsheet.pdf accessed 24 March 2022.] and experience show that a vast number of adolescents are sexually active and there are a significant number of 'consensual' sexual relations among adolescents and between older adolescents and adults. As per NFHS-5 (2019-21), for instance, 39% of women had sex for the first time before they attained 18 years (National Family and Health Survey5 at p.210). The legislation (POCSO Act), however, does not consider the possibility of consent to non-exploitative sexual activities by adolescents. These cases attract statutory rape charges under the IPC 376(3), 376(2)(n) and other provisions and the POCSO Act, especially when adolescent girls elope with their partners or get pregnant. There is a possibility that the actual proportion of romantic and consensual cases under the POCSO Act is much higher a Crime in India. A report of 2020 states that 46.7% of all cases filed under penetrative and aggravated penetrative sexual assault under the POCSO Act were one in which the offender's relation to the child victim was "Friends/OnlineFriends/Facebook Friends/Live in Partners/sex on Pretext of Marriage" and so on.

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13. We do not want to go very much empirical on these aspects though much more statistics on these aspects are available to show that non-exploitative sexual relationship without any intent is in rise among adolescents in our country. We may only say that may be for the reason of climatic change, change in food habits etc. girls are attaining puberty now-a-days in a younger age and sexuality develop in them very early may be owing to peer pressure, influence by social media, free availability of porn materials and free mixing with friends of opposite sex in a taboo free atmosphere. This being, however, sociological study by experts, we do not want to comment on these aspects. To top it all we do not want to go to the pathology of the offence(s) statutorily outlined in the POCSO Act.

14. Before proceeding further in our discussion of this case on merit we propose to discuss the legal context in relation to consent laws relating to the offence of rape. Since the 19th century, age of consent laws have been marked by shifts in the understanding of childhood, adolescence and adulthood, fuelled by developments in women's and child rights discourse, as well as multiple socio-cultural and political factors. The legislative provisions have been reflective of a colonial and patriarchal understanding of females as properties of their father or their husband [Dr. Matthew Waites, The age of consent: young people, sexuality and citizenship Basingstoke: Palgrave Macmillan (2009), p.62. Amita Pitre & Lakshmi Lingam, "Age of consent: challenges and contradictions of sexual violence laws in India", Sexual and Reproductive Health Matters, 29:2]. In India, the age of consent was blurred with the age of marriage, and social reformers often sought to increase the age of consent, with the explicit aim of raising the age of marriage.

15. In 1860, the Indian Penal Code stipulated 10 years as the age of consent for both married and unmarried girls (Government of India, Report of the Age of Consent Committee, 1928-1929, Central Publication Branch,

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1929). In 1889, the death of Phulmoni Dossee, a 10-year-old girl in Calcutta, after her much older husband tried to consummate the marriage [Subhashri Ghosh, "Coming of Age in Colonial India: The Discourse and Debate over the Age of Consummation in the Nineteenth Century" in: K. Moruzi and M. J. Smith, ed., Colonial Girlhood in Literature, Culture and History, 1840–1950, London: Palgrave Macmillan (2014), p.87.], served as a trigger to raise the age of consent for sexual intercourse to 12 years with the objective of protecting "female children from immature prostitution and from premature cohabitation" (Supra n.15, p.10). In 1925, the age of consent was further raised to 14 years for girls and 13 years for rape within marriage. In 1949, it was once again raised to 16 years and to 15 years for marital rape. For 63 years, the age of consent for sexual intercourse stood at 16 years, until the POCSO Act, 2012 raised it to 18 years. The POCSO Act is gender neutral and for the first time introduced an age of consent for children of all genders. Significantly, when it was first introduced in the Rajya Sabha, the POCSO Bill, 2011 (The Protection of Children from Sexual Offences Bill, 2011, as introduced in the Rajya Sabha) recognised the possibility of consensual sexual activity with a child between 16-18 years and specified grounds such as the use of force, violence, threats, intoxicants, drugs, coercion, fraud, and others, in the presence of which consent would be vitiated [The Protection of Children from Sexual Offences Bill, 2011 The proviso to Clause 3 on penetrative sexual assault of the POCSO Bill, 2011 stated: "Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when

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the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it.

Explanation I.— For the purposes of this section,— (a) “consent” means the unequivocal voluntary agreement where the person has by words, gestures, or any form of non-verbal communication, communicated willingness to participate in the act referred to in this section; (b) “unequivocal voluntary agreement” means willingness given for specific and be limited to the express act consented to under this section.

Explanation II.— A child, who does not offer actual physical resistance to penetrative sexual assault is not by reason only of that fact, to be regarded as consenting to the sexual activity.”]. The Ministry of Women and Child Development (MWCD) justified the exception on the ground that the law cannot be blind to social realities and criminalisation of adolescents for such acts would be detrimental (Department-related Parliamentary Standing Committee on Human Resource Development, 240th Report on The Protection of Children from Sexual Offences Bill, 2011, 21 December 2011, para 6.7.). However, following concerns raised by the Parliamentary Standing Committee (PSC), that the exception would inevitably shift focus on the conduct of the victim during trial, it was withdrawn when the Bill was placed before Parliament (Statement by Ms.Krishna Tirath, Minister of the State of Ministry of Women and Child Development when the Protection of Children from Sexual Offences Bill, 2011 was moved in the Rajya Sabha on 10.05.12).

16. In 2013, despite the recommendations by the Justice Verma Committee that the age of consent be reduced to 16 years, Section 375, IPC was amended and the age of consent was increased to 18 years. Where two underage minors are involved in a sexual relationship, the Juvenile Justice (Care and Protection of Children) Act, 2015 is applicable with the possibility of a child

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above 16 years being tried as an adult for heinous offences [JJ Act, 2015, Sections 15, 18(3)].

17. In 2017, the marital rape exception in the IPC, as per which sexual intercourse by a man with his wife not below 15 years would not constitute rape, was read down by Hon'ble the Supreme Court of India for being unconstitutional and violative of the rights of children and the POCSO Act (AIR 2017 SC 494). Thus, although a child marriage is valid under personal law and the Prohibition of Child Marriage Act, 2006, except in certain circumstances, sex within such a marriage constitutes rape or aggravated penetrative sexual assault. In 2019, following gruesome incidents of sexual violence against children, the minimum punishment for penetrative sexual offences under the POCSO Act was enhanced [POCSO (Amendment) Bill, 2019, Statement of Objects and Reasons], and the death penalty was introduced for aggravated penetrative sexual assault.

18. The lack of recognition of consensual sexual behaviour of older adolescents has resulted in their automatic criminalisation, as well as a conflation of consensual acts with non-consensual acts. While all children and adolescents are entitled to protection from sexual exploitation and violence, the approach adopted under the POCSO Act renders adolescents vulnerable to criminal prosecutions for normative sexual behaviour.

19. Sexual behaviour in adolescents, particularly from the onset of puberty, is widely established as being natural, normative, and an integral part of adolescent development and their transition into adults [Veenashree Anchan, Navaneetham Janardhana, and John Vijay Sagar Kommu, "POCSO Act, 2012: Consensual sex as a matter of tug of war between developmental need and legal obligation for the adolescents in India," Indian J Psychol Med. 2020;42:1–5 at 1. CRC, GC 20, para 9. Deborah L. Tolman, Sara I.

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McClelland, “Normative Sexuality Development in Adolescence: A Decade in Review, 2000–2009,” Journal of Research on Adolescence, 15 February 2011; WHO Regional Office for Europe and BZgA, Standards for Sexuality Education in Europe, 2010, Megan Price, et.al., “Young Love: Romantic Concerns and Associated Mental Health Issues among Adolescent Help-Seekers”, Behav Sci (Basel), 2016 Jun; 6(2): 9..26]. All persons, including children, are entitled to the right to dignity and privacy and these rights also apply in the context of their personal relationships [Section 3(xi) of the JJ Act, 2015; Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.]. By ignoring adolescent development, social realities, and diverse tribal and cultural practices which recognise adolescent sexuality (M. Santhanaraman, “Branded a criminal for following custom”, The Hindu, 13 April 2022), the law disproportionately affects adolescents in consensual and non-exploitative relationships and renders them vulnerable to criminal prosecution. While the law has primarily been used against adolescents in heteronormative relationships, the possibility of its use against adolescents in nonheternormative consensual relationships remains.

20. By equating consensual and non-exploitative sexual acts with rape and (aggravated) penetrative sexual assault, the law undermines the bodily integrity and dignity of adolescents. In Anoop v. State of Kerala (Bail Appl. No. 3273 of 2022 decided by the Kerala High Court on 08.06.2022), while dealing with a bail application, the Kerala High Court remarked about the faulty conflation of consensual acts involving adolescents with rape:

> “Unfortunately, the statute does not distinguish between the conservative concept of the term rape and the sexual interactions arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence

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and treat all 'intrusions' on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims."

21. The ensuing criminal investigation and trial, and a simultaneous inquiry under the child protection system has a stigmatic and disruptive impact on their development, education, employment, as well as their self-esteem, social reputation, and family life. Long-term damaging consequences of a conviction for statutory rape are incarceration and inclusion in the Sex Offenders Registry (Press Trust of India, "National Registry Of Sex Offenders Adds 5 Lakh Names To Database", 24 February 2019).

22. The Constitutional Court of South Africa in Teddy Bear Clinic for Abused Children & Anr. v. Minister of Justice and Constitutional Development & Anr. [(CCT 12/13) (2013) ZACC 35 decided on 3rd October 2013 by the Constitutional Court of South Africa.] has held that legal provisions criminalising consensual sex amongst adolescents offended their dignity, even if they are rarely enforced. It concluded that "If one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished." Further, "the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents."

23. While the ostensible objective may be to protect all children below 18 years from sexual exploitation, the law's unintended effect has been the deprivation of liberty of young people in consensual relationships. Although convictions in "romantic" cases are an exception, the accused men and boys are predominantly charged with non-bailable offences such as rape and penetrative sexual assault (89.2% of accused in "romantic" cases were charged with a penetrative offence under Section 4 or 6 of the POCSO Act, or under Section 376 of the IPC.), and are inevitably taken into custody. As

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per an analysis based on judgments of three States, in 15.2% of romantic cases the accused remained in judicial custody till the end of the trial. In Rama @ Bande Rama v. State (Crim. Pet. 6214 of 2022, decided by the Karnataka High Court on 2.08.2022.), the 20year-old accused in a "romantic" case was in judicial custody for 18 months. While quashing the case, the Karnataka High Court observed that the criminal process itself inflicted pain on the parties and despite an acquittal, "the sword of crime would have torn the soul of the accused." In stray cases, a strict view that the consent of a minor is irrelevant, coupled with the lack of sentencing discretion, has resulted in the imposition of high minimum mandatory sentences such as 10 years for engaging in consensual sex [State of Gujarat v. Ashokbhai, 2018 GLH 792 (Gujarat High Court)]. With the amendment in 2019, such cases will attract a higher minimum sentence of 20 years if it is a case of repeated sex, or if it has resulted in a pregnancy.

24. The law also undermines the identity of adolescent girls by unidimensionally casting them as "victims", rendering them voiceless, and without any agency to enter into relationships or choose their partners. Adolescent boys, on the other hand, are discriminatorily treated as children in conflict with the law [ICCW, Children apprehended under POCSO Act for Elopement in Tamil Nadu (2017), UNICEF, p.40.], and can even be tried as adults. The liberty of adolescent victim-girls is compromised as they are institutionalised in Children's Homes when they refuse to return to their parents and insist on being with their partner. A study on their plight reveals that "they are shamed, humiliated, and stigmatised for their acts, alienated from their partners and society, and at times not released even after they turn 18. Such institutionalisation harms their physical and mental health, as well as overall development, and they have little or no recourse to challenge or seek review of such decisions." [Raha, Mehendale, et.al., Girls Involved in "Romantic

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Cases" and the Justice System: A Study Based on the Experience of Girls in Child Care Institutions in Bihar, Enfold Proactive Health Trust (2021) 223]. Administrative confusion about whether the girls should be released by the court or Child Welfare Committees prolong their detention even after many of them had attained majority. Girls who are pregnant or have given birth to a child are compelled to reside in a Children's Home where access to sexual and reproductive health services and familial care is limited.

25. The POCSO Act lumps all persons below 18 years together without consideration for their developing sexuality, evolving capacity, and the impact of such criminalisation on their best interests. It fails to strike an effective balance between protecting adolescents against sexual abuse and recognising their normative sexual behaviour. The result is that a law aimed at addressing child sexual abuse, is instead being used against adolescents, especially to curtail the sexual expressions of adolescent girls to safeguard family honour (Geeta Ramaseshan, Control & Freedom: Women & The Age of Sexual Decisions, AALI (2012), p.32). An analysis revealed that 80.2% of the complainants in "romantic" cases were parents and relatives of adolescent girls who registered a case after she eloped or her pregnancy was discovered (CCL-NLSIU, Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, (2017) p.76.). Pointing to the possibility of further misuse of the POCSO Act, it showed that in 21.8% of romantic cases, the girls disputed the claim by their families that they were minors (Supra n.8 .p.18).

26. While all children are entitled to protection from sexual violence, such protection should "enable young people to extend their boundaries, exercise choices and engage in necessary risk-taking, while not exposing them to inappropriate responsibility, harm and danger…." [Gerison Lansdown, The Evolving Capacities of the Child, UNICEF (2005), p.32] The POCSO Act, however, reflects a protectionist approach that pushes adolescents out of the safety net and into the criminal justice system. It erodes their best interest, reflects scant regard for their evolving autonomy, and results in their victimisation within the criminal justice system under the garb of "protection".

27. The aforesaid study made by Enfold Proactive Health Trust with support from UNICEF-India, June 2022 has made it clear that though protection of children within an age fold is a laudable approach by the Government, criminalisation

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of adolescent consensual sex nips a budding talent in the bud, if such a boy or girl is very talented; and if belonging to lowest strata of the society, such criminalisation tend to ruin the very economy of the family of which the adolescent boy, accused of offence is the sole breadwinner as in the present case.

28. Aforesaid discussion, on the basis of studies taken by different organisations and individuals is suggestive of the following conclusion:

We are therefore in view that the balance between protection and evolving autonomy is central to ensure best interests of adolescents, but the current legal framework fails to do so and unjustly conflates normative consensual acts among adolescents with sexual abuse. Instead of protecting adolescents from abuse, the law exposes those in factually consensual and non-exploitative relationship to the risk of a criminal prosecution and compromises the child protection mandate. A legal amendment is, therefore necessary to decriminalise consensual sexual acts involving adolescents above 16 years, while also ensuring that all children below 18 years are protected from sexual offences under the POCSO Act. All children and adolescents need to be provided rights based comprehensive sexual education. Legal and policy reforms are also needed to ensure confidential and barrier free access of adolescents to sexual and reproductive health services. Comprehensive sexuality and life skill education should also to be integrated in the school curriculum. This should be an essential step towards safeguarding the rights and interest of adolescents and ensuring that their health, dignity and overall developmental potential are advanced.

29. The discussion so far stresses on a “Rights based approach” so far as adolescents are concerned. We may sound narrow in our view, but the practicality of the facts is that a “Rights based approach” as a panacea for all

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the problems that come is not the solution, and in our view, not the just and correct approach. For conferring the Rights suggested in the aforesaid discussion on the “captioned group” i.e. adolescents between the age fold of 16 to 18 in “romantic relationship”, some test are to be satisfied first. Those are:

(i) Whether conferment of suggested Rights on the “captioned group” is/are in their best interest?

(ii) Whether the captioned group has the discretion and maturity to use that Rights for their best interest?

(iii) Whether such rights at such age is conducive for over all development of their personality or it is destructive of their self development?

(iv) Who are the persons on whom such Rights are to be conferred, are they disciplined adolescents or a wayward lot, who have no control on their trivial urge to have sex?

(v) Whether conferment of such Rights on the captioned group is in the best interest of the society?

29.1. To find answers to these tests opinions of some individuals, Rights activists, or view of so called liberals are not at all sufficient. We need to have empirical study of:

(i) Psychology of the captioned group especially what drive them to urgently satisfy their sexual urge; and psychological trauma faced by parties of either sex in the event of break up.

(ii) Societal aspects involved in the matter;

(iii) Impact of mutual action of two consenting adolescents of opposite sex on their right to integrity of the body, on their psychology and on over all development of their personality.

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(iv) Whether the captioned relationship has any commitment or direction and whether proposed marriage before or after institution of case is an escape route?

Such empirical study besides the captioned group should include parents of the captioned group, subject experts, social workers working in the field and so on. It should also be kept in mind that such study should take into consideration the diversities and peculiarities of our society and it should not be studied on the basis of realities elsewhere though the glass of foreign jurisprudence.

30. Fundamental Rights in the Constitution and various other Rights in different statutes have been given to individuals for a balance in the society, to check arbitrariness of the Government and development of best self of an individual. If we go deep into our old texts, we find that Rights are not conferred but they are earned by action of an individual. If we look at Bentham's theory, it is found that every right has corresponding duty/duties or obligation/obligations. By performing the obligation, you have to earn the Right/Rights. It is somewhat similar to the old oriental philosophy "Do your duty and earn your Right".

30.1. The principal androgenic steroid is testosterone, which is secreted primarily from the testes in men and ovaries in women and in small amounts from the adrenal glands, both in men and women. Hypothalamus and pituitary gland control the amount of testosterone, which is primarily responsible for sex urge and libido (in men). It's existence is there in the body, so when the respective gland becomes active by stimulation, sexual urge is aroused. But activation of the respective responsible gland is not automatic. It needs stimulation by our sights, hearing, reading erotic materials and conversation with opposite sex. So sexual urge is created by our own action. Sex in adolescents is normal but sexual urge or arousal of such urge is dependent on some action by the individual, may be a man or woman. Therefore, sexual urge is not at

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all normal and normative. If we stop some action(s), arousal of sexual urge, as advocated in our discussion supra, ceases to be normal.

30.2. Ask any parents of an adolescent, may be a boy or girl, you shall get the answer how difficult it is to give a right upbringing to him/her in view of free flow of negative materials from the web and social media, which hamper their thinking process and living. We, therefore, propose to take a “Duty/obligation based approach” to the issue in hand.

30.3. It is the duty/obligation of every female adolescent to:

(i) Protect her right to integrity of her body.

(ii) Protect her dignity and self-worth.

(iii) Thrive for overall development of her self transcending gender barriers.

(iv) Control sexual urge/urges as in the eyes of the society she is the looser when she gives in to enjoy the sexual pleasure of hardly two minutes.

(v) Protect her right to autonomy of her body and her privacy.

It is the duty of a male adolescent to respect the aforesaid duties of a young girl or woman and he should train his mind to respect a woman, her self worth, her dignity & privacy, and right to autonomy of her body.

31. For the aforesaid purpose charity should begin at home and the parents should be the first teachers. We therefore feel that parental guidance and education to children specially the girls to recognise bad touch, bad signs, bad advances and bad company is necessary specially with emphasis on their health and reproductive system to have sex at an age not sanctioned by law. Similarly, parental guidance and education so far as boys are concerned is to include how to respect a woman; how to keep dignity of a woman; how to protect the integrity of body of a woman; and how to befriend a woman without being aroused by sexual urge even if there is advances from the other

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side till he becomes capable to maintain a family. The family where a child is there should maintain such a conducive atmosphere in the house that no kid grows up believing that it is OK to violate women. We should never ever think that only a girl is subject to abuse, because there is no escape for a boy even now-adays. That aspect having been recognised, POCSO Act is made gender neutral.

31.1. Besides the parental guidance, requisite sex education with emphasis on the aforesaid aspects and reproductive health and hygiene should be a part of the curriculum of every school. It is also required that the school curriculum should include, fundamental or rudimentary study of law that criminalise adolescent action and the severity of the punishment prescribed. In rural areas services of Anganbadi workers and other ground level workers be utilised to make people aware about the rudimentary part of the POCSO Act and the severity of the punishment prescribed. There should be overall endeavour by the Government, Legal Services authorities, Rights Activists and Social Workers to educate the people on these aspects including the POCSO Act.

32. We do not want our adolescents to do anything that shall push them from dark to darker side of life. It is normal for each adolescent to seek the company of opposite sex but it is not normal for them to engage in sex devoid of any commitment and dedication. We want them to spread their wings high with a view to realise their best selves. Sex shall come automatically to them when they grow self-reliant, economically independent and a person which they dreamt one day to be. Along with sex in such a stage shall come love with commitment and dedication towards each other as they shall have the discretion and maturity to understand each other, adjust with each other and forgive each other. We beseech our adolescents to follow a salutary legal principle of Mahabharata “Dharmo Rakshyati Rakshyita” (one who protects

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law is protected by law) and proceed in their path of self-development without being influenced by bashful urge of urgent sex.

32.1. We, therefore, do not propose to suggest to tinker with the age of consent in the POCSO Act. We leave it to the Law Commission of India and National Commission for Protection of Child Rights (NCPCR) to deliberate on this aspect to give their suggestions to the appropriate Government.

33. So far as the case of criminalisation of romantic relationship between two adolescents of opposite sex is concerned it should better be left to the wisdom of the judiciary. Each judiciary in the world has the nicety of pluralism. Each individual judge has his/her own opinion. He/She has his/her own unique style of addressing an issue. So far as India is concerned we have an integrated judicial system with the "foundation judiciary" (subordinate judiciary) at the base and Hon'ble the Supreme Court at the top. Each member of the judiciary at every level in India is learned enough to recognise the field, where interference is necessary to do complete justice. Lord Dennings, the celebrated Jurists of 20th Century has stated "no court has any power, each court is vested with certain jurisdiction." Each judge at every level in our judiciary is learned enough to recognise his/her jurisdiction and limitation so far as exercise of such jurisdiction requires. There is also checks from bottom to top in every level to correct error committed by the lower level to the extent of justifying wisdom for a particular decision at the top level i.e. Hon'ble the Supreme court. We are, therefore, of the view that the grey area of adolescent consensual sex about which much commotion is made should be left to the discretion and wisdom of the judiciary. It is also found from decisions of different Hon'ble High Courts that such matters have been dealt with in proper perspective taking into consideration the peculiarity of case placed before the court.

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34. Now coming to the question of the submission by learned Counsel for the appellant to the effect that the appellant and the victim being natives of rural areas, they did not have any knowledge that their free sexual mixing and marriage shall criminalise their action.

35. It is the salutary legal principal that ignorance of law is no excuse. The doctrine is based on Latin legal maxim "ignorantia juris non excusat" or "ignorantia legis neminem excusat". The aforesaid legal principle holds that a person who is unaware of law may not escape liability for violating that law merely by being unaware of its content.

36. This principle was applicable to small city states and percolated to English common law. As an obvious consequence during British rule this principle came to be recognised in Indian law also. So far as criminal offence is concerned Section 76 to 79 of IPC deals with this principle. So far as Tax juris prudence is concerned there are catena of decisions including the decision of Hon'ble the Supreme Court in Motilal Padampat Mills Ltd. Vs. State of Uttar Pradesh [1979 (118) ITR 326 SC] in which Hon'ble the Supreme Court observed thus:

> "It must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement; there is no such maxim known to the law."

But so far as penal law is concerned there is no reported decision to the effect that ignorance of law is also an excuse. Same is the position so far as limitation law is concerned.

37. True it is, India is a vast country with millions of population contradistinguished from England. This is a country with large diversities. Majority of people lives in rural area and also education has not yet reached the bottom line though

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high claims are being made by political dispensations. But in view of the diversity and ignorance, if such a principle like ignorance of law is also an excuse is adopted in case of penal law and limitation law, that may tend to set up a dangerous trend and there may be more misuse of the principle than use. We are, therefore, of the view that the submission of learned Counsel for the appellant in this regard does not commend to us.

38. Coming to the present case we find that this is a case of non-exploitative consensual sexual relationship between a minor girl and an older adolescent or may be a young adult. There is nothing on record to prove the factum of kidnapping by the appellant. No evidence has been led to that effect by the prosecution rather the victim ipse dixit has testified that she voluntarily walked into the house of her lover and married him. They started a conjugal life and about two years thereafter a female child was born to them. This is not a case where sexual offence has been committed and the appellant has married the victim to wriggle out of the punishment. In a case K. Dhandapani Vs. State by the Inspector of Police & Ors. (2022 SCC online SC 1056) the appellant before Hon'ble the Supreme Court was the maternal uncle of the victim. Victim at the time of occurrence was 14 years old and she gave birth to a second child fathered by the appellant when she was 17 years old. Taking into consideration the entire facts and circumstances Hon'ble the Supreme Court in paragraph 7 of the Judgement held thus:

> "In the peculiar facts and circumstances of this case, we are of the considered view that the conviction and sentence of the appellant who is maternal uncle of the prosecutrix deserves to be set aside in view of the subsequent events that have been brought to the notice of this Court. This Court cannot shut its eyes to the ground reality and disturb the happy family life of the appellant and

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the prosecutrix. We have been informed about the custom in Tamilnadu of the marriage of a girl with the maternal uncle."

However, it was observed that the case shall not be treated as a precedent. We, therefore, desist ourselves from taking benefit of the aforesaid decision.

39. In the present case things are even on better footing. The girl was 14+ when the occurrence happened. The boy was also an old adolescent or a young adult at that time. There was love affair between them, but the record is silent as to how they developed an affair and where they saw each other. It comes on record that the sister of the appellant lives in the vicinity of the parental home of the victim. That might be a place where the victim and appellant met and the affairs between them developed. There is nothing on record and P.W.2 ipse dixit has testified that she being the mother of the victim had never seen the appellant coming to their house. There is nothing on record to show also that the appellant by hatching a conspiracy kidnapped the victim girl. Rather there is evidence to the effect that the victim girl walked down to the house of the appellant to accept her as his wife. As discussed supra when the victim gave birth to the child she was aged about 17 years 2 months and 27 days taking the age of the birth as mentioned in the birth certificate (Exhibit-I). We, therefore, find no materials-on-record to sustain the conviction of the appellant under Section(s) 363 and 366 IPC.

40. We are constrained to say here that this is a case of non-exploitative consensual sexual relationship between two consenting adolescents though consent in view of the age of the victim is immaterial.

41. Looking at the poverty with which the appellant and the victim are living, the diseased condition of the mother of the appellant, we are sure that both of them have no means to travel farther for justice. For the poor people of the State this Court being the only constitutional court is the last hope for any

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relief. In view such fact we cannot shrink our responsibility and follow the dotted line.

42. As discussed supra many Hon'ble High Courts including this Court have exercised their inherent jurisdiction under Section 482 Cr.P.C. to quash proceeding or FIR on being moved by the accused especially in such cases. This appellant being ignorant and poor could not move this Court in appropriate time seeking quashing of the FIR or proceeding. He has however been convicted by the learned Trial Court and rightly convicted in view of the provisions contained in the POCSO Act. But taking into consideration the ground reality, subsequent development of birth of a child, peculiarity of facts and especially the economic conditions of the appellant and suffering of the victim since the date of arrest of her husband who (victim) is managing the family of an ailing mother-in-law and a small child without any support by her parents, we are constrained to take a humane view of the matter to do complete justice. We, therefore, invoke our inherent jurisdiction under Section 482 Cr.P.C. coupled with our plenary power under Article 226 of the Constitution of India and set aside the conviction of the appellant under Section 6 of the POCSO Act, Sections 376(3) and 376(2)(n) I.P.C.

43. So far as offences under Section(s) 363 and 366 IPC are concerned in view of our discussion supra, the prosecution having failed to prove the said offences, conviction of the appellant under Section(s) 363 and 366 IPC is set aside on merit on the ground of deficiency of evidence.

44. Accordingly, the impugned judgement dated 19.09.2022 and order of sentence dated 20.09.2022 are set aside.

45. The appeal is accordingly allowed.

46. The appellant who is on bail be discharged of the bail-bond.

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47. It is made clear that we having exercised our inherent jurisdiction under Section 482 Cr.P.C. and plenary power under Article 226 of the Constitution of India to set aside the impugned Judgement and order of sentence, this case shall not be a precedent to be followed by the trial courts of the State. We are however, of the view that in such cases discretion be exercised by learned trial courts affirmatively so far as grant of anticipatory bail or bail is concerned taking into consideration the fact situation in the case before them.

48. Pronounced in open Court on this day i.e. 18th day of October, 2023.

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