

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.185 OF 2018

Lakhu @ Lakhan Dharma Gaikwad)
Age : 47 Years, Occupation : Service,)
R/o: 37/142, Kavita Nagar Police Vasahat,)
Raviwar Peth, Dist. Solapur.)
At present - Yerwada Central Prison, Pune)...APPELLANT

Versus

The State of Maharashtra)
Through Jail Road Police Station, Solapur)...RESPONDENT

Mr.Priyal G. Sarada, Advocate for the Appellant.

Mr.Vinod Chate, APP for the Respondent/State.

CORAM : A.M.BADAR J.

DATED : 1st OCTOBER 2019.

JUDGMENT :

1 By this appeal, the appellant/convicted accused is challenging the Judgment and Order dated 31st January 2018 passed by the learned Designated Court under Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for the sake of brevity) and Additional

Sessions Judge, Solapur in Sessions Case No.169 of 2016 thereby convicting him of the offences punishable under Section 376(2)(i) of the Indian Penal Code and as well as under Section 6 of the POCSO Act. On each count, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for ten years apart from a direction to pay fine of Rs.25,000/- and in default to undergo rigorous imprisonment for one month. The learned trial Court had directed that the substantive sentences shall run concurrently.

2 Facts, in brief, leading to the prosecution and resultant sentence of the appellant/accused can be summarized thus :

(a) Lakhu @ Lakhan Gaikwad used to work as Police Constable.

He was residing along with his family at Room No.142 in Block No.37, Police Line, Kavita Nagar, Solapur. First informant/PW1 Sonam along with her husband PW2 Prabhakar and their daughter, who is examined as PW3, she being the victim of the crime in question, used to reside at Room No.144 of the said Block No.37 at Police Line, Kavita Nagar, Solapur. PW2 Prabhakar at that time was posted at

Gadchiroli as Police Sub-Inspector and as it was the posting at Naxal affected area, he had retained the quarter at Solapur. His daughter, the victim child/PW3, at the relevant time, was 3 years 10 months and four days old.

- (b) The incident in question allegedly took place at about 5.30 p.m. of 21st February 2016 at the house of the appellant/convicted accused. According to the prosecution case, Neha Gaikwad – daughter of the appellant/convicted accused came to the house of the victim female child/PW3 and took her for playing. The victim female child/PW3 for some time played with Neha Gaikwad. Thereafter, the appellant/convicted accused, who happens to be the father of Neha, called the victim female child/PW3 inside his house. When the victim female child/PW3 went inside the house of the appellant/convicted accused, he inserted his finger in her vagina. He touched his tongue to her vagina. When this was happening inside the house of the appellant/convicted accused, PW4 Shailendra Waghmare along with his colleague had been to

the police line, Kavita Nagar for inquiry about the students taking education in 9th and 10th Standard. They were doing publicity and marketing of the Chate Coaching Classes. PW4 Shailendra Waghmare and his colleague came to know from the local boys that the son of the appellant/convicted accused is taking education in 10th Standard. They, therefore, asked address of the appellant/convicted accused to the First Informant/PW1 Sonam, who along with her relatives was sitting in the courtyard of the house. PW4 Shailendra Waghmare and his colleague then rang the door bell of the appellant/convicted accused. The appellant/convicted accused then opened the door and started talking with PW4 Shailendra Waghmare and his colleague. At that time, the victim female child/PW3 came out of the house of the appellant/convicted accused while crying. She went to her mother First Informant/ PW1 Sonam and disclosed that the appellant/convicted accused had inserted his finger in her vagina. This fact was then disclosed by first informant/ PW1 Sonam to her husband, who was sleeping in the house. The

victim female child/PW3 also disclosed the incident to her father PW2 Prabhakar. In the bathroom, parents of the victim female child/PW3 had seen the vagina of the victim female child/PW3. They found private part of the victim female child/PW3 turned reddish in colour.

- (c) First Informant/PW1 Sonam and PW2 Prabhakar then took their daughter the victim female child/PW3, who happens to three years and ten months old to the hospital of PW5 Dr.Keyur Shirasi, Child Specialist for giving medical treatment. However, PW5 Dr.Keyur Shirasi was not present at his hospital. Telephonically, he instructed the nurse to give medicine. Then, along with the victim female child/PW3, her parents returned to their home. After two or three hours, they again went to the hospital of PW5 Dr.Keyur Shirasi, but they were informed that PW5 Dr.Keyur Shirasi has not yet returned. They were told to get their daughter admitted to Shri.Markandey Co-operative Hospital at Solapur. Accordingly, first informant/PW1 Sonam and PW2 Prabhakar

took their daughter/victim child to the said Hospital and admitted her there as a indoor patient.

- (d) In the midnight of the night intervening 21st February 2016 and 22nd February 2016, PW6 Shwetali Sutar, PSI, who was posted at the MIDC Police Station, Solapur was instructed by the Control Room that the FIR of the offence punishable under Section 376 of the Indian Penal Code is to be recorded and she would be taken for that purpose by the vehicle of the Jail Road Police Station, Solapur. That is how, PW6 Shwetali Sutar, PSI visited Shri.Markanday Co-operative Hospital, Solapur in the midnight. Then, the FIR (Exhibit 24) of PW1 Sonam came to be recorded at about 1.00 a.m. of 22nd February 2016 at Shri.Markandey Co-operative Hospital. Statement of the victim female child/PW3 also came to be recorded. Further investigation of the Crime No.81 of 2016 registered at the Jail Road Police Station, Solapur in pursuant to the FIR lodged by First Informant/PW1 Sonam came to be conducted by PW7 Devendra Rathod, Assistant Police Inspector.

- (e) At Shri.Markanday Co-operative Hospital, Solapur, the victim female child/PW3 came to be medically examined by PW5 Dr.Keyur Shirasi. Subsequently, on 22nd February 2016 itself, she was again examined by PW9 Dr.Sharmila Gurram, Gynecologist working in the said Hospital. Subsequently, on 24th February 2016, upon being referred by police PW7 Pradipkumar Jadhavar, Medical Officer of the Civil Hospital once again examined the victim female child/PW3.
- (f) During the course of investigation, PW7 Devendra Rathod, Assistant Police Inspector collected Birth Certificate of the victim female child/PW3. He seized clothes of the victim female child/PW3 vide panchanama (Exhibit 18). Papers of medico legal case came to be collected by him. After completing the routine investigation, he filed charge-sheet against the appellant/convicted accused.
- (g) The learned trial Court framed and explained the Charge for the offences punishable under Section 376(2)(i) of the Indian

Penal Code as well as under Sections 4 and 6 of the POCSO Act to the appellant/accused. He pleaded not guilty and claimed trial.

- (h) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. Defence of the appellant/accused, as gathered from the line of cross-examination of prosecution witnesses, his statement under Section 313 of the Code of Criminal Procedure as well as from evidence of the defence witnesses is that of total denial. To substantiate the defence of false implication, the appellant/convicted accused has examined three defence witnesses. DW1 Mahadev Pawar, Police Head Constable is examined to show that he had handed over the charge of post of Line Orderly to the appellant/convicted accused in pursuant to Order (Exhibit 74) dated 16th September 2014. Dr. Sham Lalu Gaikwad, Resident Medical Officer of the Civil Hospital, Solapur is examined as DW2 to show that the appellant/ convicted accused was injured in the night hours

of 21st February 2016 because of assault by PW2 Prabhakar and his friend Sushant Sonkavade. DW3 Subhash Sanap, Police Sub-Inspector is examined to establish that son of the appellant/convicted accused made a telephonic call at about 9.30 p.m. of 21st February 2016 for informing the police that ten to fifteen people have come to his house for assaulting the appellant/accused and accordingly, the Beat Marshall was sent to the house of the appellant/convicted accused.

- (i) After hearing the parties the learned trial court by the impugned judgment and order was pleased to convict the appellant/accused and sentenced him as indicated in the opening paragraph of this judgment.

3 I have heard Mr.Sarada, the learned counsel appearing for the appellant/accused at sufficient length of time. He took me through the entire oral as well as documentary evidence and argued that there is inordinate delay in lodging the FIR of the alleged incident dated 21st February 2016. There is no plausible

explanation for this delay. The learned Counsel further argued that evidence of the prosecution suffers from various inconsistencies and infirmities. First informant/PW1 Sonam deposed that she had narrated the incident to the Medical Officer and her husband PW2 Prabhakar also deposed that the incident was narrated to the Medical Officer by him. Medico Legal Case was filed after recording of the FIR. The Investigating Officer said that the victim female child/PW3 had informed the incident. These infirmities, in submission of the learned counsel for the appellant/convicted accused, are fatal to the prosecution case.

4 The learned counsel for the appellant/convicted accused further argued that PW2 Prabhakar has admitted in his cross-examination that he had been to the Jail Road Police Station in the morning hours of 22nd February 2016 and had stated that he had no complaint against the appellant/convicted accused. He had not lodged any FIR against the appellant/convicted accused at the time of that visit. In fact, during the night of 22nd February 2016, the appellant/convicted accused, PW2 Prabhakar and

Sushant Sonkavade were at the police station, but no FIR came to be lodged against the appellant/convicted accused. The learned counsel further argued that the appellant/convicted accused was beaten by the prosecuting party and in order to avoid penal consequences thereof, the appellant/convicted accused is falsely implicated in the crime in question.

5 The learned counsel for the the appellant/convicted accused further argued that age of the victim female child/PW3 is not proved and, as such, penal provisions of POCSO Act are not attracted. The offence punishable under Section 376 of the Indian Penal Code is also not proved by the prosecution. Production of Birth Certificate does not amount to proof of date of birth of the victim female child/PW3. To substantiate this contention, he placed reliance on judgment of Division Bench of this Court in the case of **Ravi Anandrao Gurupude v. State of Maharashtra**¹ and judgment of the Single Bench of this Court in the matter of **Pramod Jadhav v. State of Maharashtra**².

1 2017 ALL M.R. (Cri.) 1509.

2 2019 ALL M.R. (Cri.) 1742.

6 The learned counsel for the appellant/convicted accused further argued that the victim female child/PW3 was admitted to the hospital with a history of trouble for passing a urine and stool. Medical evidence is not supporting the case of prosecution regarding commission of rape on the victim female child/PW3 and therefore, the appellant/convicted accused is entitled to acquittal.

7 As against this, the learned Additional Public Prosecutor supported the impugned judgment and order of conviction and resultant sentence by contending that evidence of the victim female child/PW3 is gaining due corroboration from the evidence of her parents as well as the medical evidence adduced by the prosecution on record.

8 I have considered the submissions so advanced and also perused the record and proceedings including the oral as well as documentary evidence.

9 Defence of the appellant/convicted accused in this case of rape and aggravated penetrative sexual assault is that of false implication because of enmity with the prosecuting party. It is not in dispute that the appellant/convicted accused is a Police Constable working with the Police Head Quarters, Solapur (Rural). Undisputedly, PW2 Prabhakar, who happens to be father of the victim, is a Police Sub-Inspector, who at the relevant time was posted in Gadchiroli. He was, however, staying in quarter/room no.144 of Block No.37 of the Police Line Kavita Nagar, Solapur, along with his family. His sister along with her husband was also staying with him in the said house. Similarly, it is not in dispute that the appellant/convicted accused was residing in quarter/room no.142 of the same Block No.37 of Police Line Kavita Nagar, Solapur. Undisputedly, there were several blocks at the police line and the single storied block in which the appellant/convicted accused and PW2 Prabhakar were residing was having four rooms. In quarter/room no.143 Police constable named Ravi was residing whereas at the right side of the quarter of the appellant/convicted accused, one Rutu was residing. By the side as well as in front of

Block No.37, other buildings housing police personnel are located. On this backdrop, as stated in foregoing paragraphs, it is defence of the appellant/convicted accused that he was insisting ouster of sister and brother-in-law of PW2 Prabhakar due to their illegal stay in police line and as such, PW1 Sonam and PW2 Prabhakar used to quarrel with him. Similarly, according to the appellant/convicted accused, he used to insist PW2 Prabhakar to vacate his quarter/room no.144 as PW2 Prabhakar was posted at Gadchiroli. He was also objecting visits of Sushant Sonkavde to the house of PW2 Prabhakar in his absence. To probabalize his defence of false implication in the crime in question, the appellant/convicted accused has brought on record evidence to show that in the night hours of 21st September 2013 he was assaulted by PW2 Prabhakar, his friend Sushant Sonkavde and others and they all been to the Jail Road Police station, Solapur. There, PW2 Prabhakar and his father had informed the police that they had no complains against the appellant/convicted accused. However, in order to shield themselves from criminal action, PW2 Prabhakar with the help of his wife PW1 Sonam, has falsely

implicated the appellant/convicted accused in the instant crime. Considering this nature of defence and keeping in mind the fact that allegations against the appellant/convicted accused are of committing penetrative sexual assault on the victim child/PW3 – 3 years 10 months old girl child of PW1 Sonam and PW2 Prabhakar, principles of appreciation of evidence in such cases need to be placed on record. The Hon'ble Supreme Court had an opportunity to examine plea of false implication in sexual offences and following are the observations of the Hon'ble Supreme Court in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarath**³ found in paragraph 10 :-

“10 Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can

3 AIR 1983 Supreme Court 753(1)

one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

10 Similarly, in the case of State of **State of Punjab vs. Gurmeet Singh**⁴ the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. The Hon'ble Supreme Court has observed thus in the said case :

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the

4 1996 Cri.L.J. 172

statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

11 In the light of the aforesaid legal position, let us now examine whether evidence of the prosecution makes out a case of aggravated penetrative sexual assault and rape by the appellant/convicted accused on the victim child/PW3. At the outset, the prosecution will have to establish that the victim of the crime in question, at the time of the alleged offence, was below 12 years of age. The prosecution, in order to prove age of the victim

child/PW3, has relied on oral as well as documentary evidence. Evidence of PW1 Sonam – mother of the victim child/PW3 shows that at the time of the incident, her daughter i.e. victim child/PW3 was 3 years and 10 months old. Her husband PW2 Prabhakar, while in the witness box, has stated that his daughter – victim child/PW3 was 3 years and 10 months old at the time of the incident. These, oral statements made on oath by parents of the victim child/PW3 are not at all challenged by the defence while cross-examining these witnesses. As such, there is no reason to discard this oral evidence regarding age of the victim child/PW3, coming on record through her parents. Similarly, PW8 Pradipkumar Jadhavar, Medical Officer with Civil Hospital, Solapur, had deposed that the victim child/PW3 was found to be 3 years old by him. PW9 Dr.Sharmila Gurram, Gynecologist working at Shri Markandey Solapur Sahakari Rugnalaya & Research Center, had examined the victim child/PW3 on 22nd February 2016. She deposed that the patient examined by her was 3 years old female child. PW5 Dr.Keyur Shirasi, who was family doctor of the prosecuting party and consultant attached to Shri Markandey

Solapur Sahakari Rugnalaya & Research Center, had referred to the victim child/PW3 as a small girl. Age of the victim as disclosed in Medico Legal papers is 3 years. The defence has not disputed all this evidence in any manner.

12 Be that as it may, the prosecution has placed on record original Birth Certificate of the victim child/PW3 issued by the Sub-Registrar under provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 and Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules, 2000. This Birth Certificate shows date of birth of the victim child/PW3 as 2nd April 2012. Full name of PW1 Sonam and PW2 Prabhakar is mentioned as name of mother and name of father in the said Birth Certificate issued by the Sub-Registrar. The learned counsel for the appellant/convicted accused argued that this document is not proved by the prosecution and as such, cannot be read in evidence. I am unable to persuade myself with this submission. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-

Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act. Section 17 of the Registration of Births and Deaths

Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, infact, the extract of Birth Register in respect of entry of birth of the victim child/PW3, and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public

servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is a public document and it constitutes primary evidence. Proof of contents of a public document can be had by production thereof as envisaged by Section 77 of the Evidence Act. In this view of the matter, no formal proof of the Birth Certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and Rules framed thereunder is required. The Birth Certificate of the victim child/PW3 placed on record by the prosecution showing her date of birth as 2nd April 2012 makes it clear that on the date of the alleged incident i.e. on 21st February 2016, she was 3 years, 10 months and about 19 days old.

13 This court in the case of **Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.**⁵ has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is

⁵ (2013) 14 SCC 637

applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into

consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

The learned counsel for the appellant/convicted accused placed reliance on judgment of the Division Bench of this court in the matter of **Ravi Anandrao Gorpude (supra)**. That matter proceeded on its own facts. The Birth Certificate in that matter was not issued in the name of the prosecutrix and the prosecutrix had not deposed that she is also known as “Bali” i.e. the name in which the Birth Certificate was issued. With this observation, the Birth Certificate came to be discarded by the court in that matter. Similarly, in the matter of **Pramod Dattatraya Jadhav (supra)** the name of the father of the child reflected in the Birth Certificate was not tallying with the real name of the father of the victim child. Such is not the case in hand. For the reasons stated in foregoing paragraphs, I hold that the prosecution has certainly

established the fact that the victim child/PW3 was below 12 years of age at the time of commission of the alleged offence.

14 Now let us examine evidence of the victim child/PW3. As held in foregoing paragraphs, at the time of the incident, she was just 3 years, 10 months and a few days old. The learned trial court had ascertained her competency to testify by putting some preliminary questions to her and gave a finding that she has capacity to understand the questions put to her and is in a position to give rational answers thereto. Then, evidence of the victim child/PW3 came to be recorded. She stated that on the day of the incident, Neha – daughter of the appellant/convicted accused, called her for playing at her place. She accompanied Neha. However, after some time, Neha went away and she was all alone in the courtyard. The victim child/PW3 further stated that the appellant/convicted accused called her and therefore, she went in the house of the appellant/convicted accused. As stated by the victim child/PW3, then the appellant/convicted accused inserted his finger in her private part and touched it by his tongue.

Thereafter, somebody rang the door bell of the appellant/convicted accused and the appellant/convicted accused opened the door after wearing the pant. She, then, went to her mother while crying and in the bathroom showed her private part to her mother. It had become reddish in colour. The victim child/PW3 clarified that the appellant/convicted accused was all alone in the house and she suffered pain due to act of the appellant/convicted accused. She identified the appellant/convicted accused as the person who had committed the act as stated by her. This child witness is subjected to cross-examination which is infact cementing the cases of the prosecution. In cross-examination, it is brought on record that on the day of the incident, the victim child/PW3 and Neha were playing in the courtyard. She denied that Raj - son of the appellant/convicted accused was inside the house and thereafter Neha went inside the house. She denied that she was scratching her vagina and therefore, father of Neha scolder her. She denied the suggestion that she was tutored by her father. She denied all suggestions disputing happening of the incident.

15 The question is whether the testimony of the child witness can be relied upon for basing conviction in such a serious offence. The Hon'ble Supreme Court in **Radhey Shyam Vs. State of Rajasthan**⁶ has laid down the law regarding appreciation of evidence of child witness. Paragraph 12 of that judgment reads thus :

“12 **In Panchhi, (1998 SCC (Cri) 1561)** after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy pray to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility

6 (2014) 5 SCC 389

of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles."

16 The victim child/PW3, as seen from her evidence, appears to be a witness of truth. Her evidence is not showing that she is a tutored witness. Perusal of her evidence makes it clear that she had given rational answers to the questions put to her. However, as a matter of prudence, let us find whether evidence of the victim child/PW3 is gaining corroboration from other evidence available on record.

17 Immediately after the incident, the victim child/PW3 had taken shelter of her house. There was only one room in between the room of the victim child/PW3 and that of the

appellant/convicted accused. As such, after the incident, within no time the victim child/PW3 rushed to her house and met her mother PW1 Sonam. Evidence on record does not suggest that prior to meeting her mother, the victim child/PW3 met any other person.

18 PW1 Sonam had stated that at about 5.00 p.m. of 21st February 2016, as Neha – daughter of the appellant/convicted accused came to her house to call the victim child/PW3 for playing, her daughter i.e. the victim child/PW3 went to play with Neha. At about 5.30 p.m., two teachers from Chate classes came and inquired about the appellant/convicted accused. On pointing out the house of the appellant/convicted accused, they went to the house of the appellant/convicted accused and rang the door bell. The appellant/convicted accused, as stated by PW1 Sonam, opened the door and when he was talking with those teachers, her daughter i.e. the victim child/PW3 came crying from the house of the appellant/convicted accused and at that time, pink top of her daughter was tucked in her dhoti type pant. She, therefore, asked

her daughter as to what happened and then her daughter i.e. the victim child/PW3 told her while crying that the neighbouring uncle inserted finger in her private part. The victim child/PW3 disclosed the act by gestures also. PW1 Sonam deposed that then she disclosed this fact to PW2 Prabhakar. Thereafter, private part of the victim child/PW3 came to be checked by her parents and it was found to have turned reddish.

19 The victim child/PW3 in her evidence has stated that soon after the incident, by rushing to her house, she disclosed the incident as happened, to her mother – PW1 Sonam. Recital of the incident made to her, by her daughter i.e. the victim child/PW3 is proved by PW1 Sonam in her evidence. The victim child/PW3 within short span of time had disclosed to her mother about the incident in detail and there was no intervening time gap to pollute the mind of the victim child/PW3. Thus, former statement of the victim child/PW3 made soon after the incident, proved by her mother – PW1 Sonam is corroborating the testimony of the victim. The statement implicating the appellant/convicted accused and

disclosing the act of penetrative sexual assault made by him immediately after the occurrence, is certainly admissible as a previous statement under Section 157 of the Evidence Act and is relevant under Section 8 of the Evidence Act. In a similar way, even PW2 Prabhakar – father of the victim child/PW3, has deposed that he was woke up by his wife PW1 Sonam and then he heard narrations of his daughter i.e. the victim child/PW3 to the effect that the neighbouring uncle inserted finger in her private part. Evidence of these witnesses on this aspect has gone unchallenged. Evidence of the victim child/PW3 as such, is gaining corroboration from her previous statement proved by her parents.

20 PW1 Sonam and PW2 Prabhakar have congruously deposed that thereafter the victim child/PW3 was taken to the hospital of PW5 Dr.Keyur Shirasi and due to unavailability of PW5 Dr.Keyur Shirasi, she was admitted at Shri Markandey Solapur Sahakari Rugnalaya & Research Center. Both these witnesses are cross-examined by the defence. PW1 Sonam has candidly accepted the fact that Sushant Sonkavde is friend of her husband

and always visits her house. However, she denied that the appellant/convicted accused stopped said Sushant Sonkavde from visiting his house. She denied that on 21st February 2016, her husband and said Sushant Sonkavde had been to the house of the appellant/convicted accused to question him as to why he was insisting the prosecuting party to vacate the house and assaulted the appellant/convicted accused. PW1 Sonam also denied that then son of the appellant/convicted accused called police telephonically and Beat Marshall came on the spot. She denied that then the appellant/convicted accused as well as her husband were taken to Police Station Jail Road in the midnight of the night intervening 21st February 2016 and 22nd February 2016. PW2 Prabhakar showed ignorance to the fact that son of the appellant/convicted accused called the police telephonically at 9.30 p.m. of 21st February 2016 by informing police that he as well as Sushant Sonkavde assaulted the appellant/convicted accused. PW2 Prabhakar in his cross-examination stated that he did not know whether the Beat Marshall came on the spot. He denied that there was compromise and therefore the appellant/convicted

accused did not lodge complaint of assault. However, PW2 Prabhakar has admitted that on 22nd February 2016 he as well as his father had given in writing to the Police Station Jail Road that they have no complains against the appellant/convicted accused.

21 In other words, with this material brought on record through parents of the victim child/PW3, the defence is attempting to show that because of some other reason, the appellant/convicted accused was assaulted by the prosecuting party and he was falsely implicated subsequently for avoiding penal actions against the prosecuting party. The position is very clear from evidence of these witnesses. DW2 Dr.Sham Gaikwad, Resident Medical Officer of the Civil Hospital, has deposed that at 3.00 a.m. of 22nd February 2016, he examined the appellant/convicted accused and found him to have suffered blunt trauma on mouth and chest. The history given was that of assault by the mob at 9.30 p.m. of 21st February 2016. DW3 Subhash Sanap, Police Sub-Inspector made it clear that at 9.30 p.m. of 21st February 2016, there was call from cell phone to the effect that ten

to fifteen persons have gathered for assaulting him in front of the house of the appellant/convicted accused, and therefore, the Beat Marshall was sent there. The Beat Marshall then took the complainant to the chowki.

22 In respect of the incident of assault on the appellant/convicted accused, evidence of Investigating Officer PW7 Devendra Rathod, Assistant Police Inspector is relevant. As per his version in the cross-examination, in the midnight of 21st February 2016 and 22nd February 2016, the appellant/convicted accused was at the Jail Road Police Station and PW1 Sonam, PW2 Prabhakar and father of PW2 Prabhakar gave in writing that they have no complains against the appellant/convicted accused. This Investigating Officer, however, denied that there was tear on swollen lips of the appellant/convicted accused due to assault by PW2 Prabhakar and Sushant Sonkavde.

23 This evidence found on record in no manner gives an impression that to avoid penal action, parents of the victim child/PW3 have made an attempt to falsely implicate the appellant/convicted accused in the crime in question. The incident of penetrative sexual assault in question took place at about 5.30 p.m. of 21st February 2016. Assault on the appellant/convicted accused took place at about 9.30 p.m. of 21st February 2016. Evidence on record suggests that he was assaulted by PW2 Prabhakar, his friend Sushant Sonkavde and others. This incident was preceded by the incident of sexual molestation of the victim child/PW3 by the appellant/convicted accused. Subsequent assault on the appellant/convicted accused was certainly a result of mob fury because of the incident of sexual assault on a tiny tot by him. This incident of assault on the appellant/convicted accused cannot be construed as an incident triggering his false implication in the case of sexual molestation of a tiny tot. The appellant/convicted accused was merely a Police Constable and undoubtedly a Line Orderly in the police line. His job, at the most, was to report irregularity in the use of police quarters to his

superiors. PW2 Prabhakar was undoubtedly serving as a Police Sub-Inspector. He was posted at Gadchiroli. His evidence shows that he is entitled to retain the quarter at Solapur because of his posting in the naxalite affecting area. This is according to the government policy. In this fact situation, the appellant/convicted accused has not probabalised his defence by pointing out a single complaint made by him to his superior officer alleging unauthorized residence in the quarter allotted to PW2 Prabhakar, visits of outsiders and residence of relatives of PW2 Prabhakar in that quarter.

24 Now let us examine whether the FIR was lodged with due promptitude. Evidence of PW1 Sonam shows that in the night of 21st February 2016 her daughter i.e. the victim child/PW3 was admitted to Shri Markandey Solapur Sahakari Rugnalaya & Research Center. In the night intervening 21st February 2016 and 22nd February 2016 and precisely at about 1.00 a.m., FIR of PW1 Sonam came to be recorded in presence of PW6 Shwetali Sutar, Police Sub-Inspector, MIDC Police Station. Evidence of PW6

Shwetali Sutar, Police Sub-Inspector is clear on this aspect and she was especially deputed to the hospital for recording the FIR. Thus, it is difficult to hold that there is delay in lodging the report of the incident which took place at about 5.30 p.m. of 21st February 2016. Few hours delay in reporting the matter gets explained from the intervening events of taking the victim child/PW3 initially to the hospital of PW5 Dr.Keyur Shirasi and thereafter to Shri Markandey Solapur Sahakari Rugnalaya & Research Center. In the intervening period, as seen from evidence discussed supra, there was incident of assault on the appellant/convicted accused and in that regard PW2 Prabhakar along with his father was at the Jail Road Police Station. PW1 Sonam was in the hospital where the FIR came to be recorded. As such, these events are explaining the delay of few hours in lodging the FIR. Similarly, the statement of PW2 Prabhakar and his father that they had no complains against the appellant/convicted accused seems to be the fall out of the incident of assault on the appellant/convicted accused, as a consequence of the incident in question. Ultimately, PW2 Prabhakar is also a government servant serving as Police Sub-

Inspector and as such, he was also interested in avoiding lodgement of the FIR of assault against him. Therefore, no overbearing importance can be given to the fact that in the night intervening 21st February 2016 and 22nd February 2016 the prosecuting party had stated to the Investigator that they had no complains against the appellant/convicted accused. Similarly, it is not possible to hold that there is inordinate delay in lodging the FIR making the prosecution case suspect.

25 Now let us examine medical evidence on record. PW5 Dr.Keyur Shirasi though unavailable at this hospital, had been to Shri Markandey Solapur Sahakari Rugnalaya & Research Center in the night intervening 21st February 2016 and 22nd February 2016 and examined the victim child/PW3. His evidence shows that upon examination of the victim child/PW3 in the night, he found swelling on her external genitals and mild redness. Therefore, he referred the victim child/PW3 to a gynecologist. As at that time the victim child/PW3 was sleeping, on the next day he questioned the victim child/PW3 and she disclosed to him about fingering.

During cross-examination, PW5 Dr.Keyur Shirasi has admitted that the victim child/PW3 was admitted with a trouble of urinating and defecating. He admitted that the history given to him was not noted in the case papers by the houseman doctor. There is no entry of swelling in the case papers on 22nd February 2016 and 23rd February 2016. However, PW5 Dr.Keyur Shirasi made it clear that case paper of 22nd February 2016 is not in the case file. He accepted the fact that from the history mentioned in the case papers, there was no complaint regarding fingering. So far as redness on the private part of the victim child/PW3 is concerned, he stated that redness was on the upper side of vagina. PW5 Dr.Keyur Shirasi clarified that redness on the vagina can be caused by applying pressure or by infection as well as itching. This evidence of Medical Officer makes it clear that as the victim child/PW3 was not suffering from fever, chances of redness caused by infection or itching are ruled out.

26 As referred by PW5 Dr.Keyur Shirasi, PW9 Dr.Sharmila Gurram, Gynecologist at Shri Markandey Solapur Sahakari

Rugnalaya & Research Center, examined the victim child/PW3 in the night intervening 21st February 2016 and 22nd February 2016, as seen from medical case papers at Exhibit 62. Her evidence makes it clear that private part of the victim child/PW3 was reddish from the outer side. PW9 Dr.Sharmila Gurram stated that the private part of the victim child/PW3 was reddish even from the inner side. This fact is not reflected in the medical case papers at Exhibit 62. Therefore, evidence of PW9 Dr.Sharmila Gurram, Gynecologist can be accepted to hold that when she examined the victim child/PW3 at 1.10 a.m. of 22nd February 2016, the vagina of the victim child/PW3 was reddish in colour, as seen from the outer side. History noted by PW9 Dr.Sharmila Gurram, Gynecologist on Medico Legal case papers at Exhibit 62 shows that there was history of sexual assault by a neighbour at about 5 to 6 p.m. of 21st February 2016.

27 Medico Legal case papers at Exhibit 38 shows that the victim child/PW3 was admitted with a complain that she was having trouble in passing urine and while defecating. It also

shows that vagina of the victim child/PW3 was reddish in colour. When the victim child/PW3 was in the process of admission to the hospital and consequent medical examination, evidence on record shows that her father PW2 Prabhakar was at the Jail Road Police Station with his own father due to assault on the appellant/convicted accused. At that time, he had mentally concluded that he did not want to prosecute the matter further. He made it clear at the police station that he had no complains against the appellant/convicted accused. On this backdrop, complain of trouble while urinating and defecating noted in the medico legal case papers cannot be used to create doubt in the prosecution case. This mention was apparently due to subsequent incident of assault on the appellant/convicted accused and complications which arose due to it. However, it is clear from evidence of PW5 Dr.Keyur Shirasi and PW9 Dr.Sharmila Gurram that vagina of the victim child/PW3 was reddish in colour indicating penetrative sexual assault on her. Whether the inner part of the vagina was reddish in colour or not is not relevant. Definition of offence of rape as found in Section 375 of the Indian

Penal Code so also that of penetrative sexual assault found in Section 3 of the POCSO Act makes it clear that slightest penetration of vagina is sufficient to make out these offences.

28 Some minor discrepancies and omissions are sought to be brought on record from evidence of PW1 Sonam and PW2 Prabhakar. Evidence of PW2 Prabhakar to the effect that he did not lodge report immediately due to pressure of family members of the appellant/convicted accused as well as death of his brothers came by way of omission. Such omissions are not shaking the substratum of prosecution case and as such, are liable to be ignored. Similarly, whether the medico legal case was registered first or the FIR was registered first in point of time is of no consequence. It is not necessary that the medico legal case must be registered firstly and then only the FIR can be lodged. Such is not the requirement of law. In the similar way, who has disclosed the incident to the attending Medical Officer is of no consequence. It is a matter of common knowledge that in such offences, whosoever accompanies the victim is in a hurry to narrate the

incident to the Medical Officer. Therefore, whether the same is disclosed by mother or father of the victim is of no consequence on the fate of the prosecution case.

29 In the light of the foregoing reasons, this court finds that evidence of the victim child/PW3 is gaining overwhelming corroboration from medical evidence so also other evidence adduced by the prosecution on record. There is, therefore, no reason to discard the version of the victim child/PW3. Even if no external injuries were found on person of the victim child/PW3, yet her evidence regarding penetration of her vagina by his finger by the appellant/convicted accused, is trustworthy and reliable. The law is that even in absence of any corroboration by medical evidence, oral testimony of the victim of the sexual offence can be accepted if it is found to be cogent, reliable, convincing and trustworthy. In the case in hand, there is absolutely no reason brought on record for false implication of the appellant/convicted accused in the crime in question, particularly when evidence on record indicates that the victim was friend of the female child of

the appellant/convicted accused. If really they were having hostile relations as attempted to be suggested by the appellant/convicted accused, then PW1 Sonam would not have allowed her daughter to accompany the daughter of the appellant/convicted accused for the purpose of playing together. No infirmity, as such, can be found in the impugned judgment and order of conviction and the resultant sentence. Hence the order :

ORDER

The appeal is dismissed.

(A.M.BADAR, J.)