

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.900 OF 2015

AMOL MARUTI SHERKAR)
Age 25 years, Occupation : Bus Attendant,)
R/o. Sai Heights, Flat No.5, Vadgaon Bk.)
Taluka Haveli, District Pune.)
Native : Bhalawani, Taluka – Pandharpur)
District Solapur.)
At present at Yerwada Central Jail)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
At the instance of Deccan Police Station)
C.R.NO.59 of 2014)...RESPONDENT

Mr.B.A.Aloor, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 25th JANUARY 2019

ORAL JUDGMENT :

1 This is one more case of sexual molestation of a very young female child noticed by this court. Parents of the tiny tots

entrust them with utmost confidence to the conductor and driver of the school bus for reaching them and bringing them back from the school. They feel that their children are in safe hands, particularly when the school bus belongs to so called reputed educational institute like Sinhgad Institute, Pune, and the drivers as well as the conductors/attendants of such school bus are direct employees of such educational institution. The case in hand reflects breach of the trust reposed by the parents of a toddler on conductor/attendant of the school van, who happened to be the employee of the so called reputed educational institute named Sinhgad Institute, Pune. Taking advantage of such entrustment of children to him, it is seen that the appellant/accused had repeatedly committed penetrative sexual assault on the minor female victim/PW1 aged about 4 years who was taking education in Mini Kinder Garten (K.G. Class) of the Sinhgad Springdale Pre-Primary School run by the Sinhgad Institute, by undertaking to and fro journey by school bus no.A7 provided by the school. The case in hand is also an example of sheer insensitivity in handling the complaint of sexual assault on the toddler taking education in

the Pre-Primary school by none else than the Head Mistress of the Sinhgad Springdale Pre-Primary School (examined as PW4 before the learned trial court) who after hearing the complaint of sexual molestation of the PW1 - a four year old girl student by the employee of the school, instead of reporting the matter to police in view of the mandate of Section 19 of the POCSO Act and ignoring the penal consequences thereof as provided by Section 21 of the said Act, had advised her parents to first get the medical examination of the victim female child done from the gynecologist. It is seen that the Head Mistress had chosen to file the First Information Report (FIR) only when parents of the victim agitated, when mob of citizens damaged the property of the school due to inaction of the school authorities in the matter and manhandled the Head of the Institute. It was expected of the Head Mistress of the school to keep in mind that the mental and psychological trauma of such sexual assault troubles the minor female child throughout her life resulting in depression, anxiety and post traumatic stress disorder. Sex abuse of a toddler is a peculiar sinister type of trauma because of the shame it instills in

the victim, which lasts throughout the life. With this prelude, let us now go to the facts of the instant appeal.

2 By this appeal, the appellant/accused no.1, who was serving as School Bus Attendant with Sinhgad Springdale Pre-Primary School, Pune, is challenging the judgment and order dated 27th March 2015 passed by the learned Special Judge under Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act for the sake of brevity), Pune, in Special (Child) Sessions Case No.158 of 2014 thereby convicting him of offences punishable under Sections 354 and 376(2)(i) of the Indian Penal Code, under Sections 3(m) read with Section 6 and under Section 7 read with Section 8 of the POCSO Act. For the offence punishable under Section 354 of the Indian Penal Code, the appellant/accused no.1 is sentenced to suffer rigorous imprisonment for 5 years apart from a direction to pay fine of Rs.1,000/- and in default, to undergo simple imprisonment for 3 months. For the offence punishable under Section 376(2)(i) of the Indian Penal Code, the appellant/

accused no.1 is sentenced to suffer rigorous imprisonment for 10 years apart from a direction to pay fine of Rs.1,000/- and in default to undergo further simple imprisonment for a period of 3 months. For the offence punishable under Section 5(m) read with 6 of the POCSO Act, the appellant/accused no.1 is sentenced to suffer rigorous imprisonment for 10 years apart from a direction to pay fine of Rs.1,000/- and in default, to undergo further simple imprisonment for 3 months. For the offence punishable under Section 7 read with 8 of the POCSO Act, the appellant/accused no.1 is sentenced to suffer rigorous imprisonment for 5 years apart from a direction to pay fine of Rs.1,000/- and in default to undergo simple imprisonment for 3 months. The learned trial court had directed that all these substantive sentences shall run concurrently. By the impugned judgment and order, the learned trial court was pleased to acquit accused no.2 Vinayak Karande – driver of the school bus, of the alleged offence.

3 Facts leading to the prosecution of appellant/accused no.1 Amol Sherkar along with co-accused Vinayak Karande and

the resultant conviction of appellant/accused no.1 Amol Sherkar are thus :

- (a) PW2 Varsha is a housewife and mother of the victim female child of 4 years of age. Her husband was serving as a Software Engineer in a Software Company named Cognizant located at Hinjewadi area of Pune. The couple was blessed with a female child who at the relevant time was taking education in Mini Kinder Garten Class (K.G.Class) of Sinhgad Springdale Pre-Primary School located at Erandawane area of Pune. For undertaking to and fro journey to the school, Sinhgad Springdale Pre-Primary School had provided services of seven school buses to the students. Each school bus was having one driver and one attendant/ conductor. The drivers and conductors used to be employees of Sinhgad Springdale Pre-Primary School, Pune. The school hours used to be from 8.10 a.m. to 12.30 p.m. School bus no.A7 used to pick up and drop the victim of the crime who is four years old female child, examined as PW1 by the prosecution.

- (b) The victim female child/PW1 as usual returned to her house by school bus no.A7 driven by acquitted accused no.2 Vinayak Karande of which appellant/accused no.1 Amol Sherkar was an attendant. She disclosed to her mother/PW2 Varsha that appellant/accused Amol Uncle had touched her vagina. Thereafter, on return from school on 2nd April 2014, upon being asked, the victim female child/PW1 disclosed to her mother PW2 Varsha that appellant/accused no.1 Amol uncle took her on his lap and kissed her. Her mother PW2 Varsha cautioned her by saying that she should tell appellant/accused no.1 Amol uncle not to touch her. On the next day i.e. on 3rd April 2014, PW2 Varsha again asked her daughter/PW1 as to what happened, on her return from the school. Then, the victim female child/PW1 disclosed that appellant/accused no.1 Amol uncle inserted finger in her vagina. When PW2 Varsha made further enquiry to ascertain, the victim female child/PW1 told her that such type of incidents took place on previous occasions also. On 4th April 2014 on her return

from the school, the victim female child/PW1 disclosed to her mother PW2 Varsha that on reaching the school, appellant/accused no.1 Amol uncle allowed other students to go to their classes, but she was made to sit in the school bus. Then appellant/accused no.1 Amol uncle told her that her vagina became reddish and oil needs to be applied to that place. The victim female child/PW1 further told her mother PW2 Varsha that then appellant/accused no.1 Amol uncle applied oil to her vagina and then left her to the class.

- (c) Ultimately, on 5th April 2014, in the afternoon PW2 Varsha accompanied by her husband and the victim female child/PW1 met PW4 Sujata Karanjkar, Head Mistress of the Sinhgad Springdale Pre-Primary School, Pune. They disclosed the incident to Head Mistress PW4 Sujata Karanjkar. She then took them to Monali Shinde, Principal of the school. Monali Shinde ascertained the incident from the victim female child/PW1. Upon hearing the facts of her sexual molestation from the victim female child/PW1, the

school authorities and particularly PW4 Sujata Karanjkar, Head Mistress, advised parents of the victim female child/PW1 to get the victim female child/PW1 medically examined. They assured inquiry in the matter.

(d) On 5th April 2014 itself, PW2 Varsha then took the victim female child/PW1 to the clinic of PW7 Dr.Anagha Pai-Raiturkar. The victim female child/PW1 was then clinically examined by PW7 Dr.Anagha Pai-Raiturkar. She found that there was redness near intraoitus. On separating labia minora of the victim female child/PW1, it was noticed that there was bruising in the healing stage. PW7 Dr.Anagha Pai-Raiturkar opined that vaginal fingering took place with the victim female child/PW1. This witness again examined the victim female child/PW1 on 8th April 2014 for giving her written opinion (Exhibit 44).

(e) 6th April 2014, being Sunday, was holiday. On 7th April 2014, PW2 Varsha, her husband and other parents again

approached PW4 Sujata Karanjkar, Head Mistress of the Sinhgad Springdale Pre-Primary School, Pune, for action in the matter. The Head Mistress was informed about the result of the medical examination of the victim female child/PW1. PW2 Varsha had also submitted a written application Exhibit 14 on 7th April 2014 itself to PW4 Sujata Karanjkar, Head Mistress, for taking action against appellant/accused no.1 Amol Sherkar. The Head Mistress in turn contacted the Management and thereafter lodged report Exhibit 26 with Deccan Police Station, Pune, against accused persons.

- (f) The report Exhibit 26 lodged by PW4 Sujata Karanjkar, Head Mistress, was recorded by PW6 Varsha Shinde, Police Officer, and accordingly, Crime No.59 of 2014 for offences punishable under Section 354 of the Indian Penal Code as well as under Sections 5(m), 6, 7 read with 8 of the POCSO Act came to be registered against accused persons. Wheels of the investigation were then set in motion.

- (g) The Investigating Officer recorded statement of PW2 Varsha – mother of the victim child. The victim female child/PW1 was sent to the Sassoon Hospital where she was examined by PW3 Dr. Supriya Rode, Resident Doctor. The Investigating Officer collected the Medico Legal Certificate. The school bus numbered as A7 came to be inspected in presence of PW5 Avinash Shelke and the same came to be seized vide Panchnama Exhibit 32 on 8th April 2014. On completion of routine investigation, appellant/accused no.1 Amol Sherkar as well as the co-accused came to be charge-sheeted.
- (h) The learned Judge of the Designated court under the POCSO Act framed the Charge for offences punishable under Sections 376(2(i) and 354 of the Indian Penal Code as well as under Section 5(m) read with 6 of the POCSO Act and under Section 7 read with 8 of the POCSO Act against appellant/accused no.1 Amol Sherkar. Charge for the offence punishable under Section 109 read with 34 of the

Indian Penal Code so also under Section 17 read with 18 of the POCSO Act came to be framed against accused no.2 Vinayak Karande, driver of the Bus No.A7. Both these accused persons pleaded not guilty and claimed trial.

- (i) In order to bring home the guilt to appellant/accused no.1 Amol Sherkar so also the co-accused, the prosecution has examined in all eight witnesses. The victim female child/PW1 is examined as PW1. Her mother Varsha is examined as PW2. Exhibit 15 is the Birth Certificate of the victim female child/PW1 issued by the Registrar under the Registration of Births and Deaths Act, 1969, disclosing her date of birth as 19th February 2010. Dr.Supriya Rode, Resident Doctor of the Sassoon Hospital is examined as PW3. Exhibit 22 is the Medico Legal Certificate issued by this witness. Sujata Karanjkar is the Head Mistress of the Sinhgad Springdale Pre-Primary School, Pune, and she is examined as PW4. Exhibit 14 is the written application dated 7th April 2014 of PW2 Varsha received by this witness.

Panch witness Avinash Shelke is examined as PW5 whereas Seizure Panchnama of the school bus bearing no.A7 is at Exhibit 32. Varsha Shinde, Police Sub-Inspector with Deccan Police Station, Pune, who recorded the FIR Exhibit 26 lodged by PW4 Sujata Karanjkar, Head Mistress, is examined as PW6. She had taken the victim female child/PW1 to the Sassoon Hospital for medical examination. Dr.Anagha Pai-Raiturkar who clinically examined the victim female child/PW1 on 5th April 2014 and 8th April 2014 is examined as PW7. Exhibit 44 is the Medico Legal Certificate issued by her on 8th April 2014 whereas the letter sent by her to the Senior Police Inspector of Deccan Police Station is at Exhibit 45. Pravin Chougule, Senior Police Inspector of Deccan Police Station, Pune, who conducted investigation of the crime in question is examined as PW8.

- (j) The defence of the appellant/accused no.1, as gathered from the line of cross-examination of the prosecution witnesses as well as from his statement under Section 313 of the Code of

Criminal Procedure, is that of total denial as well as false implication in the crime in question. As per the defence version, about forty to fifty students used to travel in the school bus. Time of about eight to ten minutes was used to be taken by the said school bus to undertake to and fro journey. According to the defence, PW2 Varsha was not following the time and was not dropping and picking up the victim female child/PW1 in time. Therefore, appellant/accused no.1 Amol Sherkar had spoken to her in the matter. However, PW2 Varsha became angry and that is how appellant/accused no.1 Amol Sherkar is falsely implicated in the crime. As per defence version, huge mob gathered at the school on 7th April 2014 and upon being pressurized by political parties, police registered the crime and falsely implicated accused persons.

- (k) Upon hearing the parties, the learned trial court by the impugned judgment and order was pleased to convict appellant/accused no.1 Amol Sherkar and sentenced him

as indicated in the opening paragraph of this judgment. Co-accused Vinayak Karande – driver of the school bus no.A7 was, however, acquitted of the offence alleged against him.

4 I have heard Shri Aloor, the learned counsel appearing for appellant/accused no.1 Amol Sherkar at sufficient length of time. By taking me through the entire record and proceedings, the learned counsel argued that though the incident allegedly took place much earlier and came to the notice of PW2 Varsha on 1st April 2014, the same came to be reported to police on 7th April 2014. Evidence on record shows that mob of 400 to 50 persons had gathered at the school on 7th April 2014 and there was riot. Several political parties intervened in the matter and property of the school was damaged. The learned counsel further argued that because of the riot and resultant damage to the school property and due to pressure of the political parties, the police registered the FIR against the accused persons. This is how the accused persons were falsely implicated in the crime in question with

deliberation only because there was dispute between appellant/accused no.1 Amol Sherkar and mother of the victim female child/PW1 over the issue of late dropping and picking up of the victim female child/PW1. The learned counsel further argued that the investigation of the crime in question was conducted by PW6 Varsha Shinde, Police Sub-Inspector, who had recorded the FIR and therefore, the entire proceedings are vitiated. It is further argued that the panchnama of seizure of the bus recorded by the prosecution is not reflecting the fact as to on what seat of that bus the incident took place. The learned counsel submitted that numerous questions were asked to appellant/accused no.1 Amol Sherkar under Section 313 of the Code of Criminal Procedure and this act on the part of the learned trial court is illegal. He further submitted that accused no.2 Vinayak Karande should have been made an approver by the prosecution and as this was not done, appellant/accused no.1 Amol Sherkar deserves acquittal. The learned counsel submitted that the punishment imposed on appellant/accused no.1 Amol Sherkar is disproportionate and the learned trial court has ignored

the fact that the sister of appellant/accused no.1 Amol Sherkar is deaf as well as dumb. With this, the learned counsel submitted that the appeal deserves to be allowed.

5 As against this, the learned APP argued that parents of the victim female child/PW1 are well educated and her father is a Software Engineer. In such situation, there was no reason for them to falsely implicate the appellant/accused at the cost of honour of the family. The learned APP further submitted that evidence of the prosecution is clear, cogent and consistent. The delay in lodging the FIR is getting explanation from evidence adduced by the prosecution. Version of the victim female child/PW1 is corroborated by the medical evidence on record. With this, the learned APP submitted that the appeal deserves to be dismissed.

6 I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence.

7 The case in hand is a case of rape/penetrative sexual assault on a minor female child/PW1, who according to the prosecution case, was just about 4 years, at the time of the alleged incident. It hardly needs to be mentioned that rape is a ghastly act which leaves the victim shattered for the life as it causes not only physical but emotional and psychological trauma to the victim. Sexual activities with young girls of immature age have a traumatic effect on them, which persists throughout their life and often destruct whole personality of the victim. The victim of a sexual assault is not an accomplice, but she is a victim of lust of another person. Her evidence stands at a higher pedestal than that of an injured witness. Evidence of victim of rape case is required to receive same weight as is attached to evidence of an injured witness. If totality of circumstances emerging on record discloses that the victim of such crime does not have any motive to falsely implicate the accused, then, it is not required to seek corroboration to her evidence and the court generally needs to accept her evidence. While dealing with cases of sexual assault on

females of tender ages, the court is expected to shoulder great responsibility and is required to deal with such cases sensibly. Broader probabilities of the prosecution case are required to be examined in such crimes and the court is not expected to get swayed by minor contradictions or insignificant discrepancies in evidence of prosecution which does not go to the core of the prosecution case.

8 The defence has not disputed the fact that the victim female child/PW1 at the time of commission of offence was four years of age. The prosecution has placed on record her Birth Certificate issued as per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. This certificate at Exhibit 15 issued by the Registrar under the said Act shows that the victim female child/PW1 was born to PW2 Varsha on 19th February 2010. Oral evidence of PW2 Varsha that date of birth of her female child/PW1 is 19th February 2010 has virtually gone unchallenged. According to the prosecution case, the victim female child/PW1 was subjected to the aggravated penetrative

sexual assault by appellant/accused no.1 Amol Sherkar who was attendant/conductor of the school bus no.A7 by which she was undertaking to and fro journey to Sinhgad Springdale Pre-Primary School, Pune. The prosecution is heavily relying on evidence of the victim female child/PW1 in order to bring home the guilt to the appellant/accused no.1 Amol Sherkar. She is examined by the trial court without administering oath to her. The record shows that her examination-in-chief is recorded through the learned Presiding Officer of the Designated court under the POCSO Act in question answer form. The victim female child/PW1 is cross-examined by the learned defence counsel and the same is also recorded in question answer form. At this stage, one must be alive to the age of the victim female child/PW1 as well as the fact that younger the child, more care is required to be taken before accepting her evidence to base conviction. Child witness, on account of fear and inducement, can be made to depose about things which such witness has not seen or perceived. Such child witness is susceptible to tutoring and often lives in a world of make belief. Evidence of a child witness of young age can be

relied upon if deposition of such child witness inspires confidence and is free from embellishments or improvements. From contents of deposition of a child witness, inference as to whether such witness is tutored or not can be drawn. When tutored part can be separated from untutored part and when such untutored portion of deposition of a child witness inspires confidence, then the same can be acted upon by the court. Even in case of unlikelihood of tutoring, deposition of a child witness needs to be examined and tested against former statement of such witness, so also with all attending circumstances of the case. This is particularly so because principle of criminal jurisprudence requires that the prosecution must establish its case by cogent and convincing evidence. No matter how diabolic is crime, the burden always rests on the prosecution to prove guilt of the accused beyond all reasonable doubts. The same principle is equally applicable to the cases of sexual offences against persons of tender years. Keeping in mind these principles of appreciation of evidence in such cases, let us examine evidence of the prosecution in order to ascertain whether the prosecution has established that the appellant/

accused had committed aggravated penetrative sexual assault on a 4 years old female child and whether evidence adduced by the prosecution justifies conviction of the appellant/accused.

9 On this backdrop, deposition of the victim female child/PW1 recorded in question answer by the Designated court shows that she was a student of the Sinhgad Springdale Pre-Primary School, Pune, and was attending the school by school bus. She categorically stated that appellant/accused no.1 Amol Sherkar used to be in that bus. As per her version, while going in the bus to the school, appellant/accused no.1 Amol Sherkar used to insert his finger in her private part. The victim female child/PW1 in answering the question as to what happened in the bus has further narrated that on the next day of insertion of finger in her vagina, appellant/accused no.1 Amol Sherkar applied oil on her vagina as it had turned red. In answer to the question whether she suffered pain in her private part, the victim female child/PW1 stated that though Amol uncle inserted his finger in her private part, she did not feel pain. In reply to the question as to whether

she reported the fact to anyone, the victim female child/PW1 answered by stating that she told her mother and father that Amol uncle inserted his finger in her private part. She added that she had reported this fact to teacher also. The victim female child/PW1 has identified appellant/accused no.1 Amol Sherkar before the trial court.

10 During the course of her cross-examination, the victim female child/PW1 has stated that the school bus used to take stop at many places. She stated that the stop where she used to board and alight from the school bus was the last stop. During cross-examination, the victim female child/PW1 upon being suggested that her mother used to drop her in the bus, had replied that her mother used to reach her up to her house, but she used to go alone up to the bus. She stated that she used to take her school bag by herself while going from her house up to the school bus. She was asked as to what is the distance from her house to the bus stop. The victim female child/PW1 answered that the distance can be traveled in one minute. She, then, answered that her

mother also used to reach her up to the door of the bus. Upon being asked, the victim female child/PW1 categorically denied that as she was reaching up to the bus late, there was dispute between her mother and appellant/accused no.1 Amol Sherkar. The victim female child/PW1 categorically answered that she was never attending the bus late. The victim female child/PW1 was questioned as to whether she raised alarm when appellant/accused no.1 Amol Sherkar misbehaved with her. She answered that she told appellant/accused no.1 Amol kaka not to put his hand in her private part. The victim female child/PW1 categorically denied the suggestion that she was tutored by her mother and father as to what should be stated before the police. It was asked to her as to whether other students were present in the bus when the incident took place. The victim female child/PW1 replied that on the day of the incident all other students were dropped at their destination and nobody else was in the bus. When she was asked as to whether her parents instructed her what to state before the court, the victim female child/PW1 nodded suggesting negative answer. She again nodded in

negative when she was asked whether there is iron net in-between the driver seat and the back portion of the school bus. Upon being asked whether teachers used to receive the students when the school bus used to reach the school, the victim female child/PW1 deposed that students themselves used to alight from the bus and go to their class.

11 This is evidence given by the victim female child/PW1 before the court in respect of the incident. PW1 being the victim of the crime in question and the only witness of the ordeal suffered by her during the course of to and fro journey to the school, there is no justifiable reason for non-reception of her unsworn testimony. Evidence of a child witness can be considered in absence of administration of oath provided such child witness is able to understand the questions and able to give rational answers thereto as per mandate of Section 118 of the Evidence Act. In the case in hand, evidence of the victim female child/PW1 is intelligible and is easily capable of being understood. It is recorded in question – answer form. If the same is perused, then

it is clear that all questions are answered in a rational manner by the victim female child/PW1. No doubt she had nodded to suggest negative answers to few questions, but her gestures were understood by the learned trial court for recording the answers. Ultimately, one will have to keep in mind that the victim female child/PW1 was just four years of age when the incident in question took place. Her evidence was recorded when she was below 5 years of age. On this backdrop, if her deposition is perused, then the same reflects capacity of understanding the questions and rational answers given by the victim female child/PW1 thereto. Even if one of her answers is tested with the contemporaneous documentary evidence, then it will be clear that the victim female child/PW1 had correctly nodded in negative to the said questions. It was put to her by the learned defence counsel as to whether there was iron net in-between the driver seat and the back portion of the school bus. She nodded in negative. Authenticity and correctness of this answer is clear from the recitals in Panchnama Exhibit 32 under which the school bus was seized during the course of investigation. This panchnama,

in detail, describes the exterior features of entire bus. It shows that there was no iron net in-between the driver seat and back portion of the school bus. Over all scrutiny of evidence of the victim female child/PW1 shows that her testimony has ring of truth. However, before placing explicit reliance on version of the victim female child/PW1, which is free from embellishments and improvements, let us see whether her evidence is gaining corroboration from other evidence on record and whether attending circumstances are in tune with her version before the court.

12 The first and foremost piece of corroborative evidence to version of the victim female child/PW1 is medical evidence adduced by the prosecution on record. Congruous evidence of PW2 Varsha, who is mother of the victim female child/PW1 and that of PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, goes to show that before acting upon the oral complaint of the victim female child/PW1 as well as her parents, on 5th April 2014 PW4 Sujata Karanjkar had

told parents of the victim female child/PW1 to get the victim female child/PW1 medically examined. That is how, despite hearing from parents of the victim female child/PW1 as well as from the victim female child/PW1 about her molestation at the hands of the employee of the school, PW4 Sujata Karanjkar, Head Mistress, had insisted for medical examination of the victim female child/PW1. That job was also delegated to the parents of the victim female child/PW1 by the Head Mistress of the Sinhgad Springdale Pre-Primary School, Pune. This has caused PW2 Varsha to take her toddler to the clinic of PW7 Dr.Anagha Pai-Raiturkar, a Medical Practitioner holding graduate and post graduate degree in medical science viz., MBBS, MS, DNB. As per version of PW7 Dr.Anagha Pai-Raiturkar, on 5th April 2014, at about 1.30 p.m., the victim female child/PW1 was brought to her clinic by PW2 Varsha. PW7 Dr.Anagha Pai-Raiturkar candidly deposed that on 5th April 2014 she clinically examined the victim female child/PW1. Upon local examination of the victim female child/PW1, as stated by PW7 Dr.Anagha Pai-Raiturkar, she noted that there was redness near intraoitus and on separating labia

majora, she noticed that there was bruising in the healing stage at the vagina of the victim female child/PW1. PW7 Dr.Anagha Pai-Raiturkar further stated that hymen of the victim female child/PW1 was found dilated for her age. With these findings, she opined that it is a case of vaginal fingering. Cross-examination of this witness shows that she had again examined the victim female child/PW1 on 8th April 2014 for issuance of Medical Certificate on the request of parents of the victim female child/PW1. Contemporaneous Medical Certificate Exhibit 44 duly corroborates version of PW7 Dr.Anagha Pai-Raiturkar. Her cross-examination reveals that she had also sent letter to Police Station Deccan, Pune, intimating the fact that the victim female child/PW1 was brought to her clinic by her mother with a complaint that some person had touched the vagina of the victim female child/PW1. This medical evidence fully corroborates version of the victim female child/PW1 about penetrative sexual assault on her by appellant/accused no.1 Amol Sherkar by fingering her vagina. There was no reason for PW7 Dr.Anagha Pai-Raiturkar to tell a lie about condition of the private part of the victim female

child/PW1. Cross-examination of PW2 Varsha – mother of the victim female child/PW1 shows that PW7 Dr.Anagha Pai-Raiturkar was not her family doctor. The victim female child/PW1 was not a regular patient of PW7 Dr.Anagha Pai-Raiturkar, as seen from evidence coming on record from cross-examination of PW2 Varsha. The defence has not even disputed the fact that the victim female child/PW1 was taken to the clinic of PW7 Dr.Anagha Pai-Raiturkar by PW2 Varsha for medical examination. The defence has brought on record from cross-examination of PW2 Varsha that Dr.Vivek Vidhwans is the family doctor, who is attending the victim female child/PW1 in case of her illness. This shows that PW7 Dr.Anagha Pai-Raiturkar is totally a disinterested witness having no concern with the prosecuting party. This witness seems to be approached by mother of the victim child as she happens to be a Gynecologist. As such, there is no reason to disbelieve version of PW7 Dr.Anagha Pai-Raiturkar regarding the condition of the vagina of the victim female child/PW1 noticed by her on 5th April 2014 and her opinion is perfectly in tune with the condition of the vagina of the victim female child/PW1 noticed by her. This

overwhelming medical evidence fully corroborates version of the victim female child/PW1.

13 Another corroboration to evidence of the victim female child/PW1 is coming on record from evidence of PW3 Dr.Supriya Rode, Resident Doctor of the Sassoon Hospital, Pune. After registration of the FIR, the victim female child/PW1 was admitted to this government hospital by her parents on 11th April 2014. PW3 Dr.Supriya Rode examined the victim female child/PW1 at the Sassoon Hospital on 11th April 2014 and noticed that there was redness in labia majora of the victim female child/PW1. This Medical Officer further deposed that hymen of the victim female child/PW1 was dilated for her age and perihymenal redness was also present. With these findings upon clinical examination of the victim female child/PW1, PW3 Dr.Supriya Rode, Resident Doctor, opined that there is evidence of genital handling and fingering of the victim female child/PW1.

14 Evidence of this Medical Officer i.e. PW3 Dr.Supriya Rode, is sought to be criticized by the defence by bringing on record from her cross-examination that she was the student postgraduate course in Medicine and Head of the Department had not given in writing, orders to her to examine the patient. However, this fact by itself will not cast a shadow of doubt on version of this Medical Officer. Ultimately, PW3 Dr.Supriya Rode was functioning as a Resident Doctor at the government hospital and it is not necessary for Head of the Department to give written instructions to such Resident Doctor to examine thousands of patients visiting the government hospital. Further cross-examination of PW3 Dr.Supriya Rode makes it clear that hymen can remain intact if insertion of finger is with use of lubricant. It was suggested to this witness that because of infection, use of wet inner-wear and napkins, there can be redness at the private part of a female child. However, such suggestions and answers thereto does not lead us anywhere. There are no questions in cross-examination either to the victim female child/PW1 or her mother

that the victim female child/PW1 used to wear wet inner-wear or that she was suffering from infection. Even PW3 Dr.Supriya Rode was not asked by the defence if she noticed infection in the vagina of the victim female child/PW1. Thus, over all scrutiny of evidence of PW3 Dr.Supriya Rode, Resident Doctor of the government hospital at Pune, shows that the victim female child/PW1 had suffered fingering. It was by the appellant/accused no.1 Amol Sherkar, as seen from evidence of the victim.

15 Now let us examine whether case of the prosecution is suffering from reasonable doubt because of belated FIR. Delay in lodging the FIR alone cannot be used as a ritualistic formula for doubting the prosecution case. Such delay, if any, can at the most put the court on its guard to search if any explanation has been offered for the delay. If prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, then only delay would be fatal to the prosecution case. If there is proper explanation for the delay, then such delay, by itself, cannot be a

ground for disbelieving and discarding the entire prosecution case. It is a matter of common knowledge and also a judicially noted fact that incident like penetrative sexual assault on a toddler involves honour of the family and therefore, there is reluctance on the part of the family of the victim to report the matter to police. In the case in hand, victim of the offence is a toddler from a well to do family, head of which was a Software Engineer working in a prestigious Software company named Cognizant. His daughter was studying in Mini K.G.Class of the Sinhgad Springdale Pre-Primary School, Pune. Evidence on record suggests that it was the mother of the victim female child/PW1 who was looking after the child. She is PW2 Varsha. It is in her evidence that at about 1.00 p.m. of 1st April 2014, on return from the school, her daughter/PW1 told her that Amol kaka touched her private part by hand. This mother further stated that on 2nd April 2014 also she sent her daughter/PW1 by the same bus to the school and on return, asked her daughter/PW1 as to what is done by Amol kaka to her on that day. Her daughter/PW1 replied that Amol kaka took her on the lap and kissed. As per version of PW2 Varsha, on

return from the school on 3rd April 2014, her daughter/PW1 told her that Amol kaka inserted two fingers in her private part. PW2 Varsha ascertained whether such incident took place for the first time and then her daughter/PW1 told her that such type of incidents happened in past also. The victim female child/PW1 told her mother PW2 Varsha that she was under fear and Amol kaka told her not to disclose such incidents. Thereafter, again on 4th April 2014, PW2 Varsha had sent her daughter/PW1 by the same school bus no.A7 to the school by instructing her to shout loudly if such acts are repeated by Amol kaka. As per deposition of PW2 Varsha, on return her daughter/PW1 told that after parking the bus, Amol kaka restrained her from alighting and when all students left, he told that her private part became reddish and oil needs to be applied thereat. PW2 Varsha deposed that her daughter/PW1 disclosed to her that Amol kaka put oil in her private part. After hearing these narrations on four occasions, PW2 Varsha along with her husband and the victim female child/PW1 went to Sinhgad Springdale Pre-Primary School, Pune, on 5th April 2014 and narrated the incidents to PW4 Sujata

Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune.

16 Congruous evidence of PW2 Varsha and PW4 Sujata Karanjkar shows that upon hearing narrations of PW2 Varsha regarding the incident of penetrative sexual assault on the victim female child/PW1 by appellant/accused no.1 Amol Sherkar, they all went to Monali Shinde, Principal of Sinhgad Springdale Pre-Primary School, Pune. As stated by PW2 Varsha and PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, the victim female child/PW1 disclosed the incident even to Monali Shinde, Principal of the Sinhgad Springdale Pre-Primary School, Pune. PW4 Sujata Karanjkar stated that she also heard from Monali Shinde about the disclosure made by the victim female child/PW1. Evidence of PW2 Varsha shows that then she requested PW4 Sujata Karanjkar as well as Monali Shinde to make inquiry but she was told by Monali Shinde to file written complaint after gynecological examination of the victim female child/PW1. This fact is also clear from evidence of PW4

Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune. Her evidence shows that upon hearing narrations of sexual molestation of the victim female child/PW1, she confronted PW2 Varsha as to how they were leveling allegations in such a confirmed manner. PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, further stated in her evidence that she told parents of the victim female child/PW1 to go to the gynecologist. Even after meeting Monali Shinde, Principal of the Sinhgad Springdale Pre-Primary School, Pune, as per version of PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, she told the parents of the victim female child/PW1 to get the victim female child/PW1 medically examined. With this, PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, further stated that subsequently she made inquiries from the accused nothing came out and therefore, as school hours were over at 3.00 p.m. of 5th April 2014, she left the school. PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, further deposed that the next day i.e. 6th

April 2014 was Sunday, and therefore holiday. As deposed by PW2 Varsha, after hearing from the school authorities to get her female child/PW1 examined through the doctor, she went to PW7 Dr.Anagha Pai-Raiturkar and got her female child/PW1 examined.

17 Callous attitude in handling the serious and sensitive case of penetrative sexual assault on the victim female child/PW1 by the authorities of the Sinhgad Springdale Pre-Primary School, Pune, is further reflected from evidence of PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune. This witness deposed that at about 9.00 a.m. of 7th April 2014 parent of the victim female child/PW1 along with 25 persons came to her cabin and PW2 Varsha submitted written complaint Exhibit 14 for lodging report to police immediately. PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, deposed that then she told that she would consult Management. Her cross-examination reveals that she lodged report with police only when 400 to 500 people gathered at the school and damaged the property of the school apart from

scuffling with Head of the school. PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, stated that the report was lodged by her only when parents of students taking education in the school started agitation. This makes it candidly clear that duty of reporting the offence under the POCSO Act cast on the person knowing about commission of an offence under the POCSO Act was flouted with impunity by PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune. Despite being aware of commission of an offence punishable under penal provisions of the POCSO Act on 5th April 2014 itself, this witness failed to report it to police. So far as PW2 Varsha is concerned, instead of lodging the report to the police directly, she was insisting the school authorities to lodge the report against employees of the school. Her cross-examination makes it clear that her father is an advocate as well as doctor by profession. It was father of PW2 Varsha who had advised or rather ill-advised her that as wrong doer is an employee of Sinhgad Springdale Pre-Primary School, Pune, that school must lodge the FIR against the accused. Under this ill-advise of her

own father, PW2 Varsha did not lodge the FIR by herself. It is elicited from cross-examination of PW2 Varsha that she was continuously talking with her father on phone and was getting such type of advise from her father. This ill-advise to PW2 Varsha explains the delay in not lodging the report by her to the police with promptitude though she was aware about sexual molestation of her toddler right from 1st April 2014. Apart from this, evidence of PW2 Varsha makes it clear that she was under shock and was not in good mental state after hearing narrations of her minor female child/PW1. Thus, though Deccan Police Station was at a distance of five minutes travel from the house of PW2 Varsha and in between her house and Deccan Police Station, there was Kothrud Police Station, she failed to lodge report of the incident directly to police. Ultimately, it was the incident of penetrative sexual assault on her four year old daughter and as such, trauma suffered by her needs to be kept in mind, so also her efforts to seek justice by approaching the school authorities, by consulting the gynecologist and getting her child medically examined from the gynecologist. Her evidence shows that she was approaching

the school authorities and the doctor for ventilating her grievance under advise of her own father. On the contrary, despite having knowledge about the penetrative sexual assault on the victim female child/PW1, the Head Mistress of the Sinhgad Springdale Pre-Primary School, Pune, was avoiding to lodge report against the employees of the school on various pretexts and even by leaving the school on 5th April 2014 on the ground that working hours were over. Thus, it needs to be held that explanation for the delay in lodging the FIR is brought on record by cross-examining PW2 Varsha as well as PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, by the defence. From cross-examination of PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, the defence has brought on record that only when Head of the Sinhgad Springdale Pre-Primary School, Pune, was manhandled, parents agitated to lodge report and 400 to 500 persons damaged the property of the school, she lodged report Exhibit 26 with the Deccan Police Station. Thus, the delay, if any, is not fatal to the case of prosecution, as it is sufficiently explained.

18 Now let us examine whether evidence on record creates reasonable doubt in prosecution case and indicates false implication of appellant/accused no.1 Amol Sherkar in the crime in question. By pointing out that the incident, as alleged, is totally improbable, the defence has brought on record through cross-examination of PW2 Varsha that the distance between her house and the school can be traveled in ten minutes. There used to be 20 to 30 students in the bus by which the victim female child/PW1 was attending the school. Similarly, PW2 Varsha has stated in her cross-examination that on one or two occasions, she had seen PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, standing at the office when she went to drop the victim female child/PW1 to the school. By cross-examining PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, it is brought on record by the defence that five to six guards are available at the school. PW4 Sujata Karanjkar has stated in her cross-examination that duty of the attendant is to take the students in the school bus to their seat and to reach the students from the seat up to the door.

There is a parking place for buses near the school building. Attendants of the school buses used to get the students alighted from the bus and to allow them to enter in the school. PW4 Sujata Karanjkar has stated in her cross-examination that if one stands outside, one can notice the bus.

19 Even if the material elicited from the cross-examination of PW2 Varsha and PW4 Sujata Karanjkar is examined then also it cannot be said that a reasonable doubt creeps in judicial mind about improbability of the incident of penetrative sexual assault on the victim female child/PW1. PW4 Sujata Karanjkar, Head Mistress of Sinhgad Springdale Pre-Primary School, Pune, was never suggested that she used to watch arrival of all school buses, alighting of all students from those school buses so also boarding the school buses by all the students. It cannot be expected of a Head Mistress of the school to remain present on the spot at the time of arrival of all school buses as well as at the time of departure of those school buses transporting the students. It cannot be expected from the Head Mistress to keep

watch on what is happening inside the school bus. The victim female child/PW1 has candidly stated during the course of her cross-examination that other students were not present when she was molested by appellant/accused no.1 Amol Sherkar. Therefore, this theory of improbability sought to be advanced by appellant/accused no.1 Amol Sherkar does not deserve consideration.

20 So far as alleged false implication of appellant/accused no.1 Amol Sherkar in the crime in question is concerned, the victim female child/PW1 so also her mother PW2 Varsha have candidly denied that there used to be quarrel between appellant/accused no.1 Amol Sherkar and PW2 Varsha as the victim female child/PW1 used to reach the pick up and drop point late. Similarly, considering the strata of the society from which the victim female child/PW1 hails, it is hard to believe that for such flimsy reason, PW2 Varsha would put future of her minor female child at stake in order to wreak vengeance against appellant/accused no.1 Amol Sherkar. The material on record

does not suggest so. The crime in question was investigated by PW8 Pravin Chougule. Role of PW6 Varsha Shinde, Police Sub-Inspector, was to record the FIR and to take the victim female child/PW1 to Sassoon Hospital for medical examination by PW3 Dr. Supriya Rode. Therefore, I see no force in argument of the learned counsel for appellant/accused no.1 Amol Sherkar that the entire case is vitiated because the offence is investigated by the officer who recorded the FIR. In sexual offences, prime witnesses are the victim and the doctors who examine the victim. Role of the Investigating Officer is of formal nature. Similarly, all incriminating circumstances were brought to the notice of appellant/accused no.1 Amol Sherkar by the learned trial court and therefore, the learned counsel for appellant/accused no.1 Amol Sherkar cannot be heard to say that several questions were asked to appellant/accused no.1 Amol Sherkar by the learned trial court.

21 Penetrative sexual assault is defined by Section 3 of the POCSO Act. Insertion of any part of the body to any extent

into the vagina of a female child makes out the offence of penetrative sexual assault. When such penetrative sexual assault is on a child below 12 years of age, then it becomes an aggravated penetrative sexual assault and the same is punishable under Section 6 of the POCSO Act. Similarly, insertion of any object or part of body into the vagina of a female makes out the offence of rape as defined by Section 375 of the Indian Penal Code. When such act is committed on a woman under 16 years of age, the same becomes punishable under Section 376(2)(i) of the Indian Penal Code. Evidence on record unerringly points out that appellant/accused no.1 Amol Sherkar had inserted his finger in the vagina of the victim female child/PW1 which has resulted in injury to the vagina of the victim female child/PW1 in the nature of bruising as deposed by PW7 Dr.Anagha Pai-Raiturkar. The prosecution, as such, has established commission of offences alleged against appellant/accused no.1 Amol Sherkar.

22 In the light of the foregoing discussion, no infirmity can be found in the impugned judgment and order of conviction as well as resultant sentence imposed on the appellant/accused. It cannot be said that sentence imposed on him is disproportionate to the proved offences. The appeal, as such is devoid of merits, and therefore the order :

ORDER

The appeal is dismissed.

(A.M.BADAR, J.)