

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 809/2019.

Pravin Narayan Khole,
Age 40 years, Occupation
Service, resident of Umarkhed,
Taluq Umarkhed, District Yavatmal.
(In Jail)

... **APPELLANT.**

VERSUS

State of Maharashtra,
through P.S.O. Umarkhed,
Taluq Umarkhed, District Yavatmal.

... **RESPONDENT.**

Shri V.R. Thote, Advocate for the Appellant.
Shri S.D. Sirpurkar, A.P.P. for Respondent.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT : 10.12.2020.
JUDGMENT PRONOUNCED ON : 22.12.2020.

JUDGMENT :

Heard learned Counsel for the parties.

2. Challenge in this appeal is to the judgment and order of conviction in Special (Child) Case No.9/2014 whereby the

Additional Sessions Judge, Pusad has convicted the appellant / accused for the offence punishable under Sections 8, 10, 12 of the Protection of Children from Sexual Offences Act (POCSO Act) and under Section 506 of the Indian Penal Code. The Trial Court has imposed maximum sentence for the offence punishable under Section 10 of the POCSO Act, to suffer simple imprisonment for 5 years. The total fine has been imposed to the tune of Rs. 12,000/- with default clause. Since all the sentences were directed to run concurrently, the term of imprisonment for different offences has not been mentioned. However, the Trial Court has acquitted accused of the offence punishable under Section 376(1) of the Indian Penal Code.

3. The State has neither challenged the acquittal of accused for the offence punishable under Section 376(1) of the Indian Penal Code, nor sought for enhancement of sentence for the offence under which he was convicted.

4. The facts in brief leading to the prosecution case are that, mother of the victim girl aged 11 years lodged report on 12.03.2014 with the police about atrocities committed by the accused on her minor daughter [victim]. It was stated that the informant was having two daughters, out of which the victim aged

11 years was elder one. Prior to 20-25 day, from the report, the victim sustained injury to her right hand, hence, she was sent to Government Hospital Umarkhed for treatment. A token [O.P.D. case paper] was issued in the name of the victim. Medical Officer gave treatment to victim and asked her to visit on the following day for followup treatment. On the next date, the victim once again visited to the hospital for treatment. Thereafter, informant mother noticed behavioural change of the victim as she used to remain frightened.

5. On 11.03.2014, the victim girl was again suffering from cough, hence, informant asked her to go to the Government Hospital to which she denied. On enquiry, the victim disclosed that last time when she visited to the Hospital, the person who has issued token (OPD Card), asked her to meet after treatment. When she returned to him, he took her in the adjacent room, closed the door and touched her buttocks in inappropriate manner. The victim asked him to desist, however, he took her in nearby bathroom by holding her hand. In her presence, the said person has passed urine and moved his hand on her person. Then he forcibly gave her 10 rupees and asked her to visit daily. He also threatened her for not to disclose the things, otherwise he would beat. After realizing the

things, the informant mother narrated the happenings to her husband and then on the following day, they went to the police station and lodged report [Exh.36].

6. On the basis of said report, a Crime No. 61/2014 was registered. During the course of investigation, the victim was medically examined, her birth date certificate was collected and test identification parade was conducted. On completion of investigation, charge sheet was filed in Special Court. On trial, prosecution has led evidence of nine witnesses. On believing the evidence of prosecution witnesses the Trial Court has recorded the finding of guilt and passed sentence as referred above.

7. The learned Counsel for the appellant has strongly criticized the judgment and order of conviction. It is submitted that the trial Court committed serious error in convicting the accused sans adequate evidence. The argument consists of several points on the basis of which it is urged to set aside the order of conviction. Defence has concentrated submissions on the point of delay in lodgment of first information report, inconsistencies in the evidence, material omissions and irregularity in holding prior test identification parade. Much stress has been led on the point that there was no proper identification of the accused.

8. On the other hand, the learned A.P.P. has strongly supported the impugned judgment. It is submitted that the victim has specifically identified the accused in Court which is sufficient to fasten the guilt. Learned A.P.P. would submit that there is clinching and reliable evidence against the accused, therefore, the impugned judgment of conviction calls for no interference.

9. The accused is charged for the offences under the POCSO Act. In order to sustain the prosecution under POCSO Act, the victim must be a “child” within the meaning of Section 2[d] of the POCSO Act, meaning thereby the victim must be below the age of 18 years despite gender. In order to comply this basic requirement, the prosecution has tendered victim’s bonafide certificate [Exh.79] and birth certificate [Exh.80] showing that her date of birth was 25.04.2004. The alleged offence took place on 11.03.2014, meaning thereby on the date of occurrence the victim was barely 10 years of age. Moreover, the defence has not denied that at relevant time the victim was a minor i.e. a ‘child’ within the meaning of Section 2[d] of the POCSO Act. Therefore, the victim being minor there was no impediment in launching prosecution under the provisions of POCSO Act.

10. The prosecution though examined in all nine witnesses, however, the evidence of victim and her mother assumes significance. The victim has stated about the occurrence which was corroborated by her mother. Needless to say that direct evidence would have primacy over other evidence. In that light, it would be advantageous to initially examine the evidence of victim, which is of great importance.

11. PW.1 Victim, stated that in the month of January, since she was suffering from an injury at her right hand, she went to the Government Hospital, Umarkhed, along with her grand-mother Shantabai. Initially they went to the accused who was sitting on a table of issuing ticket (MLC paper). After obtaining MLC paper, she was examined by the Medical Officer who gave her treatment and asked to visit again on the following day. Victim deposed that since on the following day it was a holiday, she went to the Hospital on third day and again met the accused who was sitting on the same table. The accused gave her MLC paper and asked to come back after treatment. Accordingly, after treatment she went to the accused who took her into the room, closed its door. Thereafter accused had shown her money and touched her back and lower portion i.e. buttocks. Though she asked the accused for not doing

so, he took her into the bathroom, passed urine in her presence and put his hand inside her nicker on her private part. Not only that, the accused gave her currency note of Rs.10/- and asked her to visit daily. Moreover, accused also threatened her to beat if she would disclose the incident to any one. This was precisely the victims evidence on the occurrence.

12. The victim deposed that since she was frightened, she had not disclosed the incident to any one, however, after 1 to 1 ½ month when she was suffering from cough, her mother advised her to visit Hospital. At that time she disclosed the incident to her mother as a reason for refusing to go the Hospital once again. After realizing the things, her mother informed the happenings to her father and on the following day they went to the police station and lodged report.

13. Victim was subjected to lengthy cross examination in which certain inconsistencies were brought on record, however, by and large she faired in the entire cross examination. PW. 3 victim's mother deposed that, as victim was suffering from injury at her hand she was sent to the Hospital. Thereafter the next day being holiday, victim went to the Hospital on third day. It is her evidence that after returning from the Hospital on second occasion, there was

behavioral change in the victim as she used to live in fear. After a gap of 20-25 days, victim again suffered from cough, hence, she has advised her to go to the Hospital. At that time, victim broke down and narrated the entire incident, as has been stated by the victim in her evidence.

14. The defence has firstly criticized the evidence of victim by pointing certain inconsistencies. At this juncture, it would be advantageous to refer few dates which are relevant. As per evidence and record of the Hospital, the victim went to the Hospital for the first time on 25.01.2014, and then on 27.01.2014. Admittedly the first information report (FIR) was lodged on 12.03.2014. It is argued that though there was gap of near about 40 days, informant stated that prior to 20-25 days from the FIR the victim suffered injury, hence was advised to go to the Hospital. Therefore, according to the defence, though the incident occurred in the month of January, 2014 it does not matches to the informants' statement that the first incidence occurred just 20-25 days prior to the lodging of the FIR dated 12.03.2014. True, the gap between the first occurrence and lodgment of FIR is near about 40 days, however, said inconsistency does not make any difference at all. One has to take into account that the informant is a labourer and

rustic villager, she never stated a specific date of first occurrence, but, in general parlance, she stated that the first occurrence took place prior to 20-25 days. Certainly one cannot mathematically calculate the days, but, in generality the said statement has to be appreciated. Therefore, the said inconsistency being insignificant, has no bearing at all.

15. The defence has pointed out that as per evidence of victim, on her first visit to the Hospital the Medical Officer had asked her to visit again on the following day, however, she went on the third day. Hospital record, particularly OPD case paper [Exh.68], were sufficient to establish that the victim visited to the Hospital on 25.01.2014 and 27.01.2014. The reasonable explanation has been given that on 26.01.2014, being Republic day, it was a holiday, hence on third day victim went to the Hospital, therefore, no fault could be found.

16. The next submission is about inconsistency about the cause for victim to visit the Hospital. The victim as well as her mother both stated that, since the victim was suffering hand injury, she visited to the Hospital on both days. The learned defence Counsel took me through the evidence of P.W.6 Dr. Jaghirdar, the treating Doctor, who stated that since victim was suffering from

cough, cold and viral fever he gave treatment. In short inconsistency is about cause for visit to the Hospital which is pointed. Infact the cause for victims visit to the Hospital is immaterial. There may be possibility that due to hand injury victim was also suffering from fever. It is important to see as to whether the victim visited to the Hospital on 25.01.2014 and 27.01.2014, apart from the type of her ailment. The evidence of P.W.6 Dr. Jaghirdar specifies that on 25.01.2014 he has prepared OPD Card [Ex.68] in his own handwriting and examined her. He further deposed that the victim again visited to the Hospital on 27.01.2014 with OPD card. His evidence is well corroborated by the OPD card [Exh.68], which was tendered in the evidence. In view of said evidence, there is no escape then to hold that the victim visited to the Hospital on both days i.e. 25.01.2014 and 27.01.2014, therefore, the inconsistencies about the type of ailment absolutely does not matter at all.

17. The Supreme Court in case of ***U. P. vs. M. K. Anthony (1985) 1 SCC 505*** has observed that in case of minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the

matter would not ordinarily permit rejection of the evidence as a whole. Likewise in another case of *Rammi vs. State of M.P (1991) 8 SCC 649*, the Supreme Court has observed that when an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness were so incompatible with the credibility of the version then the court is justified in jettisoning his evidence. In the light of such position, minor inconsistencies are appreciated. As discussed above, certain minor variances does not touches to the core issue therefore, they being in significant, have no impact on the prosecution case.

18. The evidence of victim appears to be quite natural and trustworthy. Inasmuch as it is corroborated by evidence of her mother i.e. PW.2, [Mother] on the aspect of victims' visits to the Hospital on relevant dates. Moreover, the said aspect has been reaffirmed through the evidence of PW.6 Dr. Jaghirdar [treating doctor], along with the documents in the nature of OPD card [Exh.68] and extract of patient's register [Exh.69], maintained by

the Hospital. The extract bear entries of names of patients who visited to the Hospital on 25.01.2014. It bears entry of victims name at Sr.No.37. Thus, the fact of victims visit to the Hospital cannot be doubted at all.

19. The victim being child witness, her evidence is criticized by placing reliance on the decision in case of **Chutukumar Kabarar Trivedi .vrs. The State of Maharashtra - 2015 (4) BCR (Cri) 549**. It is also well settled that a child of tender age can be allowed to testify, if he/she has intellectual capacity to understand the questions and give rational answers thereof. The record indicates that the Court has put to the child witness preliminary questions to satisfy that she was capable of understanding the questions and having sufficient understanding capacity. The evidence of child witness is not required to be rejected *per se* but the Court as a rule of prudence considers such evidence on close scrutiny and only on being convincing about the quality and reliability thereof records conviction based thereon. Precisely, there is no rule of law that conviction cannot be based on the evidence of child witness unless it is corroborated. No doubt the corroboration can be from any quarter. Having regard to the nature of accusations, there is hardly possibility of viewing incident by stranger. However, the evidence of

doctor coupled with documents fully corroborates victim's evidence about her visit to the Hospital on given dates.

20. Having regard to the nature of accusation, it is unrealistic to expect the direct evidence on the point of occurrence. Always it depends upon the facts and circumstances of each case, whether there is necessity to have corroborative evidence in the form of eye witness. This is a case of sexual assault on a minor girl. Certainly the culprit would take every precaution to maintain secrecy while doing such act, therefore, in such kind of cases it is hard to expect direct evidence of eye witnesses.

21. No doubt the victim being a child witness, the Court should be at guard while appreciating her evidence. So far as her visit to the Hospital is concerned, it is amply proved as discussed above. The victim's evidence about actual occurrence is reliable and trustworthy. Besides that, there is no reason for a child victim to falsely implicate a person who is serving in the Government Hospital. The defence has not brought any material to show that the parents of victim had enimical terms with accused to rope him in a false accusation. Obviously parents of a girl would be the last person to level false allegations at the cost of chastity of their own daughter. The entire evidence of victim remained unshattered

during cross examination and bears corroboration from the other quarters. Therefore, there is no reason to suspect her evidence which inspires full confidence.

22. The next contention urged is about proper identification of accused. The point canvassed is about irregularity in holding prior test identification (TI) parade. The learned defence counsel would submit that the TI parade is nothing but a farce which was in flagrant violation of settled norms and procedural guidelines. The submission is that by very nature, the identification of the accused for the first time in Court is a weak type of evidence which cannot be made basis for conviction.

23. To appreciate the submission, I have gone through the prosecution evidence on the point of identification of the accused. True FIR [Exh.37] does not bear the name of the accused. The victims' mother has stated in the FIR about the story narrated by the victim and finally lodged a report against a person issuing receipts [OPD card] in the Government Hospital to whom her daughter recognizes by face. Since the report was against unnamed person, the investigating agency has very much carried the exercise of holding TI parade. In this regard, the prosecution has examined PW 4 – Eknath Shinde, who was panch on TI parade. Unfortunate

to the prosecution, the panch witness has not supported to the prosecution case.

24. PW.5 Rajesh Chavan Naib Tahsildar, in his evidence stated that on requisition from police he held T.I. parade on 01.04.2014. He has stated that on the date of TI parade, he made the accused to sit in the video conferencing room, whilst the TI parade was conducted in the meeting hall. He took precaution that the accused could not see victim who was made to sit in the election room. He stated that he has given choice to the accused to choose the position in the row, and then in first identification, the victim has correctly identified the accused. Thereafter, he again conducted said exercise within a short span in which the accused was allowed to change shirt as well as his position in the row. This time also the victim has unmistakably identified the accused. The prosecution has duly proved the memorandum of TI parade [Exh.64], Panchnama of TI parade [Exh.63] and two separate memorandums [Exh.61 and 62] regarding each round of actual identification.

25. While critisizing the evidence on TI parade, the defence has pointed out several irregularities. PW.5 – Naib Tahsildar admitted that there was no mention in the TI parade panchnama as to where the accused and witnesses were made to sit

prior to the parade. There is no mention in panchnama as to whether the 4 dummies were of similar physic, height and complexion like that of accused. Admittedly age of dummies alongwith description of their clothes has not been mentioned.

26. In order to impeach the TI parade, it is canvassed that the requisite procedure has not been followed. There was inordinate delay in holding TI parade and the memorandum of TI parade no where bears details regarding precautions taken while holding TI parade. To substantiate said argument, reliance has been placed on the decision of Supreme Court in cases of ***Mulla & Anr. Vs. State of U.P., 2010 ALL SCR 823*** and ***Sheikh Hasib @ Tabarak .vrs. The State of Bihar – (1972) 4 SCC 773***, wherein it is ruled that always it is desirable to hold TI parade at the earlier possible opportunity, otherwise it loses its significance. Further reliance is placed on the decision of this Court in case of ***Ramkishan @ Bala Haribhau Hulgunde and others .vrs. State of Maharashtra – 2015 [1] Mh.L.J. (C ri) 643***, wherein detailed procedure for holding TI parade as per paragraph 6[2][a to p] from Chapter I of the Criminal Manual has been emphasized. In order to impress the object of holding prior TI parade, the defence has placed reliance on the decision of Allahabad High Court in case of ***Asharfi and***

another .vrs. The State – AIR 1961 Allahabad 153. Besides that on the same point reliance has been placed on the decision of this Court in case of **Ramchandra Bhudiram Gupta .vrs. State of Maharashtra – 1995 Cri.L.J. 4048**. The entire endeavour was to impress that test identification parade was faulty hence cannot be relied.

27. Bare perusal of the TI parade memorandum [Exh.64] discloses that it was a ‘blank filling’ mechanical exercise in printed proforma. Since most of the requirements have already been printed, it creates doubt about its compliance in real sense. For the purpose of quick appreciation, it would be convenient to reproduce printed portion of the test identification memorandum (Exh. 64) in marathi language which is as below:-

“१) ओळख परेडच्या वेळी कोणीही पोलीस अंमलदार दालनात हजर नव्हता.

२)

३) ओळख परेड भरण्यापुर्वी साक्षीदारास आरोपी आसामीस पाहण्याची संधी दिलेली नाही.

४) साक्षीदारास आरोपीत आसामीस ओळखण्यापुर्वी भेटू दिले नाही.

५) आरोपींना कोणत्याही जागी उभे राहण्याची परवानगी दिली.

६) आरोपींना कपडे बदलण्याची संधी देण्यात आली होती.

७)

८) ह्यास स्पर्श करुन ह्यानेच..... असे

विचलीत न होता स्पष्टपणे दाखवुन व सांगून दिले आहे.

९)

१०) त्यांना कपडे बदलण्याची संधी दिली असता त्यांनी शर्ट बदलविले.....

११) वर उभे असलेल्या आरोपीत आसामींना ओळखले.”

28. Apparently, it gives impression that the officer has mechanically filled the format without pondering on it. It is expected that the officer holding TI parade shall apply his mind independently and record the things as it happens. Since several requirements are one sidedly printed, it creates serious doubt whether in reality it happened or not, therefore, such a practice is deprecated. No format has been prescribed for holding test identification parade, so it can be in any form. The sole object is that it shall inspire full confidence of the Court, irrespective whether it is in particular format or not.

29. As per the procedure set out in Criminal Manual, for identification of one suspect, generally 8 or more dummies are required. Obviously figure can marginally vary, but, in case at hand only 4 dummies were used for one suspect, which has reduced the scope of identification, and consequently, loses its credibility. Moreover, it is the requirement of using dummies of same age, height, complexion etc. However, none of the documents relating to

TI parade bears reference in that regard. Neither there is reference about precautions taken, nor even age of dummies has been stated. Besides that though accused was arrested on 12.03.2014, the TI parade has been belatedly conducted on 01.04.2014 without plausible explanation. For all these reasons the TI parade loses its significance and it would not be safe to rely on the same.

30. The learned defence counsel submitted that if the accused was first time identified in the Court without support of prior TI parade, it is no identification. In this regard, reliance has been placed on the decision of this Court in case of **Rajnish Purushotta Pogade and another .vrs. State of Maharashtra – (Criminal Appeal Nos.786 & 787 of 2018 decided on 10.06.2019)**. wherein this Court has considered the worth of Court identification, its impact and evidentiary value. The Court has discarded the Court identification, however, those observations were restricted to the facts of that case only. It was a case of robbery, where the incident took place in the late evening within few minutes on highway. In that context, it was held that it was risky to rely on the sole evidence of Court identification. No doubt the Court identification is on and often considered as a weak piece of evidence unless it is corroborated by prior TI parade. It is a rule of prudence

to seek corroboration from prior TI parade, as first time identification in the Court gets assurance from earlier exercise.

31. The law in this regard is fairly well settled in catena of decisions. The Supreme Court in case of **Simon .vrs. State of Karnataka – (2004) 2 SCC 694**, has made the following observations in paragraph no.14.

“14. mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification

parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration....”

32. These observations would convey that, as a rule of prudence generally the Court seeks for the evidence of prior TI parade, but, as a rule there is no legal requirement to hold prior TI parade. Moreover, it is observed that in appropriate cases, the Court may accept the evidence of identification in Court even without insisting on corroborative evidence. Thus, it largely depends in the realm of the facts of the case to see whether evidence of prior TI parade requires or not.

33. Yet in another decisions in case of ***Dana Yadav .vrs. State of Bihar – (2002) 7 SCC 295***, it has been observed in para Nos. 5 and 8 as below :-

“5----- The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a

witness in court. This Court has dealt with this question on several occasions. In the case of Vaikuntam Chandmappa v. State of A. P. which is a three Judge Bench decision of this Court, the Court, observed that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence.

8. *In the case of State of Maharashtra v. Sukdev Singh, it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test Identification parade was held. In that case, the*

accused concerned had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha, it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P v. Lekh Raj it was observed that:-

"test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can

safely rely without such or other corroboration."

34. In reported case of *Daya Singh Vs. State of Haryana, (2001) 3 SCC 468*, the Supreme Court expressed that if the evidence of Court identification is found to be reliable, then absence of corroboration by test identification would not be in any way material. The relevant observations from paragraph no.13, are reproduced as under :

"13. ...For this purpose, it is to be borne in mind that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring impress of the identity of the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion what in present day social environment infested by terrorism is really unimportant. In such cases not holding of identification parade is not fatal to the prosecution."

35. In substance, the proposition can be laid that mere failure to hold prior TI parade would not make the evidence of identification in Court inadmissible. It depends upon the facts and circumstances of each case as to whether the Court identification can be treated as sufficient identification of the accused. In such a backdrop the worth of Court identification on given facts require serious consideration.

36. At the inception, it is to be noted that when the accused was totally unknown to the witness, the evidence of prior TI parade assumes significance. True, in case at hand FIR does not disclose the name of the accused, but, in true sense it was not a case of accusation against unknown person. Facts of the case are having its own peculiar character since FIR spells out the occupation and particular job of the accused. Naturally reference of accused in such manner has narrowed down the scope of mistaken identity. It is to be borne in mind that this is not a case against totally unknown culprit like a case of road robbery or dacoity etc.

37. Reverting to the FIR, the informant mother has narrated the things which she learnt from the victim. Specific accusation has been leveled by the victim against a person who use to issue MLC card in the Government Hospital. Particularly the

report has been lodged against a person who issues MLC card in the Hospital. Coming to the evidence of victim girl, in no uncertain words she has stated that the accused gave her MLC paper and asked her to come back after medical examination. In that reference she stated that said person did the things as narrated earlier. Thus, though name of the accused has not been mentioned in the FIR, however, there is sufficient description regarding his occupation, place of sitting which has pin pointed towards accused who was admittedly issuing MLC cards in the Hospital.

38. The victim throughout her evidence has stated that accused has done the atrocities as she spelt out, which is amply referred above. She deposed that the person to whom she identified in TI parade, is present in the Court. Besides that number of time during evidence she has specifically stated that the accused did the things. The said Court identification on the above background inspires full confidence.

39. It is not at all denied that accused was serving in concerned Hospital and was looking after the work of issuing MLC paper. A faint attempt has been made to suggest that there were 2/3 clerks doing said job, therefore, it is not specific that on the crucial date accused alone had issued concerned MLC paper. The

prosecution has led evidence of PW.7 Medical Officer, who was incharge Superintendent. It is his evidence that on both crucial dates i.e. 25.01.2014 and 27.01.2014, accused was on duty of maintaining OPD register, and the concerned entries were in his hand writing. He deposed that his predecessor has allotted the work of maintaining OPD register to accused from 10.12.2013. Particularly, he has produced copy of muster roll showing that on 25.01.2014 and 27.01.2014, accused was on duty and had signed the muster roll. Thus, apparently on relevant date the accused was present in the Hospital and was very much concerned with issuance of OPD card. True, Medical Officers has not identified his handwriting, but, that will not diminish the value of his evidence in the context of nature of his job and specific identification in the Court.

40. The learned defence counsel would submit that in absence of description of accused in the FIR, it is not safe to convict the accused. In this regard reliance has been placed on the decision of Supreme Court in case of **Subash and Shiv Shankar .vrs. State of U.P - AIR 1987 SC 1222**. The facts of said case are quite distinct since it was a case of murder committed by unknown person. Herein the description of assailant was given by specifying his

nature of job and work, therefore being distinct facts, said ratio has no application.

41. Always there are chances of mistaken identity when the incident occurred in dark, or within few minutes or the witness does not have proper opportunity to see the culprit due to paucity of time. This is not the case of that kind to accord benefit on that count. Herein, the victim twice went to the Hospital and had conversation with the accused in connection with issuance of OPD card and receiving stamp on it. It has come in the evidence that on the date of occurrence, victim was near about one hour in the Hospital. Successive visits to the Hospital and interaction with the accused provided her ample opportunity to remember the face of the accused, which eliminates the chances of committing mistake.

Moreover, as per the evidence of victim, on the date of occurrence, the accused took her in the room, did the things, gave threats, therefore, naturally she had ample opportunity to see the accused properly and remember him. One can understand that in routine affair, if there was casual visit, then person may not have reason to memorize the face of that person. However, herein act of the accused of committing sexual assault was the first horrifying experience in the life of victim. In that context, there was very

much reason for her to remember and identify the culprit. There was no reason for the victim to name someone else by excluding real culprit. Moreover, it is not a case against totally unknown person, but, from FIR itself culprit was pin pointed through his occupation, nature of job and type of work. In view of such special circumstances, Court identification inspires full confidence and it can be safely relied to base conviction.

42. Lastly, the defence has criticized the delay in lodgment of FIR. True, the incident occurred on 27.01.2014, whilst the report has been lodged on 12.03.2014. Undoubtedly as a general rule delay in lodgment of FIR becomes a cause for suspicion, but it is a matter of appreciation based on facts of the case. In this regard I may refer the observations of Supreme Court in case of ***State of Punjab vs. Gurmit Singh and others, (1996) 2 SCC 384*** of which para 8 reads as under:-

“8..... The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of

sexual offence is generally lodged.”

The evidence of victim as well as her mother itself provides sufficient explanation regarding the delay in lodgment of report. Pertinent to note that victim girl was threatened by the accused for not disclosing the things to anybody. It has come in the evidence that the Hospital where the accused was serving was just across her school, therefore, it was quite natural for tender mind to bear fear of accused. However, when after gap of one month, the victim was again asked to go to the Hospital, at that time she broke down and exposed the things. It is quite natural for a victim to refuse to once again go to the Hospital where the accused was serving. The cause for delayed exposure of things is very natural and real. Moreover, it is the evidence that on 11.03.2014, the victim disclosed the things to her mother, who in turn informed her husband and lodged report on the following day. On the background facts, the time period taken in lodging report, if tested, it gets convincing and acceptable explanation. Therefore, the defence would not muster any strength from said angle.

43. Section 29 of the POCSO Act, enjoins a statutory presumption for prosecution under the POCSO Act, for the offence punishable under Section 3,5,7 and 9 of the POCSO Act. In such

prosecution, it is mandatory that the Court shall presume commission of offence by accused unless contrary is proved. The prosecution has duly and amply proved the foundational facts therefore statutory presumption can certainly help to record the finding of guilt. Moreover as the presumption has not been lifted on the touchstone of preponderance of probabilities, the prosecution evidence can be safely considered as sufficient to establish the charged offences against accused.

44. On minute scrutiny of entire evidence, it reveals that in case at hand though evidence of prior test identification parade fails, however Court identification inspires full confidence as set out above. Hence, there is no difficulty in holding that the prosecution has duly established that the accused has committed aggravated form of sexual assault on a minor vulnerable girl. The learned trial Judge has considered all the probabilities, dealt with all the submission properly and has rightly held that the charged offences are duly proved. In that view of the matter, I am in conformity with the view expressed by the trial Court, therefore, the appeal being devoid of merit, deserves to be dismissed and I do so accordingly.

JUDGE

Judgment

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Rgd.