

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 564 OF 2017

Kesarinandan Sabhapati Upadhyay
age 37 years, Indian Inhabitant,
residing at Room No.2, Annai Chawl,
Vaghobawadi, Tembhipada Road,
Tulshetpada, Sonapur, Bhandup (W),
Mumbai- 400 078 (At present in
Taloja Central Prison).

... Appellant.

V/s.

1. The State of Maharashtra
(at the instance of Bhandup Police
Station, vide C.R.No.454 of 2014).

2. XYZ.

... Respondents.

Ms.Anjali Patil with Ms.Mallika Sharma for the Appellant.
Ms.Prajakta P. Shinde, APP for Respondent No.1 - State.
Ms.Megha S. Bajoria for Respondent No.2.

**CORAM : NITIN JAMDAR AND
 C. V. BHADANG, JJ.**

DATE : 2 August 2021.

JUDGMENT : (Per Nitin Jamdar, J.)

The learned Special Judge, Greater Mumbai, by judgment and order dated 15 June 2017, has convicted the Appellant under the offences punishable under the Protection of Children from

Sexual Offences Act, 2012 and has sentenced him to suffer imprisonment for life. Being aggrieved, the Appellant has filed this criminal appeal.

2. The grandmother of the survivor child (the child) resided at Bhandup (W), Mumbai. Her daughter and four-year-old granddaughter were residing with her as her son-in-law (father of the child) was missing since an accident. Her daughter was working in a mall, and her granddaughter was studying in a school at Bhandup. She used to drop her granddaughter at the school and used to bring her back. The school timing was from 1.00 p.m. to 5.30 p.m. On 9 December 2014, when she picked the child from the school, her hair was disheveled, and her clothes were in disarray. When the grandmother asked, the child told her that Chhote Sir in the school took her to the toilet and inserted his penis in her private part and navel and her mouth, licked her private parts, and she was not able to urinate. The child complained of stomach pain. The child did not go to school on 10 December 2014 and refused to go to school on 11 December 2014. On the next day, i.e. 12 December 2014, the grandmother took the child to Savitribai Phule Hospital and informed the doctor that the child was subjected to sexual assault and had stomach pain. The doctor advised her to go to Rajawadi Hospital, but since her daughter came late and since the OPD was closed, the grandmother came back. The child was given home remedies. The grandmother feared that her family would be defamed, so she did not go to the police station or the school. The

incident came to be known and on 16 December 2014, one shopkeeper called her and asked her to come to one place. On 17 December 2014, when she intended to go to the police station, the police themselves arrived at her house. She stated to the police regarding sexual assault on the child, and on this statement, police registered C.R.No.454/2014 for the offences under the Protection of Children from Sexual Offences Act, 2012, the Act.

3. The accused was arrested. His disclosure statement was recorded, and recovery panchanama of his clothes was conducted. The Investigating Officer recorded statements of the child and witnesses, and collected the birth certificate. The child showed the spot, and spot panchanama was conducted. The Investigating Officer sent the child and the accused for a medical examination. The Investigating Officer sent the clothes of the child and the accused for chemical analysis. After completion of the investigation, a charge sheet was filed.

4. The learned Special Judge framed the charge against the Appellant for the offences under sections 6 and 10 of the Act of 2012. The Appellant pleaded not guilty and claimed to be tried.

5. The prosecution examined nine witnesses. The child (P.W.1), Informant/grandmother of the child (P.W.2); Bhagwan Kisan Bodhade, Panch (P.W.3) of Disclosure panchanama Exh.12; Mother of the child (P.W.4); Dr.N.B.Kumar, (P.W.5) Medical Officer, who had examined the child and the accused; Isak Zibrail

Choudhary, (P.W.6) Panch of spot panchanama at Exh.24; Dr.C.B.Sane, (P.W.7) Senior Medical Officer attached to Savitribai Phule Hospital, Bhandup; PSI G.P.Londhe, (P.W.8), First Investigating Officer; and PI B.P.Suryavanshi, (P.W.9) the Second Investigating Officer.

6. The defence of the Appellant was of total denial and false implication. The Appellant examined four defence witnesses viz. Kusum Fatebahadur Singh (D.W.1), a teacher in the school; Dhananjay Tribhuvan Singh (D.W.2), Secretary and Principal of the school; Madhuri Ishwar Pradhan (D.W.3), a peon in the school; and Ranjana Chandramani Gavai (D.W.4), a peon in the school.

7. The learned Special Judge, after evaluating the evidence on record and after considering the arguments, concluded that the prosecution has proved that the Appellant on 9 December 2014 between 1.00 p.m. to 5.30 p.m. committed aggravated penetrative sexual assault on the child and thereby committed an act punishable under Sections 6 and 10 of the Act of 2012. The learned Special Judge convicted the Appellant for the offence punishable under section 6 of the Act and sentenced him to suffer imprisonment for life and imprisonment for seven years for the offence punishable under section 10 of the Act. Fine was also imposed, in default further imprisonment. The Appellant was directed to pay compensation of Rs.25,000/- to the child as per section 33(8) of the Act. The sentence was to run concurrently. The Appellant is before

us with the criminal appeal challenging the judgment and order dated 15 June 2017.

8. We have heard Ms. Anjali Patil for the Appellant, Ms. Prajakta Shinde, learned APP for Respondent No.1- State and Ms. Megha Bajoria for Respondent No.2- Complainant. The name of the grandmother, Respondent No.2, is masked in this judgment. Mention of the name of the school and residential details of the child is avoided to protect the child's identity.

9. The learned counsel for the Appellant firstly relied upon the decision of the Supreme Court in the case of *Kali Ram v. State of Himachal Pradesh*¹ regarding principles of appreciation of evidence. There can be no dispute about these basic principles, the question is always of their application to the facts of each case and the provisions of the statute in question.

10. Before we analyze the evidence on record, certain provisions in the Act of 2012 need to be noticed. Section 29 and 30 of the Act create presumptions casting a reverse burden on the accused. Section 3 defines penetrative sexual assault as occurring when there is a penetration of the penis to any extent, into the vagina, mouth, urethra or anus of a child or when to any extent, any object or a part of the body, not being the penis is inserted into the vagina, the urethra or anus of the child or when there is a manipulation of any part of the body of the child to cause

¹ (1973) 2 SCC 808

penetration into the vagina, urethra, anus or any part of the body of the child or when the mouth is applied to the penis, vagina, anus, urethra of the child. Aggravated penetrative sexual assault occurs when it falls in the categories mentioned in Section 5 of the Act. This *inter alia* includes the management or staff of an educational institute. Section 6 of the Act provides for punishment for aggravated penetrative sexual assault. Section 6 was amended with effect from 16 August 2019. Section 6 before its amendment provided for a maximum sentence of imprisonment of life, and minimum of ten years. Sexual assault is defined in Section 7 of the Act, and it occurs when any person, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or does any other act with sexual intent which involves physical contact without penetration. Section 9 states that aggravated sexual assault occurs when it is committed, *inter alia*, by a staff of an education institute. Section 10 provides for punishment for aggravated sexual assault which shall be not less than five years and can be up to seven years.

11. That the Appellant was working in the school where the child was studying and that both were present in the school on the date when the incident took place is established by the prosecution. No argument or cross-examination of the Appellant has questioned these basic facts.

12. The grandmother of the child was examined as PW2. She

deposed as follows: In the year 2014, the child was four years old. The child was studying in junior KG. The school time was 1.00 p.m. to 5.00 p.m. She used to take the child to school and bring her back. On 9 December 2014, when she got the child home from school, the child's hair was in disarray, and her clothes were dirty and wet. The child complained of stomachache and fever, and her body below the navel was swollen and had redness. The child told her that Chhote Sir in the school lifted her along with her school bag and took her to the boys' bathroom and that he put his penis in her navel. The child said that Chhote sir put his penis in her mouth and licked her private parts with his tongue, so she could not pass urine. On 12 December 2014, she took the child to Savitribai Phule Hospital. The doctor examined the child and asked her to take the child to Rajawadi Hospital. She then took the child to Rajawadi Hospital, but OPD timings were over, and so she brought the child back home as her daughter (mother of the child) also came late. When she came back home, she received a phone call from the police station at 11.00 p.m. Police came to her home and recorded the statement of the child. On 16 December 2014, after receiving a phone call from the shopkeeper, she went to Kailas Park, where one unknown person took her photograph. She went to the police station and lodged a report with the police. The child was taken to Sion hospital, where she was admitted and was examined. She, along with the child and the police, went to the school. The child showed the spot of the incident to the police. Clothes worn by the child on the date of the incident were seized. She identified them as of her granddaughter, the child. She

deposed that she had seen the Chhota Sir, the Physical Training Teacher in the school, and she could identify him if she sees him.

13. The child P.W.1 deposed, and her evidence was recorded in a question and answer format by the learned Special Judge. The child gave the name of the school where she was currently studying and the school where she was earlier studying. She deposed as follows: There was a teacher she called Bade Teacher who was not teaching and one called Chhote Teacher who used to teach physical training. There were two toilets for girls and one toilet for boys. When girls were present in the girls' toilet, she used to go to boys' toilets. Chhote Sir used to give PT dress and used to teach jumping and running on the ground. To what Chhote Sir did to her, she answered that he took her to the toilet, then here (pointing to her private part) he put his *nuna* (penis) and licked it with his tongue and licked her belly button. Chhote sir inserted his finger there (pointing to her anus), and also (by pointing to her chest) Chhote Sir pressed here. Chhote Sir touched his penis here (showing her chest and ear). He pressed her neck and threatened her that he would burn her with a matchstick. She could not do toilet. After few days, she became well. She told about the incident to her grandmother. She also told everybody and also narrated to her mother. She informed the incident to everyone. The doctor gave her medicine, and the Police recorded her statement at home. To what clothes she was wearing on that date, the child described her dress and volunteered to say, "he made me naked". To

what Chhote Sir was wearing, the child stated that he used to wear black pants and a white shirt and specs, which he used to keep in his shirt.

14. The learned Special Judge then took the child on her lap. The child was then taken on the lap by the learned Special Judge. The Appellant was called in front, without the child's knowledge. The Special Judge asked the child who the advocate for the accused was, to which she replied as 'Didi'. When the same question was asked pointing to the Special Public Prosecutor and the typist, the child called them 'Didi'. When the child was asked as to who the person (the Appellant) was, the child replied, "Chhote Sir" pointing out to the accused. Then the child insisted on going to her grandmother and started saying that she wanted to go home.

15. The third witness as regards the incident is the mother of the child, PW4. P.W.4 stated that on 19 December 2014, her daughter was saying that she will not go to school and she had a stomachache. She deposed that when she and her mother asked the child what happened, she told them that Chhote Sir in the school put his finger in her naval. He took her to the toilet. He made her lie down and licked her private parts. P.W.4 deposed that the child also complained that it hurt her and she could not urinate. She was refusing to go to school. P.W.4 further deposed that her mother (P.W.1) took the child to the hospital on 12 December 2014, and the doctor treated her and asked to take her daughter to Rajawadi

Hospital. She deposed that her mother had called her to come; however, she was on her job and could not reach in time, and as the OPD of the hospital was closed on that day, so her mother brought the child back. She deposed that her mother gave household treatment to her daughter.

16. P.W.5- Dr.Narendra Baluram Kumar, Medical Officer attached to Sion Hospital and P.W.7-Dr.Chandrahaas Bhalchandra Sane, Medical Officer, attached to Savitribai Phule Maternity Home, Bhandup, were examined by the prosecution. P.W.7- Dr.Sane deposed that on 12 December 2014, he was informed that her grandmother brought one girl aged four years and that she was sexually assaulted. Since the hospital did not examine such cases, she was sent to Rajawadi Hospital in an ambulance with Dr.Patil.

17. P.W.5- Medical Officer attached to the Sion Hospital stated that on 17 December 2014, a girl child aged four years was brought to the Gynaecology Department of L.T.M.M.C. (Sion Hospital) by Woman Police Constable, Bhandup Police Station for examination in the context of a sexual assault. Consent for examination was given by P.W.1- grandmother of the child girl. History was given by P.W.1 of forceful oral, anal and vaginal sexual intercourse on the child three times on 9 December 2014 by Chhote Sir (Clerk). She stated that on 9 December 2014, after the school was over at around 5 p.m., Chhote Sir took the child and three other girls to the toilet, but they resisted, so he had beaten them. He then

penetrated the anus of the child, and he licked the anal and perineum area. Chhote Sir licked the child's entire body after that. Chhote Sir throttled the child and threatened her. The child then went home with her grandmother; at that time, her hair were shabby, her neck was swollen, her right cheek was red, eyes were wet. The child complained to her grandmother of pain around the umbilicus, increased frequency of passing motion, and difficulty passing urine. P.W.5- doctor examined the child and found that hymen was torn at 6 o'clock position, and edges were rounded. There was no active bleeding or seminal stains. On examination of the anus, there was no evidence of external injuries or bleeding or seminal stains. Samples were collected for Forensic Science Laboratory. Overall findings were consistent with recent or old sexual intercourse or assault. The final opinion was kept pending till the receipt of FSL reports. P.W.5 referred to the CA report dated 24 June 2015 regarding the clothes of the child and the Appellant and the CA report dated 8 May 2015 regarding the blood group of the Appellant. The CA report as regards the blood group of the child and the swabs are at Exh.19 and Exh.20. The doctor opined that the injury mentioned in column no.6(f) was possible due to vaginal intercourse.

18. Two Panch witnesses examined by the prosecution were: P.W.3- Bhagwan Kisan Bodhade for disclosure of panchanama at Exh.13A and P.W.6-Isak Zibrail Choudhary for the spot panchanama. P.W.3- Bhagwan stated that along with the Police, the accused and the two Panchas went to the house of the accused at

Tembhipada. Accused told the directions while going to his house. Accused took the party to the room. One blue full pant, under pant, white shirt having yellow print and Baniyan were seized. P.W.3 signed the panchanama. P.W.6- Isak deposed that he accompanied the child with the police to her school where she showed the toilet in the corner, and he signed the spot panchanama at Exh.25.

19. Ganesh Pundlik Londhe (P.W.8) was the first investigating officer and B.P.Suryawanshi (P.W.9) was the second investigating officer. P.W.8- Londhe stated that when he was attached to Bhandup Police Station and on 16 December 2014 when he was on night duty, the Senior Police Inspector asked him to ascertain whether a girl (name of the child) was molested. Accordingly, Police visited the home of the child, and Lady PSI Shelke recorded the informant's statement at her home. Crime No.454/2014 under sections 354-A and 376 of IPC read with sections 4, 8, 12 of POCSO Act was registered. P.W.8- Londhe arranged the spot panchanama and recorded the statement of Dhananjay Singh, the Manager of the School. He arrested the Appellant on 17 December 2014. P.W.8 seized the clothes of the child produced by her grandmother on 22 December 2014. P.W.8 recorded the statement of the Appellant. He made a disclosure statement that he would produce clothes. Accordingly, clothes were seized under seizure panchanama at Exh.13A. P.W.9- Suryawanshi was handed over the charge of the investigation. P.W.9 sent the clothes of the accused and the child for chemical analysis. The

blood samples of the accused were sent for chemical analysis. P.W.9 recorded the statement of doctors, mother and grandmother of the child.

20. The primary defence of the Appellant is that there is a serious doubt about the identity of whom the child has referred to as Chhote Sir, and that the Appellant is not Chhote Sir.

21. Four witnesses were examined by the Appellant-Accused. On the defence of identity, the Appellant- accused examined D.W.1- Kusum Fatebahadur Singh, a teacher in the school. She deposed that one T.N.Singh is the chairman of the school and Dhananjay Singh is the Principal. Dhananjay Singh wears spectacles. He generally wears a white shirt and black trousers. Dhananjay Singh is known as Chhote Sir, and his father is known as Bade Sir. Dhananjay Singh was able to speak Marathi. The Appellant was working in the school office. He used to wear colourful clothes and never used to wear spectacle. He used to speak in Hindi, and he was not concerned with the Junior KG class. The defence witnesses have specifically stated that one T.N.Singh is the chairman of the school, Dhananjay Singh is the Principal, and it is Dhananjay Singh who wears spectacles and wears a white shirt and black trousers. As deposed by D.W.1, Dhananjay Singh is known as Chhote Sir, and his father is known as Bade Sir. D.W.1 deposed that the Appellant was working in the school office. He used to wear colourful dresses and never used to wear spectacles. Dhananjay Singh was able to speak

Marathi and not the Appellant who used to speak Hindi. Based on her deposition, it was contended that the Chhote Sir referred to by the child is not the Appellant.

22. Dhananjay Singh was examined by the Appellant as D.W.2. He deposed that his father was the chairman of the institute. He was working as Secretary and Principal. He deposed that the school runs from KG to eighth standard classes, and there is about 25 teaching staff in the school. The Appellant was appointed for doing paperwork. Thereafter he deposed regarding the visit of the police to the school, and that child's grandmother was called to the school who did not come to the school. Dhananjay Singh deposed that some people were against running the school. He deposed that no male teacher was appointed for physical training.

23. The submission of the Appellant on this aspect is as follows: The description of Chhote Sir given by the Appellant does not tally with the description of Chhote Sir given in the FIR. The child has categorically stated that Chhote Sir was working as P.T. Teacher and the Appellant was not the P.T. Teacher. The child has categorically referred to one Bade Sir and one Chhote Sir, and that Chhote Sir speaks Marathi. Though it is stated by the child and P.W.1- grandmother that Chhote Sir used to wear a white shirt and black pants and spectacles, no such evidence is led. The Appellant is not a P.T. teacher, does not wear specs or white shirt nor can speak Marathi. In view of the allegation of the prosecution that it is

Chhote Sir who committed the crime, it was necessary for the prosecution to examine the staff of the school to establish the identity of Chhote Sir. The prosecution has not bothered to examine anyone from the school to establish the identity of the Chhote Sir. The defence witnesses have shown that there is serious doubt regarding the identity of the real accused.

24. We have considered the evidence on record on the aspect of identity. It is established that the Appellant worked in the school where the child was admitted. On the date of incident, both the child and the Appellant were present in the school. The child was examined by the prosecution first by asking general questions. In question No.2, she was asked as to what Chhote Sir used to teach. Then in question No.11, she was asked as to what Chhote Sir did to her. Pursuant to this question, the child narrated the sexual act of Chhote Sir. Thereafter the child was taken on the lap by the Special Judge. The Accused was called in front without the knowledge of the child witness. When asked, pointing to the advocate for the Appellant as to who was the person, the child called her “Didi”. The child was asked who the Special Public Prosecutor was, to whom she called Didi. So also to the typist in the Court. Thereafter when she was asked who this person was (the accused) after pointing to the accused, she recognized him as Chhote Sir. Most importantly, after pointing to the accused, the child insisted on going to her grandmother, saying that she wants to go to her home. This demeanour as recorded is rightly stressed upon by the learned APP

and the learned advocate for Respondent No.2.

25. Section 280 of the Code of Criminal Procedure provides that while recording evidence of the witness, the presiding judge can also record such remarks as may be material in respect of the demeanour of the witness. The child was questioned, pointing out to the advocates and the staff present in the court as to who they were, and the child gave answers as expected of her age, referring to them as Didi, an affectionate and respectful expression. Her factualities of recognizing and using appropriate expression showed clarity and maturity. It is essential to note that the question in respect of the Appellant was not "whether is this the Chhote Sir?" But the question was "who is this person?" and to this question, the child categorically stated that he was Chhote Sir. Further, the child became upset and started saying that she wanted to go to her grandmother. She was not recorded as being upset when she was asked to identify the others. The child specifically identified and connected the Appellant as Chhote Sir and thereafter became upset, which demeanour has been noticed and recorded by the learned Special Judge, and rightly stressed upon by the learned APP and the learned counsel for Respondent No.2.

26. P.W.2, the grandmother of the child had deposed that when she brought the child home from the school on 9 December 2014, the child's clothes and hair were in disarray, she was complaining of fever and stomach ache. Her lower body parts were

swollen and had redness. When the child was asked, she informed P.W.2- grandmother that Chhote Sir lifted her with her school bag and took her to the boys' bathroom and committed a sexual act. Though it is sought to be urged by the advocate for the Appellant that P.W.2 has not stated before the Police that she knows Chhote Sir and, therefore, the same is an improvement, from this, it cannot be directly concluded that P.W.2 was completely unaware of the staff in the school as she deposed that she used to take her to the school and bring her back. In the cross-examination, P.W.2 has stated that she took the child to school for almost seven to eight months. She deposed that she can identify Chhote Sir and identified the Appellant as Chhote Sir in the Court. Therefore, the contention of the advocate for the Appellant, that P.W.2 was not aware as to who Chhote Sir was, cannot be accepted because P.W.2 was not a stranger to the school.

27. The learned counsel for the Appellant argued that the child and P.W.2 have specifically referred to the Appellant as P.T. Teacher and as deposed by the defence witness D.W.2- Dhananjay Singh, there was no male teacher appointed for physical training. The child, at the time of the incident, was studying in Junior KG. She has referred to Chhote Sir as a P.T. Teacher as a general reference and not as a post. When the child was asked what Chhote Sir used to teach, she said that he used to ask the children to jump and run on the ground. As rightly argued by the learned Advocate for Respondent No.2, these sort of physical activities are not conducted

by a teacher specifically assigned with P.T. subject for Junior KG, but whosoever takes such physical activities, the children refer to him generally as a P.T. Teacher. P.W.2 and the child have referred to the Chhote Sir as a P.T. Teacher based on what sort of activities he was interacting with the children, in this case, physical training and, therefore, the general reference as a P.T. Teacher and not referred to an official post. There is no merit in the submission of the Appellant.

28. It was then contended by the learned counsel for the Appellant that the child told P.W.2 and also deposed in the Court that what Chhote Sir wore on that date. The child answered that Chhote Sir was wearing black pants, a white blue shirt and spectacles, and he used to put his spectacles in the blue shirt. The learned counsel for the Appellant submitted that when panchanama was carried out on attachment of clothes at Exh.13, the clothes which were found were one blue full pant, underpants, white shirt having yellow print with collar. P.W.3- Bhagwan Bodhade was examined as he was Panch for the panchanama at Exh.13. It was sought to be argued that the colour of the pant was grey, and it was not blue. P.W.9- Suryawanshi, Investigating Officer, was handed over the investigation in Crime No.454/2014 on 18 December 2014. The learned counsel for the Appellant sought to rely upon the the cross-examination of P.W.9- Suryawanshi, the investigating officer on the aspect of identity. P.W.9 admitted that he did not collect records from the school as regards the Physical Training Teacher. He sent

sent the clothes of the accused and the child for chemical analysis. He recorded the statement of witnesses. Therefore, on the aspect of identity, his evidence is not material. P.W.9- Suryawanshi also stated that the person wearing black pants, a white shirt and spectacles is Dhananjay. He, however, clarified that he could not say that Dhananjay Singh always wear clothes of this colour. P.W.9 stated that he did not record the statement of the child after showing the photograph of Dhananjay Singh. Nothing much turns on these contradictions in the evidence regarding clothes of the Appellant as the genesis of evidence on identity is consistent.

29. According to us, the attempt of the Appellant- Accused to create confusion regarding the identity of the person who committed the offence cannot shift focus from the central fact that the child categorically identified the Appellant as Chhote Sir. The Chhote Sir is a description and not a name. What is material is what the child referred to the accused as and not what he was generally known as to establish the identity. The child clearly and cogently connected the Appellant as Chhote Sir and the one who committed sexual assault. The defence of the Appellant that the Appellant used to wear colourful clothes and was not able to speak Marathi is of no much significance in view of the cogent and consistent version of the child who has identified the Appellant- accused and is truthful in her version regarding Appellant's guilt. Pertinently, no question was put to defence witness- Dhananjay Singh whether he was called Chhote Sir. Thus, the identity of the Appellant as Chhote Sir is established

by the prosecution.

30. The learned counsel for the Appellant then argued that the child was tutored by P.W.2- grandmother and the volunteers from the Non-Governmental Organizations. The learned counsel submitted that it is clear from the evidence on record that during the trial, the members of an NGO were present. In the cross-examination of the child, she stated that she had come to the Court with an advocate and volunteer of an NGO. The learned counsel for the Appellant submitted that the child admitted that she had extended interaction with the members of the NGO and she had come to the Court with them and met them before.

31. Section 39 of the Act contemplates guidelines for the use of non-governmental organizations and other bodies and entities to be associated with the pre-trial stage and trial stage to assist the child. Therefore, the presence of a member of an NGO with the child is in consonance with the scheme of the Act. After stating that she had come to the Court with the members of the NGO and had interaction with them, the child categorically denied that she was being tutored by them. When the child was asked whether the members of the NGO told her what to be stated in the Court, the child witness stated that- she knows everything. She was asked who told what a case means; she stated that- she knows it herself. There is no reason why the NGO members will tutor the child to depose against the Appellant. Thus, the evidence of the child cannot be

discarded on the ground that the members of the NGO must have tutored her. In his defence, the Appellant stated that some outside elements had a grudge against the management of the school and had involved the Appellant- accused. In what manner P.W.2- grandmother of the child would be inimical to the school management or acting at the behest of the outside elements is not clear. P.W.2, in her cross-examination, has categorically stated that she was not aware that because the residents are annoyed with the crowd generated by the school on the street, or there was a complaint against the school or that she was acquainted with one Mr.Chandrashekhar Yadav. There is nothing on record from which it can be inferred that P.W.2 or the child had anything to gain from falsely implicating the Appellant. The social strata of the child and her mother and grandmother needs to be considered. As rightly contended by the learned counsel for Respondent No.2 and the learned APP, it is not possible that mother and grandmother of the child would stake the life of a four-year-old child for the benefit of the residents of the locality or for those who were inimical with the management of the school.

33. The argument of the learned counsel for the Appellant that the child did not even know the meaning of the names of the private parts that she uttered in her evidence is without any substance. When the child was being asked the questions, she was six years old, and it cannot be expected from her to answer the question as to the meaning of the private part uttered by her. However, the child

responded to the questions not by words but by pointing out the private parts. Though a child of tender age is amenable for tutoring, the evidence of a child witness cannot be doubted if it is clear and cogent. In the present case, the evidence of the child is corroborated by other evidence brought on record by the prosecution. There could be variations in the replies given by the child, but since throughout the cross-examination the child has stuck to the genesis of the version, there is no reason why the evidence should not be relied upon. The narration of the incident by the child is categorical. The child has answered the questions in a cogent manner, sometimes showing a tendency of indifference or refusing to answer the questions as would be expected from the child of six years old, but this was after around 160 questions were asked in the cross-examination, which must have been an ordeal for the child. As regards the identity of the Appellant- accused and the act committed by him, the child witness is consistent. The child has been consistent in her version, and there is no reason to disbelieve her version.

34. The learned counsel for the Appellant submitted that as to question No.194 that Chhote Sir has not done anything with you, the child answered that nothing was done.

35. Firstly, we note with disapproval that the child was subjected to 195 questions (163 questions in the cross-examination), and the cross-examination lasted for six months. Section 33 lays down the procedure and powers of the Special Court. It

contemplates that the child should not be subjected to prolonged examination in the Court. The child expressly stated throughout her evidence regarding the sexual act committed upon her. In fact, to the earlier question of similar nature that Chhote Sir has not done anything to her, she has asserted that he had done. The argument of the learned counsel for the Appellant, based on the sole answer of the child to question No.194, the second last question in the cross-examination, cannot be taken as admission of the Appellant's innocence.

36. The learned counsel for the Appellant then submitted that the answers of the child witness to question Nos.8, 10, 11, 12, 13, 14, 15 and 16 were omissions, and the advocate wanted to ask the child witness whether she had stated the same thing to the police at the time of recording of her statement. The learned Special Judge has opined that the witness is a child witness and, therefore, there is no need to ask such questions. The learned counsel for the Appellant took exception to this approach of the learned Special Judge. In this context, a reference needs to be made to Section 33(5) of the Act, stipulating that the court has to ensure that the child is not repeatedly called to testify. Further, the tender age of the child has to be kept in mind. When she gave the statement under section 164 of Cr.P.C. before the Metropolitan Magistrate, the child was four years old. In the statement under section 164, the child specifically stated that Chhote Sir took her to the toilet and narrated the genesis of the sexual act committed. In the statement under section 164, as

also in the evidence before the Court, the child is consistent with reference to her body part and of the Appellant- accused and the act committed. Therefore, we do not find any material omission or contradiction and that the child is consistent regarding the genesis of the incident.

37. P.W.,5- Dr.N.B.Kumar examined the child. He testified that on 17 December 2014, the child was brought to him where he was working, i.e. Sion Hospital, by a Lady Police Constable in the context of sexual assault. The child was taken to the doctor, i.e. P.W.7- Dr.Sane, on 12 December 2014, but there she was not examined. The history was given by the grandmother that there was forcible oral, anal and vaginal sexual intercourse on 9 December 2014. P.W.5- Dr.Kumar, after examining the child, found that the hymen was torn at 6 o'clock position and edges were rounded. Though there was no evidence of external bleeding or seminal stains on and around the anus, the incident was on 9 December 2014, and the child was examined on 17 December 2014. P.W.5- Dr.Kumar clarified in the cross-examination regarding evidence of injury to the anus by stating that it is not necessary that if there is a forceful attempt to insert penis in the anus of the child of four years then there has to be injury as well as bleeding. P.W.5- Dr.Kumar stated that hymen could be torn due to many reasons. He did not comment as to what is the age of the injury. He admitted that if the girl had any infection and was in the habit of pulling her finger in her vagina, an injury of 6(f) was possible. However, P.W.5-

Dr.Kumar deposed that overall findings were consistent with sexual assault. In the history given to P.W.5- Dr.Kumar by P.W.2- grandmother, there is a reference to the child's friends who were also taken to the toilet by Chhote Sir. Other friends of the child, however, they had resisted, and sexual assault was in respect of the child. In this history to the doctor, P.W.2- grandmother stated that on 10 December 2014, the child refused to go to the school and on 11 December 2014, she made more complaints and then she was taken to P.W.7- Dr.Sane on 12 December 2014 who stated that she would have to be taken for examination to Rajawadi Hospital. On this evidence, the learned counsel for the Appellant sought to argue that there are contradictions and the history given before the doctor is not reliable. The learned counsel submitted that in this history there is a reference to three other children who were subjected to sexual assault but they have not been examined by the prosecution. There is no substance in this submission. The Appellant is not charged with this offence and, according to the prosecution evidence, these children had refused. It will not be prudent and against the spirit of the Act to explore the children to the rigour of trial unnecessarily. We find that the history was given to the doctor, the deposition of P.W.2- grandmother and the version of the child as regards the genesis is entirely consistent.

38. The learned counsel for the Appellant then urged that the CA report at Exh.17 shows that neither any bloodstain nor semen was detected on articles 1, 2, 3, 4, 6 and 7, which were a half T-shirt,

skirt, nicker, full pant, full shirt, banian, underwear etc. The argument that the description of the clothes and the clothes which were recovered at Exh.13 did not tally has no specific meaning because no blood or semen was found on the same. However, as contended by the learned counsel for Respondent No.2 and the learned APP, it is consistent with the prosecution case of not an act with the discharge of semen. Therefore, neither the recovery of clothes nor the absence of any blood or semen is a matter of any significance in this case.

39. The learned counsel then contended that there is a delay in recording the first information report and also that the behaviour of the child and P.W.2- grandmother after the incident is also suspicious and is not trustworthy. The learned counsel submitted that the incident took place on 9 December 2014 and the report was lodged, and the crime was registered on 16 December 2014, i.e. after six days of the incident. The learned counsel submitted that the grandmother had not gone to the police station, and it is the police who came to the house of P.W.2, that too, with the crime number already recorded. It is submitted that this act creates doubt as regards the veracity of the prosecution case.

40. Firstly, as regards the delay and the incident post 9 December 2014 are concerned, the P.W.2- grandmother has deposed that she brought the child home from the school on 9 December 2014. On 10 December 2014, the child did not go to school. Then

P.W.2- grandmother took the child to the hospital. As noted earlier, the child was staying with her grandmother along with her mother. Her father was missing after the accident. Considering the social strata and the stigma that would entail on the child, the act of not immediately reporting to the police can be well understood. It is also not the case that P.W.2 completely ignored the incident. The prosecution has examined P.W.7- Dr.Sane, who was attached to Savitribai Phule Maternity Hospital, Bhandup. He stated that on 12 December 2014, Dr.Bhide, a paediatrician informed that one girl aged four years was brought by her grandmother and informed that she was sexually assaulted. He deposed that since they did not examine such cases, they sent the patient to another hospital. Therefore, the fact that P.W.2 brought the child to the doctor on 12 December 2014 is established. Nothing has been elicited from P.W.2 in the cross-examination to discredit her version on this count. The mother of the child, P.W.4, deposed that P.W.2 took the child to the hospital on 12 December 2014 and corroborated the evidence of P.W.2. She also stated that thereafter the child was given home remedies. The P.W.2- grandmother has deposed that on 16 December 2014, one shopkeeper called her and then she was taken to the police station. Thereafter she received a call from the police station, and the police recorded her statement. P.W.2 stated that one Shelke madam wrote down her statement. P.W.8- P.S.I. Londhe deposed that on 16 December 2014, the Senior Police Inspector informed him to verify whether one girl child was molested. Accordingly, Police Inspector Suryawanshi made inquiries, and PSI

Londhe went along with lady PSI Shelke and recorded the statement of the informant at her home. Section 19 of the Act places an obligation on any person, who knows that the offence under the Act has been committed, to provide information to the Special Juvenile Police Unit or the local police. Immunity is granted under the provisions to the informer giving information in good faith from civil or criminal liability. Therefore, there is nothing unusual about the procedure adopted in the present case. Neither the delay of six days nor the actions of P.W.2 and P.W.4 can be considered to cast doubt on the prosecution's case. Further, delay in lodging the FIR in a sexual offence could be for various reasons. In the present case, the fear of social stigma, the age of the child and the attempts made to get medical care are sufficient explanations for the delay.

41. It was sought to be argued by the learned counsel for the Appellant that the child attended the school as usual on 10 December 2014 which shows that nothing as alleged by the prosecution had happened. The P.W.2- grandmother has specifically deposed that the child did not attend school on 10 December 2014. No attendance register was produced by the defence witness on record even though the defence could do so. None of the defence witnesses has placed on record, despite they being examined, that the child attended the school on 10 December 2014.

42. The next contention of the Appellant was that the incident could not have taken place at the place alleged by the prosecution as

considering the small size of the toilet brought on record, the sexual assault is not possible to be performed. The learned counsel for the Appellant submitted that the spot panchanama at Exh.25 would clearly show that the toilets were tiny. The learned counsel submitted that P.W.6- Isak Choudhary, a panch witness, admitted that he did not know whether there was any door or latch to the toilet and that the four toilets mentioned were small.

43. D.W.1- Kusum Fatebahadur Singh deposed that one attendant used to be near the toilet, and the toilets were very small. D.W.4- Ranjana Gavai, who was working as an attendant in front of the bathroom, deposed four bathrooms for KG students. D.W.3- Madhuri Pradhan deposed that she used to take care of the children and also used to take them to the bathroom. To test the defence regarding the impossibility of the act given the size of the toilet, firstly, it has to be noted that the child has shown the toilet where the incident took place. P.W.6- Isak Choudhary, Panch to the spot panchanama has deposed to that effect. Therefore, the place where the incident took place was shown by the child. The child also informed P.W.2 that Chhote Sir lifted her and took her there.

44. Since the defence witnesses were examined on this point, the cross-examination of defence witnesses is material. D.W.1- Kusum Singh, in her cross-examination, firstly admitted that there are four toilets in the school, and the toilets are of such size that the attendant can enter the toilet with a boy of any size. Thereafter she

stated that the attendant could not enter the toilet with the child. D.W.3- Madhuri Pradhan, serving as a peon in the school, stated two bathrooms in the school. Then she changed the version that there are four bathrooms, and then she again stated that there are seven bathrooms in the school. She further stated that she did not know whether the senior students also use the bathrooms. D.W.4- Ranjana Gavai deposed that there are four bathrooms, and the students of all physiques can go to the bathrooms. The school is up to the 10th standard. Then she deposed that there are only four bathrooms for the entire school, and all students use these four bathrooms.

45. The Appellant's case is that the size of the toilet as can be seen from admission given in the cross-examination and spot panchanama that the size of the toilet and the place showing that the incident as alleged cannot take place there. P.W.8, the Investigating Officer, in his cross-examination has deposed that there is no mention in the panchanama of any doors in front of the toilet. A suggestion was put to him that he has not deliberately mentioned the size of the toilet. However, nothing is brought in the cross-examination in the prosecution evidence to show that the incident cannot occur on the spot due to its small size. Though D.W.1 deposed that the toilet was tiny, admeasuring one feet by one feet, where the Junior KG students used to be taken, she stated that the toilets are of the size that the attendant could enter the toilet with a child. D.W3-Madhuri Ishwar Pradhan, in the cross-examination,

first stated that there are only two bathrooms, then she stated there are four bathrooms in the school, and then stated that there is a total of seven bathrooms in the school. Therefore, this witness is not stating the correct number of toilets. D.W.4- Ranjana admitted that one could not notice what was going on in the bathroom when they were working in the classrooms. She admitted that the school is up to the 10th standard. Two bathrooms are meant for the senior class and two for the junior class, and she admitted that the students of all types of physique can go to the bathrooms. This admission destroys the theory of the defence based on the size of the toilet. The contention of the Appellant regarding the impossibility of the incident based on the size of the toilet cannot be accepted. Considered the natural size of a child of four years, the entire case of the prosecution cannot be discarded on the point of size of the toilet.

46. The prosecution has proved the age of the child when the incident took place being of four years and that the child fall within the purview of the Act of 2012 is admitted. The evidence of the child, her mother and grandmother is consistent, trustworthy and establishes the identity and guilt of the Appellant. The medical evidence and the deposition of the child, her mother and grandmother establish the factum of penetrative sexual assault. Statutory presumption under the Act comes into play. The defence taken that the Appellant is on identity not believable. At the time of incident, the Appellant was working in the school, thus the educational institute and, therefore, the sexual assault is and

penetrative sexual assault are aggravated falling within the purview of sections 6 and 10 of the Act of 2012. To conclude, we hold that the prosecution is successful in proving that the Appellant has committed an offence under sections 6 and 10 of the Act of 2012.

47. On the sentence, the learned counsel for the Appellant submitted that as per the mandate of section 6, as applicable when the crime was committed, there was a discretion as regards the maximum punishment, and it was from ten years to life imprisonment and that considering the circumstances, the learned Special Judge should have granted minimum punishment and not the maximum sentence. The learned counsel submitted that the Appellant has a family and no criminal antecedents. The learned counsel for the Appellant relied upon the judgment of Division Bench of this Court in the case of *Fazal Mehmud Jilani Dafedar v. The State of Maharashtra*² to contend that in this case the even though it was a case under section 6 of the Act, the sentence from life imprisonment to rigorous imprisonment was reduced to ten years and the period already undergone was given set off. It is submitted that the Appellant is in custody since the date of his arrest in the year 2014.

48. We have considered the submission. In the decision of *Fazal Mehmud*, the child was eleven years old girl, residing with the accused. The Division Bench observed that having regard to the circumstances of that case, the sentence of rigorous imprisonment for

² Cr.Appeal No.845/2017 decided on 26 November 2020 (Bombay High Court)

ten years, the minimum prescribed by section 6 of the Act, would meet the ends of justice. This decision does not lay down any precedent. That an innocent four-year-old child has become a victim of Appellants lust shows his grave mental depravity. This incident will have a devastating effect on the child's psychological and emotional well-being. There is scientific evidence that such sexual assault at a very young age get embedded in the subconscious, manifesting in numerous negative cognitive developments and disorders in adulthood. The child was in the care of the school and of the Appellant. The crime committed by the Appellant will imperil the faith with which parents entrust their toddlers to the school authorities, affecting the years of good work by schools and teachers, thus having wider consequences on society at large. Considering the age of the child, the grave depravity and ramification of the crime, maximum punishment as imposed is entirely justified.

49. The conviction and the sentence recorded by the learned Special Judge is confirmed. The Appeal is dismissed.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)