

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO. 467 OF 2020

Ajay Keshav @ Kiran Malekar
Aged about 20 years, Occ. Education,
R/o Ward No.6, Gadchandur, Tahsil
Korpana, Dist. Chandrapur

... **Appellant**

// VERSUS //

1. State of Maharashtra through Police
Station Officer, Police Station
Gadchandur, Tahsil Korpana, Dist.
Chandrapur
2. XYZ (Victim) in Crime No. 149/18
P.S.Gadchandur, Tah. Korpana,
Dist. Chandrapur

... **Respondents**

Shri R.M.Daga, Advocate for appellant
Shri S.D.Sirpurkar, APP for the State / Respondent No.1.
Ms Mukta R. Kavimandan, Advocate for the Respondent No.2/Victim

CORAM : ANIL S. KILOR, J.
DATED : 1st DECEMBER, 2022.

ORAL JUDGMENT :

This appeal takes exception to the judgment and order dated 4th August, 2020 passed by the Additional Sessions Judge, Chandrapur in Special POCSO Case No. 42 of 2018, convicting the appellant for the offences punishable under Section 376(2)(f)(i) of the Indian Penal Code (hereinafter referred to as “IPC”) and Sections 4 and 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as “POCSO

Act”), whereby the appellant-who shall be referred to as the ‘accused’ is convicted as follows:

Offence	Sentence
Section 6 of the POCSO Act.	Rigorous Imprisonment for ten years and to pay fine of Rs.5000/- in default to suffer simple imprisonment for one year
Section 4 of the POCSO Act.	Rigorous Imprisonment for seven years and to pay fine of Rs.5000/- in default to suffer simple imprisonment for one year

2. The prosecution story in short is that, the accused is the paternal uncle of the victim who was minor and aged about four years and four months at the time of incident. The informant, mother of the victim lodged the report on 3rd April, 2018 *inter alia* stating that on 1st April, 2018 at about 8 am, her husband went to duty at Manikgadh Cement Company and from there to Nagpur. At about 9.30 p.m., the informant, the victim and the accused took meal. After finishing their food the informant went for walk. The accused and the victim were present in the house. The informant returned to the house after an hour. Thereafter, the accused left the house. On the next day at about 12.00 noon while the informant was giving bath to the victim and applied soap to the private part of the victim, she started to cry because of burning sensation. Upon seeing the informant found the said area reddish in colour and there was an injury. Thereupon, she inquired with the victim. At that the victim told her that the accused by pressing her mouth removed her

cloths and he by opening chain of his pant slept on her person and put his penis on her private part.

3. Thereafter, immediately the informant made phone call to her husband and narrated the entire incident to him. However, her husband asked her that they will inquire regarding matter. Hence, she did not lodge the report on that day. Thereafter, the victim narrated the entire incident to her grandparents. Accordingly, the report was lodged. Thereupon the Crime No. 149 of 2018 was registered and after investigation was over, the chargesheet was filed against the accused for the offences punishable under Section 376(2)(f)(i) of IPC read with Sections 4 and 6 of POCSO Act.

4. Then, the charge was framed vide Exh.8 for the offences punishable under Section 376(2)(f)(i) of IPC and Sections 4 and 6 of POCSO Act. The accused pleaded not guilty and claimed to be tried.

5. Prosecution has examined in all seven witnesses. The accused examined one Dilip Digambar Kohad, a Bank Employee, in his defence. The statement of accused under Section 313 of the Code of Criminal Procedure came to be recorded vide Exh.62.

6. The defence of the accused is that on the date of incident, the husband of the informant was not present in the house. Thus, the informant lured him and tried to establish physical relationship with him. However, he denied to the same, therefore, the informant got frightened and requested the accused not to disclose this fact to her husband. On next date she asked him to deposit Rs.6,000/- in the account of her

husband. Accordingly, he deposited the said amount in the account of her husband. Hence, to indulge the accused in a false case, she lodged the false report through her daughter.

7. Learned trial Court after recording oral as well as documentary evidence passed the impugned judgment and order dated 4th August, 2020, thereby convicting the appellant for the offence punishable under Section 376(2)(f)(i) of IPC and Sections 4 and 6 of POCSO Act. The said judgment and order is under challenge in the present appeal.

8. I have heard Shri Daga, learned counsel for the appellant, Shri Sirpurkar, learned Additional Public Prosecutor for the respondent/State and Ms. Kavimandam, learned counsel for the respondent no.2/victim.

9. Shri Daga, learned counsel for the appellant has argued as under :

i) It is submitted that no semen was found on the clothes of the victim. Similarly, the medical evidence shows that hymen of the victim was intact. It is further submitted that even if the oral testimony of the victim is considered, she states that the accused touched his penis to her vagina, therefore, there is no penetrative sexual assault as defined under Section 3 and punishable under Section 6 of the POCSO Act. Hence, at the most it is a case of sexual assault as defined under Section 7 of the POCSO Act.

ii) There is no final opinion of the doctor about penetrative sexual assault. Whereas, the doctors have opined possibility of sexual assault. Hence, section 6 of the POCSO Act will not apply to the present case.

iii) The medical examination of the victim was conducted on 3rd April, 2018. Whereas, the incident is of 1st April, 2018. The injuries found on the person of the victim were fresh, thus, medical evidence does not support the case of the prosecution.

iv) If the ocular evidence is considered in right perspective, at the most it can be said that an attempt was made but no rape was committed.

10. Shri Daga, learned counsel for the appellant in support of his contention has placed reliance on the judgments of coordinate Bench of this Court of Principal Seat, in the case of *Vikas S/o vishnu Ghatule Vs. The State of Maharashtra*¹ and *Sheikh Hafeez @ Bhurya @ Bhura S/o Sheikh Hasan Vs. State of Maharashtra*²,

11. On the other hand, Shri Sirpurkar, learned Additional Public Prosecutor supports the impugned judgment and order, and makes following submission.

a) The oral testimony of the victim is consistent and sufficient to rest conviction of the appellant.

¹ 2020 ALL MR (Cri) 3235

² 2018 DGLS (Bom.) 121

Raut/CLDhakate

b) The ocular evidence of doctors and medical reports support the case of prosecution and therefore no error is committed by the learned trial Court convicting the accused.

c) There is sufficient evidence to show that there was penetrative sexual assault and it is not the case where the accused only attempted.

12. Ms Kavimandan, learned counsel for the respondent no.2/victim reiterates the submissions of the learned Additional Public Prosecutor and prays for dismissal of the present appeal. In support of her contention, she placed reliance on the judgment of Hon'ble Supreme Court in the case of *State of Karnataka Vs. Shantappa Madivalappa Galapuji and others*³

13. In the backdrop of the rival contentions of the parties, I have perused the record, the impugned judgment and order and relevant authorities.

14. This is a case of child sexual assault, which is a form of sexual violence which includes sexual abuse, rape, indecent behavior, sexual molestation, child sexual abuse, child sexual assault, sexual harassment. Sexual assault is most commonly committed against women and children by the people they know such as boyfriends, neighbors, step fathers, bosses, uncles. In the case at hand, uncle of the victim is the accused.

15. At this juncture, before examining the victim's evidence, it would be appropriate to reiterate the law on reliability of the evidence of

³ (2009) 12 SCC 731
Raut/CLDhakate

child witness as the victim P.W. 3 was four years old on the date of the offence and on the date of recording of her evidence she was six years old.

16. The Hon'ble Supreme Court of India in the case of *State of Karnataka Vs. Shantappa Madivalappa Galapuji and others (Supra)*, has held thus:

"14. The position in law relating to the evidence of child witness has been dealt with by this Court in Nivrutti Pandurang Kokate v. State of Maharashtra and Golla Yelugu Govindu v. State of A.P.

15.... "6.... The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Suryanarayana v. State of Karnataka)

7. In Dattu Ramrao Sakhare v. State of Maharashtra it was held as follows: (SCC p. 343, para 5):

"5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness

must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

The above position was highlighted in Ratansingh Dalsukhbhai Nayak v. State of Gujrat at SCC pp. 67-68, paras 6-7."

17. It is thus clear that the Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, or any other cause of same kind. A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto.

18. The learned trial Court, in the present case, on satisfaction of competence of the victim PW-3, her intellectual capacity to understand questions and to give rational answers thereto, allowed to testify her.

19. In the oral testimony of PW-3, the victim, she has categorically stated that the accused switch off the lights and removed his clothes and thereafter removed her clothes. Thereafter he touched the private part and thereafter put his private part in her private part.

20. In cross examination the defence could not bring anything contrary.

21. In the above referred backdrop, it is necessary to examine whether there is any requirement of law to insist upon corroboration of the victim of a sexual assault to rest conviction of an accused. In this regard it will be useful to refer to the judgment of the Hon'ble Supreme Court of India in the case of *Ranjit Hazarika Vs. State of Assam*⁴, wherein the Hon'ble Supreme Court of India, has held thus:

“6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In it Singh, MANU/SC/0366/1996: 1996CriLJ1728 to which one of us (Anand, J.) was a party, while dealing with this aspect observed:

⁴ (1998) 8 SCC 635
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"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of

judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

22. Similarly in the case of *State of Uttar Pradesh Vs. Hari Chand*⁵ the Hon'ble Supreme Court of India, has held thus:

"14. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

23. From the above referred observations it is evident that the testimony of the victim of a sexual assault is vital and unless there are compelling reasons which necessitated looking for corroboration of her statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. There is no requirement of law to insist upon corroboration of her statement to face conviction of an accused. The evidence of a victim of sexual assault stands almost at a par with an evidence of an injured witness and to an extent is even more reliable. Corroborative evidence is not an imperative component of judicial evidence or a requirement of law but guidance of prudence under given circumstances. Where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not extended as conclusive.

24. In the teeth of above referred well settled law though in this case at hand the victim's evidence is found to be credible and trustworthy, let me also examine the evidence brought on record by the prosecution in corroboration of victim's evidence, without going into whether, in this case, corroboration for victim's evidence is required or not.

25. PW-1 mother of the victim and informant, in her chief states that her daughter on inquiry told her that Atul dada had put off the light, removed her clothes, removed his clothes, put his penis in the area from where she urinates and lay down upon her. She further stated that when the victim shouted at that time appellant threatened to beat her if she shouts.

26. In the cross-examination of PW-1, gave a suggestion to her that she herself caused injury to victim's private part prior to lodging the report, which she categorically denied.

27. In the examination-in-chief of PW-4 Medical Officer, Rural Hospital Gadchandur, she has stated that she personally examined the victim. Upon examination, she found laceration injuries on her private part therefore for confirmation she referred the victim to Government Medical College, Chandrapur for expert advise. In cross-examination she has stated that she found laceration injuries over vagina of the victim.

28. PW-5 Medical Officer, Government Medical College, Chandrapur in her oral testimony states that upon examination she found one small tear 1 x 2 cms above labia majora and victim's hymen was intact. She also opined that evidence of sexual assault cannot be ruled out.

29. In her cross-examination she admits that superficial tear means the upper layer of the skin (epidermal). Superficial tear could be possible mechanically. She then volunteered that when the size of superficial tear is about 1 x 2 cms, it required much force.

30. In the backdrop of above referred oral testimony, let us examine the documentary evidence, particularly the medical document Exh.46 which has answered the queries of the Investigating officer. Exh.46 shows that the hymen was intact and no external injury over the parts of the body. However, it has noted small superficial tear of 1 x 2 cms over labia majora.

31. Similarly, Exh.45 Forensic Medical Examination report noted superficial tear 1 x 2 cm size to labia majora. Moreover, in the opinion column it is noted that evidence of sexual assault cannot be ruled out.

32. The Regional Forensic Science Laboratory report (Exh.58) reveals that neither blood nor semen was detected on frock, knicker, jeans full pant, full shirt, underpants and bed-sheet.

33. It is therefore, imperative to test that the above referred oral as well as documentary medical evidence, is sufficient to establish penetrative sexual assault.

34. Therefore, to ponder upon whether in order to constitute offence under Section 375 of the IPC, complete penetration of penis with emission of semen and rupture of hymen is necessary, I will first reiterate the law on this point.

35. The Hon'ble Supreme Court of India in the case of *Aman Kumar Vs. State of Haryana*,⁶ has held thus:

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See S.P. Kohli (Dr.), v. High Court of Punjab and Haryana. In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four

hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable

by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”

36. From the above referred observations it becomes evident that penetration is the *sine qua non* for an offence of rape and it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Even partial or a slightest penetration in the labia majora or the vulva or pudendum with or without emission of semen is quite sufficient as labia majora is the first to be encountered by the male organ. Hence, the depth of penetration is immaterial in an offence punishable under Section 376 of the Indian Penal Code.

37. The medical evidence shows small tear superficial 1 x 2 cm seize over labia majora and further it has come in the oral testimony of PW-4 that while examining the victim she found laceration injuries on her private part. These are the pointer to indicate that there was penetration. In this case, the medical evidence is in total harmony with the statement of the victim and therefore, I am of the opinion that the offence was completed.

38. In the circumstances, I find it highly difficult to accept the submission of the learned counsel for the appellant that there was no

penetration as no injury was found on the male organ of the accused and hymen of the victim was intact.

39. The medical report opined that the possibility of sexual assault cannot be ruled out. The learned counsel for the appellant has tried to take advantage of the same and for that he has referred to the definition of sexual assault given under Section 7 of the POCSO Act which says that whoever 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 any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

40. The Hon'ble Supreme Court of India in the case of *Wahid Khan Vs. State of Madhya Pradesh*⁷, while examining whether the rape has occurred or not is a legal conclusion or medical condition, has held thus:

"20. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (22nd Edn.) at p. 495 which reads thus :

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but

should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

41. It is thus evident from the above referred observations that the rape is a crime and not a medical condition. Rape is a legal term and not the diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity whether the rape has occurred or not is a legal conclusion not a medical one.

42. Thus, oral testimonies of P.W. Nos. 4 and 5 coupled with the medical evidence has sufficiently established the sexual activity.

43. It is a settled law that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to the alternative possibility is not extended as conclusive. In these circumstances, even though the medical examination of the victim was conducted on 3rd April 2018 whereas the incident is of 1st April 2018 and the doctor opined that the injuries were fresh, will not help the accused to create a doubt about the veracity of the case of the prosecution.

44. As regards the abbreviated sexual assault, the Hon'ble Supreme Court of India in the case of *Nawabuddin Vs. State of Uttarakhand*⁸ has held thus:

“11. While appreciating the aforesaid submissions the relevant provisions of the POCSO Act are required to be referred to and considered:

11.1 Section 3 of the POCSO Act defines “penetrative sexual assault”. As per Section 3 of the Act, a person is said to commit “penetrative sexual assault” if-(b) he inserts, to any extent, any object of a part of the body, not being the penis, into the vagina...

11.2 Section 4 provides ‘punishment for penetrative sexual assault’.

11.3 Section 5 of the Act defines ‘aggravated penetrative sexual assault’ and as per Section 5(m) whoever commits penetrative sexual assault on a child below twelve years it is aggravated penetrative sexual assault.

11.4 Section 6 provides ‘punishment for aggravated penetrative sexual assault.’

11.5 In the present case, it has been established and proved that the accused penetrated his finger in the vagina and because of that the victim girl felt pain and irritation in urination as well as pain on her body and there was redness and swelling around the vagina found by the doctor. We are of the opinion that therefore the case would fall under Section 3(b) of the POCSO Act and it can be said to be penetrative sexual assault and considering Section 5(m) of the POCSO Act as such penetrative sexual assault was committed on a girl child aged four years (below twelve years) the same can be said to be ‘aggravated penetrative sexual assault’ punishable under Section 6 of the POCSO Act. Therefore, both, the Trial Court as well as the High Court have rightly convicted the accused for the offences under Section 5 of the POCSO Act punishable under Section 6 of the POCSO Act.”

45. In this case, as it is established that the penetrative sexual assault was committed on a girl child aged 4 years, it can therefore, safely be said that it is an aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Thus, the trial Court has rightly convicted the accused for the offence punishable under Section 6 of the POCSO Act.

46. As far as the submission of the learned counsel for the appellant that there was a delay in lodging the report as the incident took place on 01.04.2018 and the report was lodged on 03.04.2018, the Hon'ble Supreme Court of India in the case of *State of Rajasthan Vs. Om Prakash*⁹, has held thus:

“9. There was delay of nearly 26 hours in lodging the FIR. The offence is alleged to have taken place at about 9 a.m. The FIR was registered at about 11.30 a.m. on the next day. It was contended by Mr. Bachawat, learned counsel for the respondent, that this delay had assumed importance and was fatal particularly when the brother of the prosecutrix, namely, Mam Raj (PW-6) was admittedly at the house. The delay, according to the counsel, has resulted in embellishments. Reliance has been placed on the decision in the case of Thulia Kali v. The State of Tamil Nadu holding that the first information report in a criminal case is extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

There can be no dispute about these principles relied upon by Mr. Bachawat but the real question in the present case is about the explanation for the delay. It is not at all unnatural for the family members to await the arrival of the elders in the family when the offence of this nature is committed before taking a decision to lodge a report with the police. The reputation and prestige of the family and the career and life of a young child is involved in such cases. Therefore, the presence of the brother of the prosecutrix at home is not of much consequence. It has been established that the father of the girl along with his brother came back to their house at 7 o'clock in the evening. The girl was unconscious during the day. PW-2 told her husband as to what had happened to their daughter. The police station was at the distance of 15 kms. According to the testimony of PW-1 no mode of conveyance was available. The police was reported the next day morning and FIR was recorded at 11.30 a.m. The delay in reporting the matter to the police has thus been fully explained."

47. In the present case, the delay has properly explained. It has come in the evidence that the fact of sexual assault was revealed by the informant on next day of the incident at about 12:00 noon and immediately thereafter she informed the said fact to her husband, who was not at home and who asked her that they will inquire into the matter. Thereafter, in laws were called and accordingly, on next day, the report was lodged. Moreover, it is imperative to note that the accused is the brother (cousin) of the husband of the informant and uncle of the victim. In the circumstances it can not be said that it is unnatural that the informant waited for the family members to take decision about lodgment of the report. Hence, the submission of the learned counsel for the appellant that there was a delay in lodgment of FIR, is liable to be rejected.

48. In the circumstances, the judgments cited by the learned counsel for the appellant in the cases of in the case of *Vikas S/o vishnu Ghatule Vs. The State of Maharashtra* (supra) and *Sheikh Hafeez @ Bhurya @ Bhura S/o Sheikh Hasan Vs. State of Maharashtra* (supra), are distinguishable on facts and not helpful to the appellant.

49. In view of the above referred findings and as the offence of penetrative sexual assault is proved and established by the prosecution beyond doubt, I do not find any error committed by the trial Court in convicting the appellant-accused. Accordingly, I pass the following order:

- i. Criminal Appeal is **dismissed**.
- ii. Fees of Ms Mukta Kavimandan, learned counsel appointed to represent the non-applicant No.2/Victim, be quantified as per the Rules.

[ANIL S. KILOR, J.]