

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

CRIMINAL APPEAL NO. 531 OF 2018

Kamlesh s/o Janardhan Walde,
Aged about 23 years, occ: Labour,
R/o Rajedahegaon, Tahsil and
District - Bhandara.
(In Nagpur Jail)

... **APPELLANT**

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Station Jawaharnagar,
District - Bhandara.

... **RESPONDENT**

Shri R. M. Daga, Advocate for appellant.
Ms. Mayuri Deshmukh, Additional Public Prosecutor for
respondent.

CORAM: V. M. DESHPANDE AND
G. A. SANAP, JJ.
DATED : 04/01/2022.

JUDGMENT : (PER G. A. SANAP, J.)

1. In this appeal, the appellant/accused has challenged the Judgment and order dated 21/07/2018 passed by the learned Special Judge in Special Criminal (Child) Case No.33/2016, whereby the learned Judge convicted the appellant for the offence punishable under Section 376(2)(i), 354-A, 506 of the Indian Penal Code and under Sections 6, 8

and 12 of the Protection of Children from Sexual offences Act, 2012 (for short, "POCSO Act") and sentenced him to suffer life imprisonment. No separate sentence was awarded for the offence punishable under Section 354-A of the Indian Penal Code and under Section 6, 8 and 12 of the POCSO Act.

The facts are as follows :-

2. In this case, there are three child victims aged about 5, 6 and 7 years respectively. In order to protect the identity of the victims, their names are masked in the Judgment. The victim children were ravished by the appellant in a span of one year. The mother of victim 'A' lodged a report of the incident at Jawaharnagar Police Station. On the basis of report, a crime bearing No.81/2016 was registered against the appellant. The informant reported to the police that the appellant and three victims are residing in the locality namely; Suyog Nagar, Rajedahegaon. The informant had cordial relations with the family of the appellant. It is stated that on 24/08/2016, the mother and the brother of the appellant came to the house of the informant and quarreled with her. They

alleged that the informant spread the false information about the appellant and as such, defamed the appellant and their family. In the said incident, those persons assaulted the mother of informant. While narrating the prelude to the incident, it is stated that prior to this incident, daughter of the informant victim 'A' had informed the informant on 11/08/2016 that 2 - 3 days prior at noon, she had gone to the house of the appellant and was watching TV in the house of the appellant. The appellant called the victim 'A' near to him. Nobody was present in the house of the appellant. The appellant removed his pant and asked the victim 'A' to shake his private part. The appellant had threatened the victim 'A' not to disclose the said incident to anybody, otherwise he would hang her upside down. It is stated that thereafter, the informant narrated this incident and conduct of the appellant to his family members. The family members did not like it and therefore, they quarrelled with the appellant on 24/08/2016. The appellant, thus outraged the modesty by sexual harassment and assault on the daughter of informant.

3. After the quarrel on 24/08/2016, the incident became known to the people. The parents of the victims 'P' and 'S', thereafter got emboldened and came forward. The father of the victim 'P' disclosed that one year ago, his daughter was ravished by the accused by giving inducement of chocolate. The appellant took his daughter to the house which was under construction and asked her to remove her underwear and thereafter, he committed sexual intercourse with her. The grand-mother of victim 'A' also came forward. She informed that her grand-daughter was also subjected to sexual intercourse by the appellant by giving inducement of chocolate. All the three victim girls were lured and ravished by the appellant. He threatened them that he will hang them upside down, if they disclose the incident to anybody. The informant - mother of victim 'A' thereafter went to the police station. The father of the victim 'P' and grand-mother of victim 'S' accompanied her. On 25/08/2016, the mother of victim lodged a report. The report was signed by the father of the victim 'P' and grand-mother of victim 'S'. On the basis of this report, the wheels of the investigating machinery were put into motion.

4. The Investigating Officer, Priti Kisan Ade (PW-9) visited this spot and drawn spot panchnama in presence of two witnesses. The spot was pointed out by the victim girls. The victims 'P' and 'S' were sent for medical examination. They were medically examined. The accused was also medically examined. The seized samples were forwarded to the Chemical Analyzer by Investigation Officer. After completion of the investigation, charge sheet was filed against the appellant.

5. The learned Special Judge vide Exh.4 framed charge against the appellant. The appellant pleaded not guilty. The prosecution examined 9 witnesses to bring home the guilt of the accused. The learned Special Judge on consideration of the materials and evidence held the accused guilty for the above offences and sentenced him as above. Being aggrieved by this Judgment and order, the appellant has come before this Court in this appeal.

6. We have heard Shri R. M. Daga, learned Advocate for the appellant and Mrs. Mayuri Deshmukh,

learned Additional Public Prosecutor for the respondent. We have perused the record and proceedings.

7. Shri Daga, learned Advocate for the appellant submitted that there is inordinate delay in lodging the First Information Report. There is no explanation for lodging the First Information Report after one year from the date of the alleged incident. In the submission of learned Advocate unexplained delay in lodging the report creates a doubt about the case of the prosecution and credibility and veracity of the witnesses. The learned Advocate submitted that the inference of false implication needs to be drawn in absence of explanation for delayed lodging of First Information Report. On this ground, the appellant is entitled to get the benefit. The learned Advocate submitted that evidence of the informant clearly indicates that she had grudge against family of the appellant and therefore, she concocted the story about her daughter and instigated the parents of the victim 'P' and 'S' to implicate the appellant. The learned Advocate submitted that evidence of victim 'A', victim 'P' and victim 'S' is not believable. There are

major omissions and inconsistencies in their evidence and therefore, reliance cannot be placed on their evidence. The learned Advocate took us through the evidence of the victim girls and submitted that before stepping into witness box, they were tutored. The learned Advocate submitted that the disclosure of alleged incident by the victims after quarrel between the informant and the mother and brother of the appellant was the root cause for concoction of the case and false implication of the appellant. The learned Advocate submitted that there is no independent witness to corroborate the evidence of victims as well as the informant. In the submission of learned Advocate, sufficient doubt has been created about the case of the prosecution and therefore, the accused is entitled to be acquitted by giving him benefit of doubt.

8. The learned Additional Public Prosecutor submitted that considering the nature of crime in this case, much weightage cannot be given to the delay in disclosure of the incident and in lodging the First Information Report. The learned Additional Public Prosecutor took us through the

report lodged by the informant at Exh.8 and submitted that the delay for disclosure of the sexual intercourse with the victim 'P' and victim 'S' as well as delay for lodging the First Information Report has been explained in the report. The learned Additional Public Prosecutor submitted that the society has not come out of the orthodox mindset. In such cases, they treat such incident as stigma and therefore, such crimes are not brought in public domain. The learned Additional Public Prosecutor submitted that the learned Special Judge has made threadbaring analysis of the oral and documentary evidence and found the same concrete and cogent. The learned Additional Public Prosecutor submitted that the evidence of the victims cannot be discarded. The learned Additional Public Prosecutor submitted that the oral evidence of victims 'P' and 'S' has been fully corroborated by the medical evidence. In the submission of the learned Additional Public Prosecutor in the teeth of the evidence adduced by the prosecution, the guilt against the appellant has been proved beyond doubt. His defence is totally improbable.

9. The case of the prosecution rests mainly on the evidence of three victim girls. At the threshold, it would, therefore, be appropriate to consider the evidence of the victims. We are conscious of the fact that the child witness is susceptible to tutoring. We are equally conscious that the tutored witness cannot stand the scrutiny of searching cross-examination and can be easily exposed. The Court can easily notice major inconsistencies in the evidence of tutored witness. If the witness is not tutored, then it becomes very difficult even for a seasoned cross-examiner to deviate such witness from the core and substance of the testimony. The cross-examination of the witness on behalf of the accused is a prime source to shake the credibility of the witness and bring on record the truth. The child witness can be allowed to testify if the Court is satisfied on preliminary enquiry that the child witness is able to understand the nature of the oath and give rational answers to the questions. In this case, the learned Special Judge before recording the evidence of victims being child witnesses found them competent to testify on the ground that besides the importance of oath, they were able to understand the questions

and give rational answers to those questions. The victim 'A' is (PW-2). She has identified the appellant in the Court. She has stated that appellant resides in her neighbourhood. She calls him 'Kamlesh Dada'. About the incident, she has stated that she had gone for watching TV at the house of the appellant. When she was watching the Cartoon Channel on TV, the appellant removed his pant and asked her to touch his penis. After this incident, the appellant threatened her that he would hang her to a fan if the incident is disclosed by her to anybody. The appellant offered chocolate to her by way of inducement.

10. On the date of recording of evidence, the victim was hardly 6 years old. In the year 2016, she used to ride on tricycle while playing with her companions. The Cartoon Channel is favourite show of the children on TV. On the date of incident, as can be seen from her evidence, she was of a tender age without maturity. The victim 'A' treated the appellant as maternal uncle. They knew each other inasmuch as they were residing in the same locality. The conduct of the victim 'A' in narrating the said incident to her mother

immediately after going back to home is natural. She has stated that she narrated the incident to her mother as well as to her grand-mother. Her evidence would show that at the time of incident, she was studying in KG-II at Ankur Convent. Attempt has been made during her cross-examination to point out certain omissions from her statement. It is seen that her statement was recorded under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate, First Class. On perusal of her evidence, we have noticed that the learned Judge has recorded a particular statement as omission from her earlier statement. However, perusal of her statement recorded under Section 164 of the Code of Criminal Procedure at Exh.9A clearly indicates that it was not omission. This omission seems to have been recorded without verifying the said fact from her previous statement. The evidence of this victim child is consistent. Minute perusal of her evidence clearly indicate that she has narrated before the Court the first-hand account of the incident. It is pertinent to mention that even the witness of matured age is not expected to make parrot like statement before the Court. He is bound to miss on certain aspects. The

child witness is naturally bound to get bogged down by the Court atmosphere. A child witness not used to the Court atmosphere would feel uncomfortable and disturbed. In our view, therefore, while appreciating the evidence of child witness, some latitude is required to be given within permitted limit. It is pertinent to note that the latitude can be shown subject to the rider and not merely for asking the rider is that the Court must be satisfied on analysis of the evidence of child witness that the witness is the natural witness and there is no material on record to indicate that the narration of the incident is due to tutoring and by use of imagination. In our view, this observation would be applicable to remaining two victims as well. On minute scrutiny of the evidence of victim 'A', we are satisfied that her evidence is consistent. No major omissions and infirmities have been established to doubt her credibility.

11. PW-1 is the mother of victim 'A'. It has come on record that her daughter narrated the incident to her on 11/08/2016. Perusal of report at Ext.8 would show that her sister Trushali Shahare is a doctor. She took the victim 'A' to her

sister. Her sister examined the victim 'A' and informed that there was no bodily injury and signs of sexual intercourse with victim 'A'. She has stated that therefore, she neglected the incident. However, when she went to the house of the appellant and brought this fact to the notice of his mother and brother, they quarrelled with her. After few days, they formed an impression that the informant was spreading misinformation about the appellant in the locality. They quarrelled with her. They beat the mother of the informant. She has deposed that when this incident and the cause of incident became known to the people in the locality, the father of the victim 'P' and the grand-mother of victim 'S' came to her and disclosed that one year prior, the appellant had sexually assaulted the victims 'P' and 'S'. It is apparent on perusal of the evidence of PW-1 informant that they all gave thought to this and then decided to lodge the report. The parents of the victims 'P' and 'S' came forward and supported the informant. In her cross-examination, attempt has been made to establish the enmity between the informant and the mother of the appellant on certain aspect. The money transactions were also brought on

record. However, despite gruelling and searching cross-examination, no material has been brought on record to doubt the credibility of this witness on the main incident. We have no reason to disbelieve and discard the evidence of the informant PW-1.

12. The parents of the victim 'P' and 'S' have not been examined. The statements of the victims 'P' and 'S' were recorded before the Magistrate under Section 164 of the Code of Criminal Procedure. The victims 'P' and 'S' were subjected to sexual intercourse at the hands of the appellant. Their evidence, therefore, assumes great importance. The spot of incident was pointed out by the victims 'P' and 'S' to the Investigating Officer. The victim 'P' is PW-3. At the time of incident, she was studying in 3rd standard. The victim P has deposed that the accused resides in the same area at short distance from her house. They know each other. She calls the appellant 'Kamlesh Dada'. She has deposed that when she was playing with other victim 'S' in front of her house, the appellant called both of them near him. The appellant induced them by giving chocolate. He took them to toilet of the house, which

was under construction. While narrating the actual incident, she has stated that the appellant asked her to remove her nicker. After removing of her nicker, the appellant penetrated his penis in her vagina and gave back and fro jerks. She has stated after seeing this victim 'S' started running away. The boy 'D' who was playing with the victims on the say of the appellant caught hold her and brought her into the said house. The victim 'P' has stated that the appellant committed the similar act with victim 'S'. After this incident, the appellant gave Rs.5/- to them. He told them to go to shop and purchase chocolate. She has categorically stated that while giving money, the appellant threatened to hang them to a fan, if the incident is disclosed to anyone. She has categorically stated that due to the threat extended by the appellant, she did not narrate the incident to anyone about the said till quarrel dated 24/08/2016 between the mother of the victim 'A' and the mother of the appellant. The evidence clearly proves that the appellant committed rape on the victim 'P'.

13. The victim 'P' was medically examined. An attempt has been made on behalf of appellant to suggest that on

the point of penetration, the statement of the victim was silent. There was omission to this effect. This is the crux of the incident. In order to satisfy ourselves, we have perused her statement at Exh.11 recorded by the JMFC, Bhandara under Section 164 of the Code of Criminal Procedure. Perusal of this statement would show that the victim 'P' had stated about penetration before the J.M.F.C. The only difference which could be seen is that it was stated in language understood by her. Instead of directly referring that part as a penis, she has stated that it was a part of urination of the appellant and to her private part, she has referred as her part of urination. Save and except this difference, her statement is consistent with her evidence before Court. On minute perusal of her cross-examination, it is seen that this witness could not be deviated from the main incident. In searching cross-examination, child witness, in the absence of being subjected to such kind of gruesome act, would not be able to stand the scrutiny of the cross-examination. We do not see any reason to disbelieve and discard her evidence. No major and material admission or statement has been elicited in the cross-examination to

disbelieve and discard her evidence about the incident.

14. The third victim is 'S'. She is examined as PW-4. On the date of recording of her evidence before the Court, she was 9 years old. She deposed before the Court on 23/10/2017. The incident occurred in the year 2016. She has stated that the victims 'A' and 'P' are her friends. She calls the appellant as 'Kamlesh Dada'. The appellant resides near her house. She has stated that on the date of incident, she was studying in 3rd standard. She has deposed that her friend victim 'P' and she were playing on the ground. At that time, 'Kamlesh Dada' called them in bathroom of Nyaymurti. She has stated that the appellant asked the victim 'P' to remove her pant. The appellant penetrated his penis in the vagina of victim 'P' and gave back and fro jerks. She, therefore, ran away. The appellant told 'D' their male friend to apprehend her. 'D' caught her and brought to the bathroom. The appellant asked her to remove her pant. The appellant made penetration of his penis in her vagina and gave back and fro jerks. The accused offered them Rs.5/- for buying chocolates. She has deposed that accused

threatened that he would hang them upside down to a fan, if the incident is disclosed to anyone. The important common thread in the evidence of victim 'P' and victim 'S' is that they consistently deposed about the act with both of them. Her conduct to ran away from the spot after seeing this dastard act on the part of the appellant is consistent. The evidence of victim 'P' and victim 'S' is consistent with each other. They were sexually ravished by the appellant at the same place and at the same time. The victim 'S' was older than the victim 'P'. She was about 7 - 8 years of age at the time of incident. It is pertinent to note that the matured witnesses are not able to understand the tricky questions asked in the cross-examination by the seasoned cross-examiner. The cross-examination of this witness would show that she was cross-examined at length on almost all aspects. However, despite the cross-examination by the seasoned lawyer, the core of her evidence could not be shattered. On minute scrutiny of the evidence of this witness, we are not prepared to accept the submissions of the appellant that no credence can be given to the evidence of this witness.

15. It is pertinent to note that such incident with the girl child is treated as stigma in society. The parents as far as possible make an attempt to sweep such incident under carpet to save their pride and prestige in the society as well as future of the victim girl. In this case, the parents of the victims displayed great courage and came forward. The stigma of this incident would remain attached to the lives of the victims and their family throughout. Perusal of the evidence and particularly cross-examination of (PW-1), victim 'A' (PW-2), victim 'P' (PW-3) and victim 'S' (PW-4) would show that without occurrence of serious incident, the parents of the victims would not put pride, prestige and the life of the victims at stake to satisfy their ego or to take revenge against the family of the appellant. It is seen that no material has been elicited in the cross-examination of these witnesses to believe that their families without occurrence of serious incident would take such drastic step which would ultimately become known to the public at large. There is no material on record to indicate that the members of the victim's family had a reason to harbour the grudge against the appellant. Even if they had grudge against

the appellant and his family members, they would not have involved the victim girls to take revenge. There would have been other means available at the disposal to teach lesson to the appellant and his family members. The difference of false implication, therefore, appears highly improbable. We, therefore, conclude that evidence of three victims and the evidence of PW-1 is consistent, cogent and reliable. We do not see any reason to disbelieve and discard the evidence. On the basis of the said evidence, the charge of rape and of offence under POCSO Act stands proved.

16. The evidence of the victim 'P' and 'S' has been corroborated by the medical evidence. Dr.Rekha Ramteke (PW-6) has testified about the examination of victims 'P' and 'S'. She has deposed that she has examined victims 'P' and 'S'. She has deposed that on examination of victim 'P', she noticed injury to the hymen of the victim 'P'. The edges of the hymen were irregular. The injury according to her was suggestive of the hymenal rupture. As far as victim 'S' is concerned, she has deposed that she found hymen injury to victim 'S'. The edges

of the hymen were found torn. The medical examination report of victim 'S' is at Exh.20 and the medical examination report of victim 'P' is at Exh.21. Dr. Rekha Ramteke (PW-6) has categorically deposed that the overall findings of the examination were consistent with the sexual intercourse. Dr. Rekha Ramteke (PW-6) was cross-examined. She has admitted that the rupture of hymen is possible due to accidental fall on sharp and pointed object. Coupled with the oral testimony of victim girls, in our view, the possibility of causing such injury to them due to fall is absolutely ruled out. The attempt made by the cross-examiner in the cross-examination of the victims to seek support to this defence has been miserably failed. No material has been brought on record in the cross-examination that the victim girls had a fall on sharp and pointed object and therefore, there were tear to their hymen.

17. The spot panchnama is at Exh.24. Yugantar Kamble (PW-7) has deposed that the spot panchnama was drawn in his presence. Yugantar Kamble (PW-7) is the Gram Sevak. The first spot of incident is the house of the appellant himself. The second spot where the victims 'P' and 'S' were

sexually abused is in the house of Nayaymurti. PW-7 has specifically stated that the victim girls accompanied them and they pointed out respective spots. The description of the spot has been noted down in the panchnama. This evidence corroborates the case of the prosecution. The medical samples of the victim girls at Exh.26 and 27 were seized in presence of Gopichand Wanjari (PW-8). It is undisputed that all the three victim girls were below the age of 9 years when they gave evidence in the Court. Their birth certificates are at Exhs.33 to 35. Their statements recorded under Section 164 of the Code of Criminal Procedure by the learned Magistrate are at Exh.37 to 39. This fact would show that the Investigating Officer considering the serious nature of the crime took all possible care and collected the relevant evidence. It is further pertinent to note that the defence of the accused is not at all acceptable inasmuch as there is no iota of evidence to suggest that the parents of the victim girls would falsely implicate him in such a case by putting the life of victims at stake. It is pertinent to mention that on trivial dispute, no one could stake his pride and prestige and the future life of the minor girls at risk.

18. In such cases, delay in lodging the First Information Report cannot be always held to be fatal to the case of the prosecution. On the point of delay, we may usefully refer to the decision in the case of **State of Himachal Pradesh Vrs. Gian Chand**¹. In this case, the Hon'ble Supreme Court of India has held that the delay in lodging the First Information Report cannot be used as ritualistic formula for doubting the prosecution case and discarding it. Delay has the effect of putting the Court on its guard to search if any explanation has been offered and if offered, whether or not it is satisfactory. If the prosecution fails to satisfactorily explain the delay and there is possibility of embezzlement in the prosecution version on account of such delay, the delay would be fatal to the prosecution case. However, if the delay is explained to the satisfaction of the Court, it cannot by itself be a ground for disbelieving and discarding the entire prosecution case. It is held that delay in filing the First Information Report in rape cases is normal especially when the perpetrator is a relative. In

1 (2001) 6 SCC 71

this case, the mother of the victim 'A' has narrated in the report at Exh.8 the reason for delay in lodging the report. Perusal of her evidence and report would show that when she came to know about the incident of 11/08/2016 through her daughter, she took her daughter to her Doctor sister and got her examined. Once she found that there was no injury on the person of victim 'A' and signs of sexual intercourse, she decided to neglect it. However, when the mother and brother of the appellant blamed her for discussing the subject in the locality and quarrelled with her, she went to the police and lodged report. It is pertinent to mention that the parents of victims 'P' and 'S' had kept mum for one year though the victims 'P' and 'S' were subjected to sexual intercourse by the accused. They also came forward when they came to know the incident occurred with the daughter of the informant victim 'A'. It is pertinent to note that in such a crime to save the prestige of the family and to save the future of girl child, the parents are bit hesitant to come forward. If there is delay in such cases, in our opinion, there is nothing unnatural about it. Ultimately, in this case, the medical evidence proved beyond doubt that the

victims 'P' and 'S' who at the relevant time were below 6 years of age were sexually abused by the appellant. In our view, therefore, the delay in this case would not stand in the way of prosecution. The explanation placed on record is to the satisfaction of the Court. The case would be covered by the law laid down in the case of State of Himachal Pradesh Vrs. Gian Chand (supra).

19. In our view, the prosecution by leading cogent and reliable evidence has proved the guilt of the accused. The learned Judge awarded the sentence of imprisonment for life. The learned Advocate for the appellant submitted that the punishment provided for the offence was Rigorous Imprisonment which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine. The punishment was increased w.e.f. 21/04/2018. However, since this crime was committed in the year 2016, the punishment provided at the relevant time would be applicable. The learned Advocate submitted that the learned Trial Judge erred in the matter of awarding imprisonment for life. The

learned Advocate submitted that the learned Judge has not recorded the reasons in support of his conclusion to award the imprisonment for life. The learned Advocate submitted that in this case, the appellant is of young age. There is no criminal antecedent. He has been in custody since 26/08/2016. At the time of commission of crime under the POSCO Act, the punishment prescribed was Rigorous Imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine. The learned Advocate submitted that the appellant has old aged parents. He has one unmarried sister by name Kalyani. The learned Advocate submitted that the abovestated mitigating circumstances ought to have been taken into consideration while awarding sentence.

20. We have perused the relevant part of the Judgment. The learned Trial Judge has taken into consideration the serious nature of the offence and the age of the victim girls while awarding the sentence. It is pertinent to note that while awarding the punishment, Court has to take into consideration

not only the crime but also the criminal. The mitigating circumstances placed on record requires due consideration while awarding punishment. In our view, in this case, if the crime and criminal are balanced in the backdrop of the crime and the mitigating circumstances qua the criminal, in our view, the sentence of imprisonment for life would be disproportionate. In our view, considering the above facts, the sentence of Rigorous Imprisonment for 10 years would meet the ends of justice. Therefore, to the extent of sentence, the Judgment and order would require modification. As far as the conviction is concerned, the same is required to be upheld. Hence, the following order :-

ORDER

- i] The criminal appeal is partly allowed.
- ii] The Judgment and order of conviction dated 21/07/2018 passed by learned Special Judge, Bhandara in Special Criminal (Child) Case No.33/2016 is hereby confirmed. However, there shall be modification in the quantum of sentence.

Instead of life imprisonment, the appellant is directed to suffer rigorous imprisonment for ten years.

iii] The criminal appeal is partly allowed and disposed of.

(G. A. SANAP, J.)

(V. M. DESHPANDE, J.)

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