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

CRIMINAL APPEAL NO.172 OF 2022

Shailendra @ Munna s/o Hiranman Gajbhiye,
age : about 62 years, occupation labour,
r/o Maskasath, Lalganj,
district Nagpur. **Appellant.**

:: V E R S U S ::

1. State of Maharashtra,
through Police Station Officer,
Shanti Nagar Police Station,
Nagpur.

2. Victim XYZ through complainant/
legal guardian,
P.S. Shanti Nagar, Nagpur.
Crime No.105/2019,
Spl.POCSO Case No.137/2019. **Respondents.**

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Shri S.P.Bhandarkar, Counsel and Shri Ganesh Mate, Advocate
for the Appellant.

Ms.S.H.Bhatia, Counsel for Respondent No.2 (Appointed).
Shri M.J.Khan, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 13/06/2023

PRONOUNCED ON : 10/07/2023

JUDGMENT

1. By this appeal, the appellant (the accused) challenges judgment and order of conviction and sentence dated 24.1.2022 passed by learned Additional Sessions Judge-8, Nagpur in Special POCSO Case No.137/2019 whereby the appellant is convicted and sentenced, as follows:

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For offence punishable under Section 376(2)(i)(n) of the Indian Penal Code, he was sentenced to suffer rigorous imprisonment for 10 years and to pay fine Rs.10,000/-, in default, to suffer rigorous imprisonment for 3 months.

For offence punishable under Section 506 of the Indian Penal Code, he was sentenced to suffer simple imprisonment for 2 years and to pay fine Rs.2000/-, in default, to suffer simple imprisonment for 1 month.

For offence punishable under Section 509 of the Indian Penal Code, he was sentenced to suffer simple imprisonment for 3 years and to pay fine Rs.2000/-, in default, to suffer simple imprisonment for 1 month.

For offences punishable under Sections 3 and 4 of the Protection of Children From Sexual Offences Act, 2012 (POCSO Act), he was sentenced to suffer rigorous imprisonment for 7 years and to pay fine Rs.3000/-, in default, to suffer rigorous imprisonment for 1 month.

For offence under Section 11(i)(iii) punishable under Section 12 of the POCSO Act, he was sentenced to

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suffer simple imprisonment for 3 years and to pay fine Rs.3000/-, in default, to suffer simple imprisonment for 1 month.

Learned Additional Sessions Judge (the trial court) directed that all the sentences of the accused shall run concurrently and set-off under Section 428 of the Code of Criminal Procedure was also given to him since he was in jail.

2. Brief facts necessary for disposal of the appeal are as under:

On 20.3.2019, mother (the informant) of the victim has lodged report against the accused on allegation that the victim, aged 10 years, is her younger daughter and studying in 6th Std.. On 19.3.2019, when she returned home at about 10:00 pm after attending work, her daughter disclosed her that the accused misbehaved with her and asked her to come along with him at his house, however she has not visited his house. At the relevant time, her neighbours Sujata and Babita Kaku were also present. It is further alleged that the victim disclosed her that in the month of October, the accused called her at his house when she was alone and

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shown obscene pictures on his mobile phone. He also disrobed her and subjected her for sexual assault. The accused threatened her that if she disclosed the said incident to anybody, he will kill her mother and sister. In the month of February also, at about 1:30 pm, the accused has called her on the pretext of giving maggi at his home and when she denied the same, he threatened her that he will kill her mother and sister and, therefore, she went at his house. At the relevant time also, the accused sexually assaulted her by committing penetrative sexual assault. The informant after such disclosure, approached to the police station and lodged the report against the accused. On the basis of the said report, the investigating officer registered the crime vide Crime No.105/2019 and wheels of the investigation started rotating.

3. During investigation, the investigating officer visited the alleged spot of the incident and drawn spot panchanama in presence of panchas. He also drawn map of the spot of the incident. He issued letter to the Municipal Corporation and collected birth certificate of the victim. The victim was referred for her medical examination. The mobile

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phone of the accused was seized by drawing seizure panchanama. The samples of the victim and the accused were collected and forwarded to Forensic Science Laboratory. The investigating officer also recorded relevant statements of witnesses and after completion of the investigation, submitted chargesheet against the accused.

4. The trial court framed charge against the accused vide Exhibit-4. The accused pleaded not guilty and claimed to be tried.

5. To substantiate the charge, the prosecution examined in all 9 witnesses as follows:

1. PW1 the victim (due to the mandate of Section 228-A of the Indian Penal Code, the name of the victim and her relatives are not mentioned hereinafter), Exhibit-13;

2. PW2 the mother of the victim, who has lodged the First Information Report, Exhibit-19;

3. PW3 Vijay Padamgirwar, who acted as a pancha on the spot panchanama, Exhibit-23;

4. PW4 Mukunda Rodge, who has also acted as a pancha on the spot, Exhibit-25;

5. PW5 Sujata Nitnaware, Exhibit-34, the neighbour;

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6. PW6 Ulhas Gajbhiye, Exhibit-35;
7. PW7 Dr.Surekha Khandale, Exhibit-38, Medical Officer;
8. PW8 Balram Zadokar, Exhibit-44, the Investigating Officer, and
9. PW9 Kiran Kursunge, Exhibit-56, the police officer, who recorded the First Information Report.

6. Besides the oral evidence, the prosecution also relied upon statement of the victim recorded under Section 164 of the Code of Criminal Procedure, Exhibit-14. The report, Exhibit-20. The First Information Report, Exhibit-21. The statement of PW2 the mother of the victim under Section 164, Exhibit-22. Spot panchanama, Exhibit-24. Letter to the Medical Officer, Exhibit-39. Medical certificate, Exhibit-14. And, Chemical Analyzer's Reports.

7. The trial court recorded statement of the accused under Section 313 of the Code of Criminal Procedure in order to obtain explanation regarding evidence appearing against the accused. The defence of the accused is of total denial and of false implication.

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8. After recording of the evidence and hearing both the sides, the trial court was pleased to convict the accused, as mentioned above.

9. Heard learned counsel Shri S.P.Bhandarkar for the accused, learned counsel Ms.S.H.Bhatia appointed for the victim, and learned Additional Public Prosecutor for the State.

10. Learned counsel Shri S.P.Bhandarkar for the accused, submitted that inasmuch as the entire prosecution case is rested on the evidence of the victim, her evidence is not cogent and reliable. Her evidence is not corroborated by any other circumstances like medical evidence or the chemical analyzer's reports. As per the victim girl, she was subjected for sexual assault by the accused in the months of October and February. However, she neither stated the date or year of the alleged incident. As per the victim girl, she was subjected for sexually assault. However, she has not disclosed the incident to anybody. As the cross examination of the victim falsifies the story of sexual assault, her evidence is not inspiring confidence. In fact, foundational facts are not proved by the prosecution. He submitted that admittedly,

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there is a presumption under Section 29 of the POCSO Act and it has to be presumed that the acts alleged against the accused were indeed committed by him, until contrary is proved and, therefore, burden is on the accused to rebut the presumption. He submitted that even if the presumption is in favour of the victim, the prosecution has to prove the foundational facts. If the prosecution fails to prove the foundational facts, the presumption would not be applicable. In the present case, admittedly, the alleged spot of the incident is the house of the accused, situated in residential locality. None has witnessed the presence of the victim either at the house of the accused or near the house of the accused. The accused is residing in the said house along with his wife and a daughter. The victim has not disclosed the incident immediately to her mother. Even if her contention is taken into consideration that she was threatened, there is no evidence to show that at any point of time the victim has visited the house of the accused. Insofar as the incident of dated 18.3.2019 is concerned, the incident is not supported by PW5 Sujata. The evidence of the victim is neither corroborated by the medical evidence nor the scientific

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evidence. The evidence of the victim is not inspiring confidence. The victim has admitted that quarrel had took place between her mother and the accused on account of hand-pump. The same can be the reason to lodge false report against the accused. He submitted that in absence of the evidence, the trial court erroneously held the accused guilty of the offences For offence punishable under Section 376(2)(i) (n) of the Indian Penal Code.

11. *Per contra*, learned Additional Public Prosecutor Shri M.J.Khan for the State submitted that as far as the age of the victim is concerned, she is not cross examined on the point of her age. The evidence of the victim, the evidence of the mother of the victim, and birth certificate of the victim placed on record sufficiently show that she is a child within the meaning of Section 2(d) of the POCSO Act. He further submitted that from the entire cross examination, nowhere it reveals that false implication was suggested. Medical evidence is not *sine qua non* for proving sexual assault. Admittedly, the victim is not examined immediately after the alleged incident and that may be the reason for not having the medical evidence insofar as the sexual assault is concerned.

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The delay is properly explained by the victim as well as her mother that the victim was threatened and, therefore, she has not immediately disclosed the said incident to her mother.

12. Having heard the rival submissions, I have perused the entire record with able assistance of learned counsel for parties.

13. In order to prove the charge levelled against the accused, the prosecution has to prove that at the time of incident the victim girl was minor within the definition of "child" under the POCSO Act. The implicit reliance was placed on the evidence of the victim who has narrated her birth date as 2.5.2008. Her mother has also narrated her birth date as 2.5.2008 and produced the birth certificate on record. Neither the victim girl nor PW2 the mother of the victim girl is examined on the point of birth date of the victim girl. Thus, the evidence of the victim as to her date of birth remained unchallenged.

14. The Honourable Apex Court in the case of **State of Madhya Pradesh vs. Anoop Singh**, reported in 2015 ALL SCR 2553 observed that, "Rule 12(3) of the Juvenile Justice (Care

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and Protection of Children) Rules, 2007 becomes relevant as it pertains to aspect to determination of age of a victim of sexual assault.”

15. The Honourable Apex Court in the case of **Jarnail Singh vs. State of Haryana**, reported in 2013 ALL MR (Cri) 2946 observed that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option

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expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat.

16. Thus, in the present case, the prosecution has relied upon the birth certificate, issued of the victim girl by the Corporation, which is not challenged by the defence during the cross examination. Thus, the evidence on record sufficiently shows that the victim girl was a child on the date of the alleged incident.

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17. To prove the incident, the prosecution mainly relied upon the evidence of PW1 the victim girl. The evidence of PW1 the victim girl shows that on the day of the incident she had been to the house of the accused and at that time the daughter and the wife of the accused were present. They both went to the hospital and the accused asked her to stay back and, thereafter, the accused disrobed her and subjected for oral sex. On her refusal, he forced her and also subjected her for penetrative sexual assault. Her evidence further shows that when she was sitting at the house of one Babita, PW5 Sujata also came there. At that time, the accused came at the house of Babita and gave a wink to her and called her at terrace. This fact is also noted by Babita and PW5 Sujata. Thereafter, they went to the police station and lodged the report. She is cross examined at length. During her cross examination, it came on record that her statement under Section 164 of the Code of Criminal Procedure is also recorded.

18. The entire cross examination of the PW1 the victim girl is based to bring on record omissions. The material omissions brought on record are that she has not informed to

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the police that the accused asked her to stop when she was sitting with Babita and PW5 Sujata. The another omission brought record is that the accused gave a wink to her is not narrated by her before the police. She admitted during cross examination that there was a previous quarrel between her mother and the accused. The cross examination, as regards PW1 the victim girl, is concerned, she has admitted portion Mark-A of the statement before learned Magistrate under Section 164A of the Code of Criminal Procedure. The said portion mark is regarding the alleged incident has taken place when she had been to the house of the accused and there the accused subjected her for oral sex as well as the sexual assault. The contraction A is to the extent that due to the sexual assault, she has sustained bleeding injury.

19. To corroborate the version of PW1 the victim girl, the prosecution examined PW2 the mother of the victim girl, vide Exhibit-19.

As per the evidence of PW2 the mother of the victim girl, her daughter, the victim girl, disclosed the said incident to her on 19.3.2019. The disclosure made to her by

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the victim is that the accused subjected her for sexual assault by threatening that he will kill her mother and sister. She also disclosed the incident regarding a wink to her by the accused. As per the evidence of PW2 the mother of the victim girl, the victim disclosed to her that the accused subjected her for sexual assault on many occasions and, therefore, she approached to the police and lodged the report.

The cross examination of PW2 the mother of the victim girl shows that her house and the house of the accused are situated in a dense locality near Buddha Vihar. It further came in her evidence that the accused is residing with his wife and daughter. However, she denied that there is a previous enmity between her and the accused.

Recital of the First Information Report shows that the victim girl disclosed her mother, PW2, that she was called by the accused in the month of October and shown her obscene pictures on his mobile phone and subjected her for sexual assault by touching her private part.

The another incident mentioned in the First Information Report is that in the month of February, the

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accused called the victim girl at his home at 1:30 pm on the pretext of giving maggi and subjected her for sexual assault.

Admittedly, PW1 the victim girl has not narrated the date and month of the alleged incident. Her evidence is vague in nature as to the day and the date of the incident alleged.

PW1 the victim girl, in her statement recorded before learned Magistrate, narrated the incident which took place in the month of October 2018. However, there is no whisper regarding the incident took placed in the month of February.

As per the statement under Section 164 of the Code of Criminal Procedure, the incident narrated is that she had been to the house of the accused as the accused called her to watch television and, therefore, she went at his house. After some time, the wife and the daughter of the accused left the house and the accused subjected her for sexual assault. Whereas, the evidence of her mother, PW1, shows that the victim girl disclosed the incident to her on 19.3.2019 that she

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was subjected for sexual assault, however date of the incident was not mentioned.

20. To corroborate the versions of PW1 the victim girl and PW2 the mother of the victim girl, the prosecution also examined PW5 Sujata Nitnaware. However, she has not supported the prosecution case. As per the prosecution, the accused gave a wink to the victim in the presence of PW5 Sujata. However, PW5 Sujata disclosed that she came to know about the incident as there was a talk in the locality about the said incident. Her cross examination also shows that her house is also situated in the residential locality. Her evidence further shows that she accompanied the mother of the victim girl to the police station to lodge the report.

21. Insofar as the medical evidence is concerned, evidence of Medical Officer PW7 Dr.Surekha Khandale shows that she has examined the victim girl on 20.3.2019. The victim girl narrated the history that she was subjected for sexual assault on 3-4 occasions forcefully. On examination, she found the victim girl normal. The genital of the victim was also found normal. After 24 days from the last

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intercourse, the victim girl was examined. There was no fresh or old injuries on external genital. She further admitted in cross examination that the hymen of the victim girl was found to be intact.

Thus, the evidence of Medical Officer PW7 Dr.Surekha Khandale shows that there were no fresh or old injury.

It cannot be commented whether sexual intercourse has happened or not. However, possibility cannot be ruled out that the sexual intercourse happened.

The cross examination of Medical Officer PW7 Dr.Surekha Khandale further shows that organs are not developed fully and tendered.

Thus, from the medical evidence it reveals that organs of the victim girl were found to be intact though there are allegations that the victim girl was subjected for sexual assault on 3-4 occasions.

22. The prosecution also relied upon the Chemical Analyzer's Reports, which are not exhibited. However, the

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said reports, in view of Section 293 of the Code of Criminal Procedure, can be looked into. The Chemical Analyzer's are not supporting to the prosecution as no semen or blood is detected on the clothes of the victim girl or the samples collected of the victim girl as well as of the accused.

23. The prosecution has examined PW3 Vijay Padamgirwar, vide Exhibit-23, who acted as a pancha on the spot panchanama. As per his evidence, the alleged spot of the incident is at Lalganj Telipura, at the house of the accused. As nothing incriminating is seized from the house, whereat the alleged incident occurred, the defence has not cross examined the witness.

24. PW4 Mukunda Rodge, is also the pancha on the spot panchanama. As per his evidence, the said spot was the house of the accused. Though the said witness is cross examined, nothing incriminating is elicited during the cross examination.

25. PW6 Ulhas Gajbhiye, is the maternal uncle of the victim girl. His evidence is only to the extent that on 19.3.2019 the mother of the victim girl called him and

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narrated the incident that the victim girl was subjected for sexual assault by the accused in the months of October and February. During his cross examination, it is elicited that he has not informed the police about the incident. During his cross examination, portion Mark-A is brought on record which shows that he approached to the police station to lodge the report against the accused.

26. PW8 Balram Zadokar, is the investigating officer who narrated about the investigation carried out by him. The sum and substance of his evidence is that during investigation, he visited the alleged spot of the incident and drawn the spot panchanama. He also seized the mobile phone of the accused. All the incriminating articles were forwarded to the Chemical Analyzer, after obtaining the samples. His cross examination shows that the victim girl along with her mother and 2-3 women approached to the police station to lodge the report. He admitted that the alleged spot of the incident is dense populated area. Thus, his cross examination also shows that the alleged spot of the incident was having a dense populated area. The investigating officer recorded the

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report of the mother of the victim girl. His evidence is formal in nature.

27. Thus, on the basis of the above evidence of the prosecution witnesses before the trial court, the trial court has convicted the accused holding that the prosecution has proved that the accused has committed penetrative sexual assault on the victim girl. The trial court further observed that the condition of the hymen should not be considered as conclusive determination whether sexual assault is committed or not. Even, in the cases, where the hymen of the victim is found to be intact, the charge for rape under Section 376 of the Indian Penal Code, as defined in Section 375 of the Indian Penal Code, could be said to be made out if there are other circumstances or materials on record to indicate that there was penetration. By observing this, the trial court held that the charges are proved.

28. Learned counsel Shri S.P.Bhandarkar for the accused, vehemently submitted that the evidence of the victim girl is not consistent and inspiring confidence. He submitted that the victim girl nowhere stated the date or the

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month when the alleged incident has taken place. Whereas, the mother of the victim girl stated that the alleged incident has taken place in the months of October and February. The evidence of the mother of the victim girl further shows that the victim girl was subjected for sexual assault on multiple occasions. As far as the evidence of the victim girl is concerned, she has only narrated one incident of sexual assault without narrating any date or month. Whereas, as per the evidence of the mother of the victim girl, the accused has subjected the victim girl for sexual assault on various occasions. Recital of the First Information Report and the evidence of the victim girl is also at variance. As per the evidence of the victim girl, she had been to the house of the accused and the accused asked her to stay back and subjected her for sexual assault. Whereas, as per the recital of the First Information Report, the victim girl disclosed to her mother that in the month of October, when she was alone in the house, the accused called her at his house, shown her obscene pictures on his mobile phone and subjected her for sexual assault. The evidence of the mother of the victim girl further shows that the victim girl further disclosed to her that

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the accused called her on the pretext of giving maggi and subjected her for sexual assault by threatening her.

Learned counsel Shri S.P.Bhandarkar for the accused submitted that there is complete variance in the version of the victim girl and in the First Information Report. The evidence is to be appreciated in the light of the admission given by the victim girl who admitted that there was a quarrel between her mother and the accused on account of hand pump. He further submitted that as far as the incident of wink by the accused is concerned, as per the evidence of the victim girl, PW5 Sujata was present, whereas, the evidence of PW5 Sujata shows that she came to know about the incident as there was discussion in the locality about the said incident. The medical evidence has also not supported the prosecution case. He submitted that if the contentions of the prosecution, that the victim girl was subjected for sexual assault for multiple occasions, it is difficult to accept that her genitals are not affected and found to be intact. Thus, the entire evidence is not sufficient to hold the accused guilty of the offence as alleged.

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29. In support of his contentions, learned counsel Shri S.P.Bhandarkar for the accused placed reliance on the decision of the Punjab and Haryana High Court in the case of **Arun Kumar vs. State of Haryana**, reported in 2018 SCC OnLine P&H 7074 wherein it has been held that if statement of prosecutrix suffers from serious infirmities and inconsistencies, no reliance can be placed thereon.

He further placed reliance on the decision of the Punjab and Haryana High Court in the case of **Bhura @ Rashid vs. State of Haryana**, reported in 2018 SCC OnLine P&H 7217 wherein it is held that accused must be protected against possibility of false implication.

On the similar point, he placed reliance on the decision of the Delhi High Court in the case of **State vs. Mahender Sahni**, reported in 2017 SCC OnLine Del 8789.

He further placed reliance on the decision of the Honourable Apex Court in the case of **Tameezuddin alias Tammu vs. State (NCT of Delhi)**, reported in (2009)15 SCC 566 wherein it is held that ordinarily the evidence of the prosecutrix should not be suspected and should be believed,

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more so as her statement has to be evaluated on a par with that of an injured witness and if evidence is reliable, no corroboration is necessary. But, at the same time, they cannot be universally and mechanically applied to the facts of every case of sexual assault which came before the court. The accused must also be protected against the possibility of false implication.

He further placed reliance on the decision of the in the case of **Jabru Ram vs. State of Rajasthan**, reported in 2019 SCC OnLine Rajasthan 4101, **Ranjit Rajbanshi vs. State of West Bengal and ors**, reported in 2021 SCC OnLine Cal 2470, **Roshan s/o Ramlal Patil vs. State of Maharashtra**, reported in 2020 Near Law (Bom) 1402, **Chinta Ram @ Chintu vs. State of Uttarakhand**, (in Criminal Appeal No.7/2016 decided on 26.2.2018) and **State of Andhra Pradesh vs. M.Madhsudhan Rao**, reported in (2008)15 SCC 582.

On the basis of the catena of decisions cited *surpa*, learned counsel Shri S.P.Bhandarkar for the accused submitted that though it is true that solitary statement of the

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victim girl is sufficient to warrant conviction, the said evidence should inspire confidence.

30. On the other hand, learned Additional Public Prosecutor Shri M.J.Khan for the State submitted that the evidence of the victim girl, corroborated by the mother of the victim girl to whom the victim girl has disclosed the said incident, is sufficient to hold the accused guilty. Non rupture of the hymen or absence of injury on victim's private part does not belie for testimony as she nowhere stated that she bleed per-vagina and her statement remained virtually unchallenged in cross examination. To constitute rape, penetration, however slight is sufficient.

31. In support of his contentions, learned Additional Public Prosecutor for the State placed reliance on the decision of the Honourable Apex Court in the case of **Ranjit Hazarika vs. State of Assam, reported in (1998)8 SCC 635** wherein it is held that To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-

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examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake.

He further placed reliance on the decision of the Honourable Apex Court in the case of **Sakshi vs. Union of India and ors, reported in (2004)5 SCC 518** wherein the Honourable Apex Court has considered the sexual abuse and scope and meaning of sexual intercourse.

On the basis of the above submissions, he submitted that the evidence adduced by the prosecution is sufficient to warrant the conviction. Moreover, there is a presumption which operates against the accused under Section 29 of the POCSO Act.

32. It is well settled that conviction of accused can be recorded on sole testimony of victim when deposition of prosecutrix is found to be trustworthy, unblemished, credible,

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and of sterling quality. Testimony of victim is vital and unless there are compelling reasons, which necessitates for corroboration of a statement, there is no difficulty to act on the testimony of victim of sexual assault.

For applying the above said principle, it is crystal clear that evidence of prosecutrix should be of such a nature which inspires confidence.

33. After appreciating the evidence of PW1 the victim girl as well as PW2 the mother of the victim girl, admittedly, the victim girl has not narrated exactly when the alleged incident has taken place. The victim girl has stated only one incident regarding the alleged sexual assault without referring any month or date. Even, she has not stated prior to how many days the alleged incident has taken place. As per her evidence, the accused has committed sexual assault on multiple occasions. As per her evidence, the first incident occurred when she had been to the house of the accused. At the relevant time, the wife and the daughter of the accused were also present. Not only the victim girl but also the mother girl as well as PW8 Investigating Officer PW8 Balram

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Zadokar admitted that the house of the accused, which is the spot of the incident, situated in a dense locality.

34. It is pertinent to note that the prosecution has not examined any witness to show the presence of the victim girl either at the house or near the house of the accused.

The evidence of the mother of the victim girl, shows that the victim girl disclosed to her that she was subjected for sexual assault by the accused on multiple occasions. Whereas, recital of the First Information Report shows that the accused has called the victim girl at his house in the month of October during the afternoon hours and subjected her for sexual assault. In the month of February, the accused called her on the pretext of giving maggi.

35. Thus, the evidence of the victim girl and her mother, as far as the visit of the victim girl to the house of the accused is concerned, is not consistent. Admittedly, the victim girl and the accused are residing in a dense locality. It is difficult to accept that none from the locality has witnessed the presence of the victim girl either at the house of the accused or near the house of the accused. It is further

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difficult to accept that though the victim girl was subjected for sexual assault on multiple occasions, her genitals are found to be intact.

36. As far as the observations of the Honourable Apex Court in the case of **Ranjit Hazarika vs. State of Assam** cited *surpa* are concerned, the facts of the case show the victim was subjected for sexual assault only on one occasion. Admittedly, finding of injury is not *sine qua non* for proving the allegation of sexual assault. However, the victim girl was subjected for sexual assault on multiple occasions and the genitals are found to be intact which create a doubt about the prosecution case.

37. The Honourable Apex Court, in the case of **Phool Singh vs. State of Madhya Pradesh, reported in (2022)2 SCC 74**, held that conviction can be recorded on sole testimony of victim when deposition of prosecutrix is found to be trustworthy, credible, and is of sterling quality.

38. The Honourable Apex Court, in the case of **Madan Gopal Kakkad vs. Naval Dubey and anr, reported in (1992)3 SCC 204**, has held that slightest penetration of penis into

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vagina without rupturing hymen would constitute rape. There is no dispute regarding the legal position.

39. It is well settled that rupture of hymen is not necessary to constitute offence of rape even slightest penetration in the vulva is sufficient to constitute offence of rape.

40. The Honourable Apex Court, in the case of **Sadashiv Ramrao Hadbe vs. State of Maharashtra and anr, reported in (2006)10 SCC 92**, observed that, it is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

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41. As already observed that the evidence of the victim girl and her mother is inconsistent, as far as the alleged incident is concerned, the prosecution story is also improbable in the light of the fact that the incident took place in a dense locality and none has witnessed the presence of the prosecutrix either near the house of the accused or around the house of the accused though the alleged incident has taken place in afternoon hours.

PW5 Sujata has also not supported regarding the incident of wink by the accused in her presence.

Learned Additional Public Prosecutor Shri M.J.Khan for the State submitted that in cases, concerning offences under the POCSO Act, presumption operates against the accused under Section 29 of the POCSO Act. The presumption under Section 29 of the POCSO Act runs as follows:

29. Presumption as to certain offences. - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

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42. Perusal of the above said Section shows that it is for accused to prove contrary and in case he faced to do so, the presumption would operate against him results into his conviction under the provisions of the POCSO Act.

43. It is not disputed that no presumption is absolute and every presumption is rebuttable. It cannot be said that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation when prosecution is first able to establish facts that would form foundation for the presumption under Section 29 of the POCSO Act to operate.

44. The manner in which the presumption would attract, the Honourable Apex Court in the case of **Babu vs. State of Kerala, reported in 2010 ALL MR (Cri) 3342 (SC)** held that Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the

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presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution.

45. In case of **Amol Dudhram Barsgade vs. State of Maharashtra**, in Criminal Appeal No.600/2017 decided on 23.4.2018, this court has held that the submission that the

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statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable.

46. In the light of the above well settled legal position, insofar as the presumption under Section 29 of the POCSO Act is concerned, it becomes clear that though the provision states that the court shall presume that accused has committed offence for which he is charged under the POCSO Act, unless contrary is proved, presumption would operate only upon prosecution first proving foundational facts against

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accused beyond reasonable doubt. Unless prosecution is able to prove foundational facts, in the context of allegation made against the accused, the presumption under Section 29 of the POCSO Act would not operate against accused. Even, if prosecution establishes such facts, accused can rebut the presumption by discrediting prosecution witnesses through cross examination showing that story of prosecution is improbable.

Thus, accused is required to rebut the presumption on the touchstone of preponderance of probability.

47. Keeping the aforesaid well settled position of law, the evidence of the prosecution witnesses in the present case if examined, PW1 the victim girl has not narrated when the alleged incident has taken place. She has only narrated only one incident and stated that on multiple occasions she was subjected for sexual assault. PW2 the mother of the victim girl, whom the victim girl has narrated the incident, discloses two incidents. The victim girl nowhere stated the incident which took place in the month of February. In fact, the evidence of the victim girl neither discloses month or date of

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the incident and even time approximately when prior to lodging of the report the said incident has taken place.

48. Thus, the entire evidence of the victim girl is vague in nature. Moreover, her evidence is to be examined in the light of the admission that the quarrel took place between the mother of the victim girl and the accused. As per the defence of the accused, it may be the reason behind his false implication. Though PW2 the mother of the victim girl denied the enmity, the victim girl has admitted the same.

49. In the aforesaid background, if the evidence adduced is appreciated, it reveals that the description of the alleged forcible sexual intercourse appears to be doubtful for the reasons mentioned above. The complete absence of medical evidence to support the case of the prosecution, in the light that the victim girl was subjected for sexual assault on multiple occasions, doubt creates by the evidence as regards the manner in which the incident was said to have occurred, which demonstrates that on preponderance of probability the accused has been able to rebut the presumption under Section 29 of the POCSO Act.

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50. Thus, on an overall analysis of the evidence and the material on record, it is apparent that the trial court was not justified in holding the accused guilty by observing that the prosecution has proved the case beyond reasonable doubt. The trial court has not considered Section 42 of the POCSO Act wherein an alternate punishment is provided. The trial court erroneously sentenced the accused under the provisions of the POCSO Act and under the provisions of the Indian Penal Code.

51. In the light of the observations in the cases cited *supra* and in the light of the discussion above, the criminal appeal deserves to be allowed. Hence, this court passes following order:

ORDER

1. The criminal appeal is **allowed**.
2. The judgment and order of the conviction and the sentence dated 24.1.2022 passed by learned Additional Sessions Judge-8, Nagpur in Special POCSO Case No.137/2019 is hereby quashed and set aside.

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3. The accused is acquitted of all offences for which he was charged and sentenced by the trial court.

4. Fees of learned counsel Ms.S.H.Bhatia appointed for respondent No.2, the victim girl, through her mother, are quantified and the same be paid to her as per Rules.

With this, the criminal appeal stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!