



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

Criminal Appeal No. 130 of 2021

Mahendra Daulatrao Ambilduke,
Age 40 Years, Occupation Teacher,
R/o. Near Gajanan Mandir, Mouda,
Tahsil Mouda, District : Nagpur.

... Appellant

- Versus -

(1) State of Maharashtra,
Police Station Officer,
Police Station Mouda,
District : Nagpur.

(2) XYZ (Victim), in Crime No. 84/2013,
Registered with Police Station Mouda,
Dist. Nagpur.

... Respondents

Mr. A. S. Mardikar, Senior Advocate assisted by Mr. D. P. Singh,
Advocate for the appellant

Ms. S. V. Kolhe, APP for the State/respondent no. 1

Ms. Mohini Sharma, Advocate (Appointed) for respondent no. 2

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 13-10-2023

Date of pronouncing judgment : 29-11-2023

JUDGMENT

The appellant – accused has assailed the judgment and order dated 8-2-2021 passed by the Sessions Court, Nagpur in Special Criminal (POCSO) Case No. 66/2013 whereby the appellant has been convicted for the offence punishable under Section 376(2)(f)(n) of the

Indian Penal Code (IPC) read with Sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) as also for the offence punishable under Section 506 of the IPC.

2. The charge against the appellant was that during the period from March, 2012 to March, 2013, he has committed rape on X, the victim, aged about 17 years for several times and at several places under the threat of giving less number of marks in practical examination of SSC. The further charge is that while committing sexual assault, the appellant has gave life threat to X.

3. The background of the charge, which is the case of the prosecution, is that on 4-5-2013, X lodged a police report stating that the appellant was working as teacher in Janta High School, Mouda where X was taking education. When she passed 9th Standard, she joined tuition classes conducted by the appellant for 10th Standard. The appellant used to ask X to stop on the pretext of giving notes and once the other students left the class, he used to kiss her and used to move his hand on her chest and used to threaten her that if the incident is disclosed, he would fail her in 10th examination. On 29-6-2012, the appellant on the pretext of his birthday, took X in his car to Nagpur and while coming back, he took X to Balaji Hotel and committed penetrative sexual assault under the garb of having birthday gift. X suffered

bleeding and was crying, upon which the appellant threatened her of giving less marks in practicals if the incident is disclosed to anyone. Thereafter appellant committed frequent penetrative sexual assaults by threatening her of failing in 10th Standard. In doing so, the appellant took her to Balaji Hotel and other hotel at Ramtek as well. X has further stated in First Information Report (FIR) that in Diwali Holidays when appellant's wife and children had been out of town, the appellant called X at his house and showed blue film on computer, despite her reluctance to watch the same, then committed penetrative sexual assault. He repeated the assault for 3-4 times till his wife and children came back. X was taken to lodge at Bhandara as well where again, similar such act was done by the appellant. According to X, the wife of appellant had some suspicion and there occurred quarrel between them on this count, upon which X made a request to appellant to let her go. The appellant, instead said that he will give divorce to his wife and will marry X. The FIR concludes by stating that in the aforesaid manner, during the period from 2012 to March, 2013, the appellant by threatening X of failing in 10th Standard and by giving false promise of marriage, repeatedly committed penetrative sexual assaults.

4. The investigation was then carried out. The appellant and the victim were subjected to medical examination. PW. 11, Doctor, who

examined X on 4-5-2013, has in the history, recorded the description of incident of having history of repeated sexual intercourse by known person on the pretext of failing X in examination for a period of six months with last episode happening two months ago.

5. Her birth certificate, Exhibit 26 was procured from the office of Gram Panchayat, Veltur. The Registrar of Birth-Death Registration, Gram Panchayat, Veltur has issued the birth certificate stating therein that date of birth of X is 17-6-1996. The birth date was registered on 1-7-1996. The certificate was, however, issued on 15-7-2015. As stated above, the offence has been committed during the year 2012 to March, 2013. Age of X, in March, 2013, was below 17 years. The Investigating Officer has recorded statements of witnesses and after completing formalities, has filed charge-sheet. The appellant did not plead guilty to the charges. The prosecution has examined 19 witnesses to bring home the guilt of the appellant. The Special Court, having found merit in the prosecution's version, has convicted the appellant.

6. The conviction has been challenged *inter alia* on the ground that the testimony of X (P. W. 1) is unreliable, she is a tutored witness, the delay in lodging FIR is not explained, the age of the victim has been not duly proved etc.

7. Having heard both the sides and having gone through the impugned judgment and the material placed before me, the following points arise for my determination. I have recorded my findings thereon for the reasons to follow.

	<u>Points</u>	<u>Findings</u>
(1)	Has the prosecution proved that during the year 2012 to March, 2013, the appellant has committed rape upon X, a minor, several times at several places by threatening her of giving less number of marks and of failing her in practical examination of SSC ?	Yes.
(2)	Has the prosecution proved that while committing rape, the appellant has given life threat to X ?	Yes.
(3)	Whether the interference is called for in the impugned judgment ?	No.
(4)	What order ?	Appeal is dismissed.

Reasons

As to point nos. 1 and 2 :

8. Both the points, being interlinked, are decided by common reasoning. The prosecution has examined following witnesses.

- 1) Victim, as P.W. 1 at Exhibit 23
- 2) Vijay Ramaji Tijare, as P.W. 2 at Exhibit 30, father of victim
- 3) Damodhar Balkrushna Burade, as P.W. 3 at Exhibit 31, panch
- 4) Santosh Sitaram Selote, as P.W. 4 at Exhibit 34, panch
- 5) Wamanrao Mahadeorao Mohjure, as P.W. 5 at Exhibit 36, Head Master
- 6) Dilip Krushnaji Sirsam, as P.W. 6 at Exhibit 39, panch
- 7) Umesh Annaji Morghade, as P.W. 7, at Exhibit 41, panch
- 8) Rajendra Yadav Palkar, as P.W. 8 at Exhibit 43, panch
- 9) Ashok Manikrao Kale, as P.W. 9 at Exhibit 46 who prepared the map.
- 10) Ravi Ganpatrao Pokle, as P.W. 10, at Exhibit 51, panch
- 11) Dr. Meera Jaiprakash, as P.W. 11 at Exhibit 54, Medical Officer who examined the victim
- 12) Dr. Avomash Harishchandra Waghmode, as P.W. 12 at Exhibit 61, Medical Officer who examined the appellant/accused
- 13) Dr. Amit Radheshyam Baheti, as P.W. 13 at Exhibit 66, Medical Officer who examined the appellant/accused.

14) WPC Ratnakala Sudam Uparward, as P.W. 14, at Exhibit 68, who took the victim for medical examination.

15) P.S.I. Sweta Adityanath Mishra as P.W. 15 at Exhibit 71, who registered the offence against the appellant/accused

16) P.I. Ramakant Sambhaji Durge, as P.W. 16 at Exhibit 75, Investigating Officer

17) Retired P.I. Vitharam Keshao Tayde, as P.W. 17, at Exhibit 88, another Investigating Officer

18) Atul S/o Sadashiv Manapure, as P.W. 18 at Exhibit 100, witness

19) Vipul Marotrao Mankar, as P.W. 19 at Exhibit 104, witness.

9. Mr. Anil S. Mardikar, learned Senior Counsel appearing for the appellant has taken me through the entire evidence. X has been examined as P.W. 1. She has elaborately deposed about the repeated penetrative sexual assault upon her which is in tune with the FIR. Her chief examination indicates that in February, 2012, her tuition classes commenced. Appellant used to take classes in his house. The time of her batch was from 6.00 a.m. to 7.00 a.m. The appellant used to talk to her and whenever she used to sit on the back benches, he used to ask her to sit on the front bench. There were approximately 50 students in her batch. Whenever she used to write notes, the appellant used to touch her hands and sometimes her legs. At times and after concluding

the class, he used to ask her to sit in the class on the pretext of giving notes to her and used to allow all the students to go out. Thereupon, he used to touch her, kiss her and used to touch her chest. He used to threaten her by saying that if the incident is disclosed to anybody, he will not give her marks in practical examination. X got frightened and thought that her future is at stake, therefore, did not inform to anyone of the activities of the appellant. All other details of appellant having taken her to Nagpur on the pretext of birthday and committing penetrative sexual assault in Balaji Hotel and other incidents as quoted in FIR have been deposed in detail. On the point of lodging FIR, she has deposed that after completing SSC exams, she informed her parents of the acts of the appellant, her father lodged report. X then stated that she lodged report in police station on 4-5-2013. X was again called to police station when her statement was recorded.

10. In the cross-examination, X admitted the suggestion that her father has lodged FIR. She further admitted that copy of FIR was given to her father. She had gone through the contents of FIR and as per contents, she has deposed before the Court. She has then admitted that prior to her chief examination, she met the learned APP and got satisfied from her what should she state before the Court. She further admits that as per the instructions of APP, she has deposed in the Court.

These admissions have been highlighted by the learned Senior Counsel to contend that X's testimony cannot be relied upon.

11. I do not find merit in the submissions in as much as suggestions put forth to X do not indicate that FIR was shown to X prior to entering witness box. A general suggestion was given that she has gone through the contents of FIR, copy of which was possessed by her father. The father and X, both are entitled to have copy of FIR and to read the same before signing it. As such, the FIR has been lodged by X herself. It however, appears that there was some confusion in her mind and, therefore, in chief examination, she initially said that her father had lodged FIR and then said that she had lodged FIR. In cross-examination, she admitted that her father has lodged the report. These admissions by itself will not render the testimony of X doubtful; rather would clearly show that X was not tutored. These admissions will further show that copy of FIR was not shown to X prior to entering the witness box. Had the copy been shown to her prior to entering witness box, she would not have deposed that her father has lodged FIR nor would had she admitted such status. Thus, the first part of the cross-examination on the point of reading FIR relates to the date when FIR was lodged and not prior to recording evidence. If on that day i.e. on 4-5-2013 copy of FIR was given to X and if X had read it, the same

would be in tune with the provisions of law. So far as her admission that she has deposed before the Court as per the contents of FIR, the admission can neither be said to be tutoring X or her refreshing memory prior to entering the witness box. The witness, like X or for that purpose, any informant is bound to say that that he/she has deposed in tune with the contents of FIR for simple reason that FIR is a document which briefly describes the contents of offence.

12. The further cross-examination on this point in paragraph no. 7 indicates that X has admitted that in her village, people used to talk about this case and because of that, their reputation was being spoiled and her father got angry and, therefore, the report has been lodged. These admissions, to my mind depicts the after effects of the incidents under question. The sexual assault continued at the hands of appellant for a considerable period. He used to take X out of town in his car. The villagers in such circumstances are bound to whisper about the relationship. The reputation of families will definitely be under jeopardy. The father of child, in such cases, is bound to get angry, if the persons like teacher has indulged into such activities and lodging FIR will accordingly follow. The appellant has given a suggestion that because of this case in the village, people used to talk about the case and their reputation was at stake and, therefore, her father got angry

and lodged FIR. The case put up by the appellant, in a way, would support the prosecution's version. The villagers would suspect the togetherness of the teacher and student and their frequent outings in the car. In the factual matrix of the case, the anger of father is pretty normal. The lodging of FIR, after the whispers in the village, would support the justification given by X of lodging FIR in the first week of May, 2013.

13. The prosecution has been blamed of having inordinate delay in lodging FIR. The learned Senior Counsel has argued that even if, the case of the prosecution is to be accepted that there were continuous threat of giving less marks in practical examination, the practical examination concluded in March, 2013 and, therefore, nothing prevented X or her father to lodge FIR immediately after completion of examination.

14. True it is that X or her parents could have lodged FIR immediately after concluding the examination, however, one cannot lose sight of the reality that it takes huge courage to the persons like X and her parents to lodge report of the incident pertaining to sexual assault, that to against a person, who is a teacher and is usually respected in the society. The FIR has been lodged when the incident became talk of the town. Thus, in a way, everybody got to know of the

relationship between the teacher and the student which ultimately resulted in lodging FIR. To my mind, the cross-examination in paragraph no. 7 depicts the aforesaid position. In the aforesaid circumstances, the lodging of FIR can be said to be well within time and the delay has been satisfactorily explained by X.

15. The next line of attack is that X has been tutored. She admits that before her chief examination, she met APP and got her satisfied as to what should she state before the Court. She has further admitted that as per her instructions, she has deposed in the Court. These admissions will have to be understood in the backdrop of the guidelines issued by the Ministry of Women and Child Development under Section 39 of the POCSO Act. The guidelines *inter alia* includes that child/victim is given an opportunity to visit the Court to familiarize himself/herself with it before the trial so that he/she will get acquainted with atmosphere in the Court and will not be intimidated at the trial. The representative of the child/victim may make a request in this regard. He can further make a request that child/victim sees or can be briefed on his/her statement for the purpose of memory - refreshing before the trial. The guidelines are elaborate.

16. Thus, it is the duty of all concerned including the learned APP to make a child/victim comfortable before he/she enters the

witness box. As such, the support person ought to have been appointed for the child who is entrusted with certain duties envisaged under the guidelines. Nonetheless, in absence of support person, those in charge of the case including the learned Judge, the prosecutors and even the defence lawyer is duty bound to keep in mind the child's welfare and his comfort during the trial. Therefore, the provision is made in the guidelines that the even questions of the defence should be routed through the learned Judge to avoid character assassination of the child/victim or abusive/inappropriate questions in cross-examination. Be that as it may, the fact remains that the child has a right to have a pretrial visit to the Court which includes making him/her aware of the procedure followed in the Court during trial. It includes explaining the child/victim as to the manner in which evidence is recorded, viz. the chief examination followed by the cross-examination etc. Thus child/victim will have to be made aware that the learned APP will ask certain questions first which the child/victim will have to answer. The child/victim will have to be further made aware that after completion of chief examination, the defence lawyer will ask certain questions. The child/victim will have to be made aware as to the reasons why the evidence is conducted in such manner which will include the generalize manner in which the child/victim will have to answer the questions. At times, in cross-examination, the defence is

required to put up a case that the witness is deposing false, the child/victim may get apprehended with such type of questions and that appears to be one of the reasons why the questions should be routed through the learned Judge. Nonetheless the child will have to be made aware of these aspect of the procedure of recording evidence. This is what appears to have been done in the present case as well. Therefore, in cross-examination, X admits that she met APP and got her satisfied from APP as to what she should state before the Court and as per her instructions, she has deposed in the Court. These admissions by X therefore, will not be sufficient to label her a tutored witness. It is worth mentioning here that it is nobody's case that X has been instructed to give false evidence.

17. These admissions are to be understood from another angle as well. Learned APP was not in the picture when FIR was lodged. As stated earlier, FIR has been lodged on 4-5-2013. The evidence of X was recorded on 3-8-2017. X has deposed what she has stated before the police in the year 2013, at which time, the learned APP was not in the picture and, therefore, was not aware as to what has X stated before the police. The admission by X that she has deposed in the Court, as instructed by APP, cannot therefore, be taken as APP having tutored X to depose a particular fact. The evidence of X is in tune with the FIR. This

evidence has been recorded after more than four years of lodging report. In the circumstances, if the memory of X is refreshed, her testimony cannot be treated as untrustworthy or inadmissible. In fact, in such situation where the defence put up a generalize question of meeting APP and the witness getting satisfied from her as to what should be stated before the Court, the learned APP ought to have in re-examination sought clarification from the witness on this point. The experience, however, shows that, more often than not the prosecutors do not re-examine the witnesses, giving unwarranted scope to the defence to blame the witnesses of being tutored or otherwise. The prosecutors in all cases must be mindful of the fact that where in the cross-examination, the admissions in generalize form are brought on record, they should seek clarification in re-examination. The learned Judge should have also exercised his powers under Section 165 of the Indian Evidence Act to get clarification on this point, particularly where the child/victim of the crime is further required to face such cross-examination. It is often said that Judge should not be mute spectator and should participate in the trial. The participation should be at such stages.

18. Learned Senior Counsel has then argued that the evidence of X on the material aspect is an omission. This omission is brought on

record in context with statement of X recorded subsequent to lodging FIR. In my view, this cannot be said to be an omission at all. The entire chief examination is in tune with the FIR. X has only elaborately deposed about the various facets of her sufferance but then the genesis of the story is akin contents of FIR. There is absolutely no omission much less material omission in the testimony of X.

19. Mr. Mardikar, learned Senior Counsel has invited my attention to the cross-examination of X where she admits that accused used to start class from 6.00 a.m. which continued till 11.00 a.m. The duration of the class was one hour. There were 50 students who joined the tuition. X then admits that after the period, the students of first batch used to go out from the class and students of next batch used to come inside the classroom immediately. Learned Senior Counsel contends that there is hardly any time in the two classes to commit sexual assault. He submits that students of one batch used to go out and the students of another batch used to come in immediately. Thus, according to him, there is absolutely no time and thus, there is no possibility of committing sexual assault in the intervening period of two classes.

20. The submissions appears to be theoretical. The evidence does not indicate that while students of first batch were going out, the

student of second batch used to come in. The simultaneous ingress and outgress of students is conspicuously absent in the evidence. The spot panchanama will make the things clear. Exhibits 48 and 49 is the layout sketch of the structure where the appellant used to reside and used to take classes. Exhibit 48 depicts the layout of the ground floor which consists of *warhanda*, living room, bed room, kitchen, *pooja* room etc. Exhibit 49 is first floor layout/plan. It includes *warhanda*, class room, hall, kitchen and bed room. Thus, the class room is on the first floor. One will have to travel from the ground floor to first floor to enter the class room. It is not the case of the appellant that the students of next batch used to line up in the staircase upto the entrance of the class room. In absence of details of location of the students of the next batch, at the time when the students of first batch exit, the argument put forth by learned Senior Counsel that during the intervening period, there is no scope of sexual assault appears to be imaginary. That apart, the acts allegedly committed by the appellant, in the intervening period are that he used to touch X, kiss her and touched her chest. These activities may not consume much time and can be performed during intervening period of two classes.

21. It can be thus safely be concluded that the alleged discrepancies in the testimony of P.W. 1 are not material. P.W. 1 X has

otherwise withstood the cross-examination. The evidence of P.W. 1 otherwise indicates her sufferance at the hands of the teacher who had influence upon her. The teacher in this case has, instead of protecting the minor student, taken advantage of her age to satisfy his lust. He threatened the minor of giving no/less mark in the practical examination and continued to satisfy his sexual urge by keeping her in continuous threat. He has threatened her to fail in the examination, if she does not cooperate. In doing so, in Balaji Hotel when he indulged into penetrative sex, may be for the first time with X, he threatened X to keep quite and when she was about to cry, he gave life threats to her. She resisted but appellant did not listen and committed sexual intercourse. She deposed that she sustained bleeding out of the incident, which fact was informed to the appellant, who in turn again gave her life threat if the incident is disclosed to anyone. The witness has withstood the cross-examination. Her evidence is otherwise overwhelming. There appears absolutely no reason why should her testimony be not relied upon.

22. P.W. 2 is the father of X. His evidence on the sufferance of X is hearsay. He deposed that after completion of examination of Standard 10, X told him of the incident, upon which on 4-5-2013, he

took X to the police station. His evidence is not relevant on the point of material allegations against the appellant.

23. P.W. 3 is a panch witness to seizure of computer. Nothing incriminating is found in the computer. The computer has been seized because X has stated that the appellant showed her blue film during the time when his wife and children were out of station. The computer has been seized on 4-5-2013. The incident of blue film is of Diwali, 2012. There is nothing on record to believe that the appellant continued to have stored blue film on the hard disc of the computer to get any benefit of seizure after about 6-7 months of the incident.

24. P.W. 4 is panch witness in whose presence police have seized blood samples and other samples of X. Nothing incriminating is found in his evidence and, therefore, detail discussion is not required.

25. P.W. 5 is a Head Master working in Janta High School and Junior College, Mouda. He has issued certificate of date of birth of X. The certificate is marked as Exhibit 37. He has deposed that the appellant was teacher of Janta High School and used to teach Maths and Science. X was student of said school. He further deposed that in the practical examination, both internal and external marks were given to the students. In the cross-examination, he has deposed that he has

verified before issuing birth certificate whether date of birth of the victim is correctly mentioned in the certificate. He has, however, admitted that it is not his duty to issue birth certificate. He has further admitted that in practical examination, the external came to conduct the examination and the purpose of calling external is to conduct practical examination impartially. He has also admitted that the students get marks on the basis of his/her performance. Thus, an attempt is made to show that the marks are allotted upon the performance of the student, that too, by the external examiner and, therefore, the appellant could not have influenced X.

26. This advantage cannot be extended to the appellant in as much as there is nothing on record to either indicate that the marking is only in the hands of external and further that X had no reason to believe that the appellant had no control over the internal marking. The experience shows that the teachers played good role in allotting internal marks to the students. In that sense, X had every reason to believe that the appellant is in a position to control internal marks to be allotted to her. Therefore, the admissions given in the cross-examination by PW. 5 will not be helpful to the defence/appellant.

27. P.W. 6 is a panch witness to seizure of nail, pubic hairs and blood samples of appellant. Nothing incriminating is found in his evidence and hence requires no consideration.

28. P.W. 7 is a panch witness in whose presence the registers of Balaji Bar and Restaurant were seized. Registers were seized from the manager of the hotel. In the cross-examination, it is brought on record that police informed him that they have seized registers and he should sign the panchanama and accordingly, he has signed panchanama. He has further admitted that as per say of police, he has deposed in the Court. His testimony has been ignored by the Special Judge and rightly so.

29. P.W. 8 is a panch witness to vehicle seizure panchanama. The car bearing number MH-40/A-7826, used by the appellant to take X to Nagpur and hotels, has been seized. The seizure appears to be of no relevance and requires no further discussion.

30. P.W. 9 is a retired Mandal Adhikari. He has drawn, in presence of panchas, the map of the house of the appellant (Exhibits 48 and 49) which have been referred to in the earlier paragraphs. He has not been cross-examined by the defence and, therefore, maps could be relied upon.

31. P.W. 10 is a businessman, who acted as panch to the seizure of registers from Kohinoor Plaza Hotel. This seizure is not of much relevance and hence, no further discussion is made.

32. P.W. 11 is a Doctor, who has examined X on 4-5-2013. She has stated that there was no external marks of injury, no loose pubic hairs were found and hymen was torn with old heal tear at 3 O'Clock position. Injury was old. There was no abnormality detected in vagina and cervix. In the cross-examination, the Doctor has deposed that in the event of sports, cycling or exercising, there is possibility of hymen tear.

33. The medical examination of X was undertaken after considerable period of occurrence of incident and, therefore, the support to the prosecution version is only to the extent of tear in hymen with old injury. The other important support is in the history of incident described by X. She appears to have stated that she suffered sexual intercourse at the hands of known person on the pretext of failing her in the exam, last episode before two months ago, meaning thereby that last episode occurred sometimes in March, 2013. The learned Senior Counsel argued that known person could be anyone and not necessarily the appellant. He further submits that the defence has put forth a case to X that she had an affair with a boy of village.

34. This argument appears to be without any substance. The suggestions put forth to X on the point of affair with a boy has not only be denied by X but these suggestions have been given randomly without any foundation of X having been involved in affair with any boy in the village. Therefore, the theory of X having been involved in affair with a boy is based on conjunctures and surmises and is not believable. On the point of absence of name of appellant in the history, the appellant will not get any advantage in as much as the known person is said to have committed repeated intercourse on the pretext of failing her in the examination. The evidence, if read in totality leads to the only inference that except for the appellant, there was no person who could have given such threats to X. The known person in history, therefore, is the appellant himself. The medical evidence in that sense would corroborate the prosecution version.

35. P.W. 12 is a Doctor who has examined the appellant on the point of his potency. He is found to be potent. P.W. 13 is another Doctor who has collected semen samples of the appellant. P.W. 14 is lady Police Constable, who has taken X to the Mayo Hospital for examination. She brought back, collected samples to the police station. The evidence of P.W. 12, P.W. 13 and P.W. 14, being formal, does not warrant elaborate discussion.

36. P.W. 15 is a Police Sub Inspector attached to Mouda Police Station. She has registered the FIR, Exhibit 25. In the cross-examination, it is brought on record that the column no. 9 in FIR relates to reasons of delay in lodging FIR and is kept blank. The witness has then admitted that had informant given reasons for delay, the concerned officer would have mentioned the delay in column no. 9 in printed FIR. This absence will not be advantageous to the defence because it is something which could be said to be lapse on the part of investigating agency for which the informant's version cannot be disbelieved. Her evidence is self speaking on delay.

37. P.W. 16 is a Police Inspector of Mouda Police Station, who carried out further investigation. He has deposed about the details of investigation which includes drawing panchanamas, seizure of articles, seizure of samples, arrest of appellant and filing charge-sheet. In the cross-examination, it is brought on record that he has not recorded the statements of classmates of X, who used to sit next to X in the tuition classes. He has not seized CCTV footage of the hotel.

38. These two discrepancies cannot really be said to be material in as much as X has not deposed that appellant has committed sexual assault in the presence of any student and there is no evidence that the CCTV footage of the relevant time was available with the hotel. As

stated earlier, the incident occurred couple of months prior to commencing the investigation and therefore, one cannot presume of availability of CCTV footage for old period. Normally, the CCTV footage is stored for about 10 to 15 days, depending upon the storage capacity. There is absolutely nothing in the evidence as regards storage capacity of the instrument recording CCTV footage. There is, thus, nothing in the cross-examination to disbelieve the testimony of this Investigating Officer.

39. Mr. Mardikar, learned Senior Counsel has drawn my attention to the entries made in the registers of hotels seized by the investigating agency. In the entry dated 20-8-2012, the presence of appellant is noted and in the column of number of persons, number 2 is written meaning thereby that on that day, two persons were present in the room at the hotel. The time of entry is written as 6.00 p.m. The another entry is dated 27-6-2012 which indicates similar status. The third entry is of Hotel Kohinoor Plaza. Date of entry is 21-12-2012, the presence of appellant and his wife is noted. Similar such entries of Kohinoor Plaza finds place on 14-1-2013, 7-2-2013 and 23-3-2013. It is accordingly argued that the entry in the register indicates that appellant and his wife were present in the hotel. However, what is noticeable is that out of five entries, the presence of wife is recorded in three entries.

Insofar as other two entries are concerned, the name of appellant only has been recorded and in the column under the head of 'Number of persons', number 2 is mentioned meaning thereby that two persons stayed in the room. One entry is of 6.00 p.m. and another entry is of 5.00 p.m. This time is the same as has been stated by X in her evidence. These entries have been made by the appellant and is within the exclusive knowledge of the appellant as to why has he in some entries mentioned only his name and in some entries, the name of his wife. The absence of investigation on this point will be of no consequence as it does not throw light in favour or against the prosecution version.

40. P.W. 17 is a Police Inspector attached to Mouda Police Station. He had sent the sealed samples of accused and informant to Chemical Analyser's office. He has collected CDR details of the appellant and informant and has filed charge-sheet against the appellant. In the cross-examination, the defence has brought on record that he has not made any enquiry about the date of birth of X by visiting any office. He has not recorded the statement of persons residing nearby the tuition class and has not prepared spot panchanama of the vicinity of tuition class.

41. In my view, the aforesaid cross-examination will be inconsequential to the prosecution version. The birth certificate has

been issued by Gram Panchayat and carries presumption under Section 35 of the Indian Evidence Act of its genuineness. The defence further failed to show as to how the topography of the vicinity of the tuition class is of any significance as nothing has been argued in this regard.

42. P.W. 18 is a student of Janta High School. He deposed that appellant was his class teacher for three years and used to teach Maths. He knew X because both had joined Karate classes. This evidence has been taken aid of by the defence to contend that X was engaged in Karate classes and hymen could be ruptured in practicing Karate.

43. Though the theory of rupturing hymen is believable, it will be far fetched to connect it with the hymen rupture in the present case. The fact remains that the evidence of X is writ large on hymen rupture when she deposed that she sustained bleeding after the penetrative sexual assault at the hands of the appellant in the hotel room.

44. P.W. 19 is another student of Janta High School, who knew the appellant and X, both. He did not support prosecution version. His testimony is of no relevance.

45. Put all together, this is a case of sole testimony of victim X. The law on this point is well settled. If the prosecutrix/victim is

trustworthy, the conviction could be based on her sole testimony. In the present case and as stated earlier, the testimony of X is found to be trustworthy. She has elaborately deposed about her sufferance which indicate that the teacher has exploited the student.

46. Learned Senior Counsel has placed reliance upon following authorities in support of the contentions that the victim's testimony in the present case is not believable, the fact of delay in lodging FIR and so on.

- (1) *Arun Kumar Vs. State of Haryana [2018 SCC Online P & H 7074]*,
- (2) *Bhura @ Rashid Vs. State of Haryana [2018 SCC Online P & H 7217]*,
- (3) *State Vs. Mahender Sahni [2017 SCC Online Del 8789]*,
- (4) *Tameezuddin alias Tammu Vs. State (NCT of Delhi) [(2009) 15 SCC 566]*,
- (5) *State of Andhra Pradesh Vs. M. Madhusudhan Rao [(2008) 15 SCC 582]*,
- (6) *Criminal Appeal No. 370/2019 (Roshan s/o Ramlal Patil Vs. State of Maharashtra) dated 13-1-2020* passed by this Court,
- (7) *Sadashiv Ramrao Hadbe Vs. State of Maharashtra and anr. [(2006) 10 SCC 92]*,

- (8) *Babu Vs. State of Kerala [2010 ALL MR (Cri) 3342 (S.C.)]*,
- (9) *Criminal Appeal No. 600/2017 (Amol s/o Dudhram Barsagade Vs. State of Maharashtra) dated 23-4-2018* passed by this Court,
- (10) *Swadhinchandra Hariramji Zade Vs. The State of Maharashtra [2021 ALL MR (Cri) 2060]*,
- (11) *Shri Sharad s/o Namdeorao Shirbhate Vs. State of Maharashtra [2007 ALL MR (Cri) 352]*,
- (12) *Kanbi Vaghji Savji Vs. State of Gujarat [AIR 1968 Gujarat 11]* and
- (13) *Criminal Appeal No. 74/2015 (Dilip s/o Bhaiyyasingh Tekan Vs. State of Maharashtra) dated 4-1-2017* passed by this Court.

47. The first case is a case of Punjab and Haryana High Court wherein Single Judge in the case of *Arun Kumar Vs. State of Haryana* has referred to couple of Supreme Court's judgments on the point that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

This judgment will not help the appellant in as much as the evidence of X here is found to be trustworthy and secondly, the defence

could not in the cross-examination or otherwise remotely show that story put forth is improbable.

48. The Single Bench of Punjab and Haryana High Court in the case of ***Bhura Vs. State of Haryana*** disbelieved the sole testimony of prosecutrix on the ground that the evidence therein revealed that though her hymen was found ruptured, but it has come in the statements of prosecutrix and her parents that she was already married about a year prior to the incident.

The appellant in the present case cannot draw any advantage of such judgment when the facts are altogether different. There is absolutely nothing in the present case, except for a general theory of hymen rupture in sports that X's hymen was ruptured prior to the incident and even if ruptured, will be inconsequential, considering the nature of evidence in the present case.

49. In the case of ***Mr. Rajat Katyal, APP for the State Vs. Mahender Sahni***, the Division Bench of Delhi High Court considered the settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected.

This judgment will also be of no help to the appellant for totality of the story of the prosecution is not only found to be probable but is found to be proved on the touchstone of the provisions of law including provision of Indian Evidence Act and POCSO Act.

50. The next case relied upon is the judgment of the Supreme Court in the case of *Tameezuddin alias Tammu Vs. State (NCT of Delhi)* wherein the Supreme Court, considering the evidence found the story of the prosecution improbable and emphasized on the well settled principle of acceptance of the sole testimony of prosecutrix if found to be trustworthy and not otherwise. In the present case, the evidence of prosecutrix is found to be trustworthy.

51. The appellant has then relied upon the judgment in the case of *State of Andhra Pradesh Vs. M. Madhusudhan Rao* on the point of delay in lodging FIR. The Supreme Court has highlighted the object and importance of prompt lodging of FIR. The Court noted that the delay in lodging the FIR, more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity.

Therefore, it is essential that the delay in lodging the report should be satisfactorily explained.

In the present case, the evidence of X is indicative of the fact that she was put under continuous threat of being failed in internal examination, if she does not cooperate. The internal examination was conducted in March, 2013. The FIR has been lodged on 4-5-2013. The reasons for delay have been elaborately dealt with in earlier paragraphs. That apart, the defence failed to point out that the delay is an outcome of any malafide or that the prosecutrix has introduced a coloured version or is an exaggeration of the incident. The delay will have to be considered not only from the point of view of completion of examination but also from the point of view of result of examination in the sense the internal examination might have been completed in March, 2013. X will continue to be under threat of getting less marks until result is declared. In the present case, it appears that father of X took her to police station because of some developments in the village where the villagers started whispering about the relationship between the appellant and X. The totality of evidence also indicates that initially X was reluctant to indulge into activities but later was made to believe that appellant will marry her and thus continued the relationship with the appellant. This precisely is the reason why it could be said that the

appellant teacher has exploited the minor student. The appellant has taken advantage of the age of X, initially by putting her under the threat of failing and later lured her by making false promise of marriage. In the circumstances, the delay in lodging FIR cannot be said to be intentional or malafide but is a consequence of threat and then of innocent hope of marriage.

52. The next judgment is in the case of ***Roshan s/o Ramlal Patil Vs. State of Maharashtra*** passed by the coordinate Bench of this Court. This judgment along with the judgment of the Supreme Court in the case of ***Babu Vs. State of Kerala*** has been relied upon by the appellant to deal with the aspect of statutory presumption under Section 29 of the POCSO Act. The Supreme Court has cautioned the Courts below to be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. The appellant further referred to the judgment of coordinate Bench of this Court in the case of ***Amol s/o Dudhram Barsagade Vs. State of Maharashtra*** wherein the Court held in paragraph no. 6 as under :

“6. The statutory presumption under Section 29 of the POCSO Act must be understood and tested on the anvil of the golden thread which runs through web of the criminal jurisprudence system in this country that an accused is presumed to be innocent till the guilt is conclusively established beyond reasonable doubt. In the factual matrix,

at best, the prosecution has succeeded in bringing on record material giving rise to some suspicion. However, it is trite law that suspicion is not a substitute to proof. The gulf between “might have committed” and “must have committed” must be bridged by the prosecution by unimpeachable and confidence inspiring evidence. The fact that Hindi test books were found on the bench of the victim who was answering the Hindi paper, that the Investigating Officer did not make any enquiry with the victim and that the Investigating Officer did not make any effort to record the statement of the seventeen students who were present in the examination hall when the incident allegedly happened, cumulatively creates a doubt, and the doubt is not a speculative or fanciful doubt, about the veracity of the version of the victim. The benefit of this nagging doubt must necessarily go to the accused.”

53. Learned Senior Counsel has accordingly argued that presumption under Section 29 of the POCSO Act cannot be drawn lightly. The prosecution will have to prove the case beyond reasonable doubt.

54. The law on the statutory presumption is well settled. The prosecution has to prove the foundational facts to call upon defence to rebut the presumption. The question, however, remains as to when would the statutory presumption attracted. To my mind, once the prosecution, by leading evidence, establishes that its version is believable, the statutory presumption under Section 29 of the POCSO Act would be attracted. The prosecution version could be said to be believable when after considering all attending circumstances, the Court

comes to the conclusion that the incident under question must have occurred. The prosecution will have to be given some leeway in the cases where the statutory presumption of guilt of accused is provided and the cases where it is required to prove the guilt beyond reasonable doubt, else there will be no difference in the cases where the prosecution has to establish the guilt in terms of settled principle of proof beyond reasonable doubt and the cases where by way of statutory presumption, the guilt of accused is to be presumed. In that sense, once the case of prosecution is found to be believable, the Court will be fully justified in drawing statutory presumption against the accused, who if fails to rebut the same in accordance with law, should be held guilty of the crime, particularly where the nature of offence is such that availability of eye witness is almost impossible. In the offence like rape under IPC and the penetrative sexual assault under POCSO Act, the offence is committed in an isolated place where the only witness is the victim herself. In these circumstances, if her testimony is found to be believable, the statutory presumption will be attracted. In the present case, the evidence of X coupled with the medical evidence is not only believable but self sufficient to bring home the guilt of appellant. The statutory presumption under Section 29 of the POCSO Act will further substantiate the prosecution version.

55. The appellant has blamed the prosecution of not recording statement of wife of the appellant. In my view, the appellant could have examined his wife, if what X has stated, as regards the suspicion of appellant's wife of his activities with X, were incorrect or false. This was one amongst others reasons for drawing presumption under Section 29 of the POCSO Act which the appellant herein has failed to rebut. The judgments cited by the appellant on thus point of presumption will therefore have no bearing in the present case.

56. The appellant has then relied upon the judgment of the Supreme Court in the case of ***Sadashiv Ramrao Hadbe Vs. State of Maharashtra*** wherein the Supreme Court disbelieved the testimony of prosecutrix of rape but for obvious reasons. In the said case, the allegations were against a doctor. The prosecutrix along with her child and husband went to the clinic of the doctor. Several patients were waiting for consultation with the appellant doctor. The prosecutrix took her child to the doctor who examined the child and prescribed some medicines. Thereafter prosecutrix herself wanted to consult the doctor as she had some ailment. She entered the room of doctor then a boy (attendant) directed the prosecutrix to go to another room for being examined by the doctor where she alleged that doctor meddled with her private parts and before she could raise any alarm, he pressed her

mouth and had sexual intercourse. The prosecutrix came out weeping and told the entire incident to her husband and FIR came to be lodged. The Supreme Court noted that there were many patients waiting outside and they could not have been far-off from the room wherein the prosecutrix was allegedly sexually assaulted by the doctor. The medical evidence also did not support her case because the vaginal swab did not contain sperms. The Court noted that there were many persons in the clinic and it was highly improbable that appellant – doctor would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. The Court further noted that it is highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique. The Court further noted that there were no injuries on the body of the prosecutrix. Thus, the totality of the circumstances were considered by the Supreme Court to disbelieve the prosecutrix version.

57. Learned Senior Counsel argued that in the present case also, there were so many students waiting outside the class-room and therefore, it is highly improbable that in short intervening period of two classes, the appellant herein could have sexually assaulted or that she

could not have raised alarm. The appellant, thus, intends to take advantage of a single line in the judgment that there were so many persons in the clinic and it was highly improbable that the appellant could have made a sexual assault. The argument, however, ignores a vital fact of continuous threats at the hands of the appellant. In the case before the Supreme Court, the aspect of threatening is completely absent. Further, the spot in the case before the Supreme Court was such that the patients were waiting at the adjacent room. The medical evidence also did not support the prosecution. As against in the present case, the location of class-room is on the first floor. There is nothing in the evidence to show that the students of next batch used to line-up in the staircase up to the entrance of the class-room. The nature of sexual assault is also different in the two cases. In the case before the Supreme Court, the doctor is said to have committed penetrative sexual assault. As against in the present case, the appellant herein has in the intervening period of two class, kissed X and touched her chest. The time to commit offence in two cases will naturally vary. Further X was not in a position to raise alarm as she had apprehension of losing her year at the hands of the appellant. Thus, the judgment will be of no help to the appellant.

58. The defence has then relied upon the judgment of coordinate bench of this Court in the case of ***Swadhinchandra Hairramji Zade Vs. The State of Maharashtra*** wherein the Court disbelieved the theory on two counts, firstly, the delay in lodging FIR and secondly, the spot and the presence of wife and daughter of appellant therein in the house at the relevant time. The evidence was such that tuition classes were conducted in the verandah in front room. The prosecutrix admitted that the appellant therein had one daughter, aged 17 years and she used to remain present in the house so also the wife, who used to do household work. The allegations made by the prosecutrix were such that she was taken in the room where the appellant has committed sexual assault. The prosecutrix admitted in the cross-examination that she had seen the house of the appellant from inside which consisted of one room where there was one bed and some kitchen articles. In the circumstances, the Court disbelieved the prosecutrix on the count that evidence led before the Court was indicative of the fact of presence of wife and daughter of the appellant in the house which consisted of one room. As against, in the present case, even if the presence of wife of appellant is to be accepted, the said presence would be on the ground floor where various room were located. There is nothing in the evidence to show that wife used to be on first floor at the relevant time. That apart, it is worth reiterating that the sexual assault in the present

case is of touching chest of X in the intervening period of two classes. It is not the prosecution case that the appellant herein has committed penetrative sexual assault during the intervening period of two classes. The penetrative sexual assault has been committed in the hotel rooms and in the house when the wife and children of appellant were out of town in Diwali holidays. The judgment, therefore, will be of no assistance to the appellant.

59. The appellant has in support of the argument of refreshing memory has referred to the judgment of coordinate Bench of this Court in *Sharad s/o Namdeorao Shirbhate Vs. State of Maharashtra*. The Court noted that there is nothing wrong in refreshing memory but it ought to be done before the Court and not outside the Court. The Court further held that it would not be permissible for a witness to stealthily refresh his memory before entering the Court and deposing about the entire evidence giving minute details as if he was reeling them out from his memory.

60. In the present case, the appellant appears to have presumed that X has refreshed memory prior to entering witness box on the ground that she has readover the contents of FIR and has deposed accordingly. I have already noted that FIR was readover at the time when it was lodged. The evidence of X in paragraph no. 6 does not

indicate that FIR was read by X prior to entering witness box. That apart, the guidelines issued by the Ministry of Women and Child Development under Section 39 of the POCSO Act would enable the child/victim to refresh the memory. In such cases, merely because memory is refreshed, the evidence of prosecutrix will not become untrustworthy.

61. It will be appropriate to mention here that the trial Court has referred to the judgment of this Court in the case of ***Gopal Madhukar Bombatkar Vs. The State of Maharashtra in Criminal Appeal No. 494/2011*** wherein this Court noted that in the cross-examination, the prosecutrix admitted that she had met the prosecutor and her statement was readover to her to contend that her testimony is unreliable. This Court held that meeting of witness with prosecutor prior to entering witness box will not by itself amount to tutoring. It is further held that making aware the witness of her statement recorded in police station with an instructions to narrate the incident in the Court will not amount to tutoring. The Court held that the case of prosecution will be adversely affected if it was indicated in the cross-examination that the witness was informed to give incorrect evidence. Thus merely because the statement was readover to the witness or that she was informed to narrate the incident properly in the Court will not

amount to tutoring the witness. In any case, refreshing memory will not by itself render the evidence inadmissible particularly in the cases where the testimony of child witness/victim is recorded after considerable period.

62. On the point of refreshing memory, the Gujarat High Court in the case of *Kanbi Vaghji Savji Vs. State of Gujarat* has considered the effect of Section 162 of the Code of Criminal Procedure (Code) where it prohibits use of statement recorded under Section 161 of the Code for refreshing memory. Section 162 provides that statement recorded under Section 161 shall not be signed by person making it and shall not use for any purpose, except as provided at any inquiry or trial. The Court referred to the case of Privy Council where the witness has signed the statement and refreshed his memory by actually looking into statement while giving evidence. The Privy Council observed that value of his evidence may be seriously impaired as a consequence of the contravention of the statutory safeguard against improper practices. The Division Bench of Gujarat High Court, considering the peculiar facts of the case before the Bombay High Court, has at the end opined that the Privy Council did not intend to lay down a rule of law that evidence of such a witness would be inadmissible in law. The evidence of such a witness may be shaken. The Division Bench held that even in such

cases, the consideration of evidence of such a witness would depend upon circumstances of the case.

63. Thus, in a way, the Gujarat High Court has also held that merely on the ground of refreshing memory, the evidence ought not to be discarded. That apart, the evidence in the present case does not really reveal that X has refreshed her memory prior to entering witness box.

64. The defence has then placed reliance upon the judgment of this Court in the case of *Dilip s/o Bhaiyyasingh Tekan Vs. State of Maharashtra*. In the said case, the question of proof of age of prosecutrix was under challenge. The mother of prosecutrix had placed on record copy of birth certificate. The trial Judge however, has not discussed in the judgment about the source of said certificate rather there was not even reference to the said certificate in the judgment. The Division Bench noted that, had the certified copy of birth certificate been brought on record, then in view of the provisions of Section 35 of the Indian Evidence Act, there would have been some material to establish that the prosecutrix was below 18 years of age. However, nothing of that sort has been done. In the circumstances, the Division Bench, considering the stringent provisions of the Act, held that

conviction of the appellant therein under the POCSO Act would not be sustainable.

In the present case, the investigating agency has placed on record the certified copy of birth certificate issued by the gram panchayat. It will have presumptive value in terms of Section 35 of the Indian Evidence Act. There is no reason to doubt the said certificate. The birth was registered on 1-7-1996 i.e. within one month of birth of X. Merely because it was procured on 15-7-2015, the certificate will not lose its evidentiary value. The age of X has, therefore, been proved in accordance with law.

65. Thus none of the cited judgments would have bearing in the present case. As noted earlier, the evidence of X is overwhelming. The appellant - teacher has exploited student. He has repeatedly committed penetrative sexual assault on a minor student. He further failed to rebut the presumption under Section 29 of the POCSO Act. The prosecution has, therefore, proved the charges levelled against the appellant. Accordingly, point nos. 1 and 2 have been answered in the affirmative.

66. The learned Special Judge has in detail considered the evidence and has rendered sound reasoning while convicting the

appellant under the provisions of the POCSO Act and IPC. No interference is, therefore, called for in the impugned judgment. Accordingly, point no. 3 is answered in the negative, resulting into following order.

ORDER

- (i) The appeal is dismissed.
- (ii) Fees of learned counsel appointed for respondent no. 2 shall be quantified and paid as per the rules.

(Anil L. Pansare, J.)

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