

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

**CRIMINAL APPEAL NO.589 OF 2022**

Vishal S/o Rashtrapal Gajbhiye,  
Age about- 30 years, Occupation- Business  
(Cloth), R/o Shantinagar, Jagruti Nagar,  
Near Juleka College, Boudha Vihar, Nagpur  
(Presently at Central Prison, Nagpur)

... Appellant

**// VERSUS //**

1. The State of Maharashtra,  
Through P.S.O., P.S. Shantinagar, Dist.  
Nagpur.
2. XYZ,  
(Victim in Crime No.97/20148 dated  
22.09.2018 registered with Shantinagar  
Police Station)

... Respondents

Shri S.V. Bhutada, Advocate for the appellant.  
Shri N.R. Rode, A.P.P. for the respondent No.1/State.  
Ms A.S. Mishrikotkar, Advocate for the respondent No.2.

**CORAM : ANIL S. KILOR, J.**  
**DATE OF RESERVING THE JUDGMENT: 22.12.2022**  
**DATE OF PRONOUNCING THE JUDGMENT: 11.04.2023**

1. Heard Shri S.V. Bhutada, learned counsel for the appellant, Shri N.R. Rode, learned A.P.P. for the respondent No.1/State and Ms A.S. Mishrikotkar, learned counsel for the respondent No.2/victim.

2. This appeal takes exception to the Judgment and order dated 22.08.2022 passed by the Extra Joint Additional Sessions Judge, (Special Judge, POCSO Court), Nagpur in Spe.Cri.(Child) Case No.302 of 2018, convicting the appellant for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the Act of 2012”) and sentenced to suffer Rigorous Imprisonment for 20 years and to pay fine of Rs.15,000/- in default to suffer further Rigorous Imprisonment for one year. The appellant is further convicted for the offence punishable under Section 10 of the Act of 2012 and sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.5,000/- in default to suffer further Rigorous Imprisonment for three months.

3. The prosecution case is that, the incident in question took place on 22.09.2018 around 7.30 p.m. at Shantinagar, Bagde Plot, Nagpur. The First Information Report is lodged by the mother of the victim on very day.

4. The victim is a girl child of 6 years. The accused is resident of same area where victim resides. It is stated that, the victim was playing

with her girl friends near her house at the time of incident. They were playing 'hide and seek' game.

5. It is further stated that, the victim came crying to her home and informed that the accused pulled her inside his house while she was hiding in front of his house and he closed the door of his house. Then he removed his clothes and gave his penis in her hand. Thereafter, he removed legging of the victim and touched and sucked her vagina. The victim then informed the accused that she is having a wee and started crying. The accused asked her to come next day again.

6. Thereafter, the victim forced open door of the house by giving push and went to her house. She narrated incident to her mother. The mother thereupon, informed her husband, mother in law and sister.

7. Thereafter, informant with her husband went to the house of the accused to question him about the incident. The accused kept mum without giving answer. While inquiry was being made with the accused, the public in the locality gathered. The public locked him inside the house.

8. Thereafter, informant with her husband went to the police Station and lodged the report.

9. Whereupon, the First Information Report (FIR) came to be registered. On filing of the charge-sheet, the case was registered as Spe.Cri.(Child) Case No.302 of 2018. The charges were framed at Exh.2 against the appellant under Sections 6 and 10 of the Act of 2012 and the contents of the charge was read over and explained to the accused in vernacular. Whereupon, he refused to plead guilty. Hence, the trial was conducted.

10. The trial Court after marshaling oral as well as documentary evidence passed by the impugned judgment and order convicting the appellant for the offence punishable under Sections 6 and 10 of the Act of 2012 and thereby, sentenced to suffer Rigorous Imprisonment for 20 years and 5 years respectively. The said judgment and order dated 22.08.2022, is under challenge in this appeal.

11. Shri Bhutada, learned counsel for the appellant submits that there is a variation in oral evidence of prosecution witnesses particularly

PW-1 mother of the victim, PW-2 the victim and PW-7 the sister of the mother of the victim, as regards the incident.

12. It is submitted that in absence of any corroborative evidence particularly, in view of the fact that, the victim was tutored which resulted into improvisation in her version in oral testimony, it is not safe to base the conviction of the appellant merely on the oral evidence of the victim.

13. He further submits that, there was no compliance of Section 27 Act of 2012 read with Section 164-A of the Cr.P.C. as the victim was not medically examined within 24 hours of the incident. It is submitted that the medical examination of the victim was conducted after more than two months from the date of incident.

14. It is submitted that even if medical examination is considered, the doctor has found labia majora and labia minora intact and therefore, the medical evidence does not support the case of the prosecution.

15. The learned counsel for the appellant submits that the FIR was the outcome of the quarrel which took place fifteen days prior to the

incident between the father of the victim and the father of the accused wherein, the father of the victim threatened the father of the accused of dire consequences. He, therefore, submits that the accused has been falsely implicated in the alleged offence.

16. On the other hand, the learned A.P.P. supports the conviction recorded by the trial Court and also the finding recorded by the trial Court and prays for dismissal of the present appeal.

17. Ms Mishrikotkar, learned counsel for the respondent No.2/victim submits that after considering the oral as well as the documentary evidence, the learned trial Court has held the appellant guilty. He, therefore, prays for dismissal of appeal.

18. The Hon'ble Supreme Court of India in the case of State of *Karnataka Vs. Shantappa Madivalappa Galapuji and others*<sup>1</sup>, has held thus:

*"14. The position in law relating to the evidence of child witness has been dealt with by this Court in Nivrutti Pandurang Kokate v. State of Maharashtra and Golla Yelugu Govindu v. State of A.P. 15.... "6.... The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a*

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<sup>1</sup> (2009) 12 SCC 731  
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witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States*. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See *Suryanarayana v. State of Karnataka*)

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

"5. ... A child witness if found competent to depose to the facts and reliable on such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored." The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

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

19. The conclusion which can be deduced from the above referred pronouncement of the Hon’ble Supreme Court of India is that, the Indian Evidence Act, 1872 does not prescribed any particular age as determinative factor to treat a witness to be a competent one. On the contrary, Section 11(A) of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to the questions, because of tender years, extremely old age or any other cause of same kind.

20. It is also evident that in case of child witness, the precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-belief. Though it is an established principal that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norms that if after careful scrutiny of their evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witness.

21. In the teeth of above referred well settled principle of law, let us examine the oral evidence of the victim PW-2. PW-2 in her oral testimony states that she was playing with her friends Sakshi and Mehvish near her house. They were playing Lapa-Chafi (hide and seek). During the game she hide herself near the house of the accused who held her hand and dragged her inside his house. The accused then removed his clothes and then gave his penis in her hand. He also removed her leggin. He touched her vagina and sucked her vagina.

22. It is to be noted that in her oral testimony the victim deposed that the accused gave his penis in her hand and touched her vagina and sucked her vagina. Nonetheless, in a statement recorded by the Magistrate under Section 164 of the Code of Criminal Procedure (Cr.P.C.) Exh.11 on 03.10.2018, the victim states that the accused touched her vagina.

23. It can therefore, be seen that in the oral testimony the accused has improvised her version by stating that, the accused gave his penis in her hand and sucked her vagina.

24. In this case, to find out whether there is a possibility of being tutored, it is necessary to consider and examine the evidence of the mother of the victim, PW-1.

25. PW-1 in her oral testimony states that on the date of incident her daughter came to her crying and told that the accused Vishal caught her hand while she was hiding herself in her house in a game of “Lapa-Chafi”. She further states that the victim told her that the accused removed her clothes and also the legging of the victim. The accused inserted his finger in vagina of her daughter. The accused also sucked her vagina.

26. The facts of insertion of finger in the vagina of the accused or sucking of vagina are missing in a statement of the victim recorded by the Magistrate under Section 164 of the Cr.P.C. Whereas, it is the case of the PW-1 that the whole incidence was narrated by the victim.

27. Furthermore, in the FIR, it is the case of the mother PW-1 that the victim gave his penis in the victim’s hand and touched the vagina and sucked. The PW-1 changed her version in her oral testimony and stated

that the accused inserted his finger in the vagina of the accused. Whereas, in the FIR it is the case of the mother that the accused touched the vagina of the victim.

28. Similarly, in the evidence of PW-7, sister of PW-1 she has deposed that the victim told her that while she was playing hide and seek game, the accused Vishal held her hand and pulled her inside his house. She further states that the victim told her that the accused gave his penis in her hand and touched her vagina by his hand.

29. Thus, it is evident that there is a variation in the version of PW-1, PW-2 and PW-7.

30. If the statement of the victim recorded by Magistrate under Section 164 is considered, it says that the victim touched her vagina. This statement was recorded on 03.10.2018 whereas, the report was lodged on 22.09.2018 by the mother. It was the version of the mother in the FIR as well as in the oral testimony that the accused gave his penis in her hand and sucked her vagina. Thus, it gives rise to a suspicion about tutoring because of improvisation made by the victim in her oral evidence by

saying that the accused gave his penis in her hand and sucked her vagina. Whereas, as noted herein above that under the statement recorded under Section 164 of the Cr.P.C. it was only the case of the victim that the accused touched her vagina.

31. Keeping the law referred herein above as regards the child witness, in mind and considering improvisation made by the victim in her oral testimony, the possibility of tutoring cannot be ruled out. Hence, I am of the opinion that in this case corroboration by way of medical evidence is necessary.

32. The Exh.18 i.e. medical examination report of Sexual Violence depicts that urethral, uterus and vestibule are intact, labia majora is intact labia minora is intact and fourchette and introitus are intact. However, the doctor has noted that hymen penneum is old healed tear.

33. The witness PW-3 has prepared the Exh.18 medical report who has deposed in cross examination that hymen can be torn due to playing, cycling or by fall.

34. The Hon'ble Supreme Court of India in the case of *Aman Kumar Vs. State of Haryana*<sup>2</sup>, has held thus:

*“7... In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.”*

35. The above referred observations, make it clear that labia majora is the first to be encountered by the male organ. In the present matter, labia majora and labia minora are found intact.

36. It is pertinent to note here that, in this case, the medical examination of the victim was conducted on 28.11.2018 i.e. after more

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<sup>2</sup> (2004) 4 SCC 379  
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than two months from the date of incident. Whereas, Section 27 of the Act of 2012 read with Section 164 of the Cr.P.C. mandate to carry out medical examine of the victim within 24 hours from the incident. No explanation has been offered by the prosecution for such delay.

37. The Hon'ble Supreme Court of India in the case of *Navin Dhaniram Baraiye Vs. State of Maharashtra*<sup>3</sup>, has held thus:

*"19. The manner in which a presumption would operate against an accused has been analysed and deliberated upon by Courts because such a presumption is also provided for in various statutes, including the Prevention of Corruption Act, 1988. In the case of Babu .vs. State of Kerala (supra), while examining as to in what manner presumption under a statute would operate against the accused, the Hon'ble Supreme Court has held as follows:-*

***"(IV) Burden of Proof and Doctrine of Innocence***

*27. 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 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.*

*28. 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. (Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., AIR 2004 SC 3249; Rajesh Ranjan Yadav v. CBI, AIR 2007 SC 451; Noor Aga v. State of Punjab & Anr., (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325)."*

*20. In the case of Sachin Baliram Kakde .vs. State of Maharashtra (supra), this Court in the context of presumption under Section 29 of the POCSO Act, after quoting the said provision, has held as follows:-*

*"18. Thus, when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that the said person has committed the said offence unless the contrary is proved.*

*19. The presumption, however, cannot be said to be irrebuttable. In-fact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved.*

*20. One has to keep in mind, as expressed by an eminent jurist that presumptions are bats in law; they fly in a twilight but vanish in the light of facts."*

*21. In a recent judgment, again in the context of presumption under Section 29 of the POCSO Act, in the case of Amol Dudhram Barsagade .vs. State of Maharashtra (supra), this Court has held as follows:-*

*"5. The learned Additional Public Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim 12.10.2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the 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."*

38. Thus, considering the oral as well as documentary evidence brought on record by the prosecution, I am of the opinion that the presumption under Section 29 of the Act of 2012 would not operate in this case against the accused.

39. In defence, the accused came up with the case that 15 days before the incident, a quarrel took place between the husband of the informant and the father of the accused. The husband of the informant thereafter threatened the father of the accused of dire consequences. Therefore, it is the case of the accused that the complaint made by the informant is the outcome of the said quarrel.

40. The PW-1 in her cross examination admitted the fact that 15 days prior to incident there was a quarrel between her husband and father of the accused.

41. Thus, in light of above referred observations and finding recorded, I have no hesitation to hold that it is not safe to maintain the conviction of the appellant only on the basis of the oral evidence of the victim in absence of any corroboration, particularly when the oral evidence of the victim suffers from possibility of tutoring. Hence, I am of the opinion that the present appeal needs to be allowed by quashing and setting aside the impugned judgment and order dated 22.08.2022. Accordingly, I pass the following order:

- a) The appeal is **allowed**.
- b) The impugned Judgment and order dated 22.08.2022 passed by the Extra Joint Additional Sessions Judge, (Special Judge POCSO Court), Nagpur in Sp.Cri.(Child) Case No.302 of 2018 convicting appellant for the offence punishable under Sections 6 and 10 of the Act of 2012, is hereby quashed and set aside and the appellant is acquitted for the offence punishable under Section 6 and 10 of the Act of 2012.

The Criminal Appeal stands **disposed of** accordingly.