



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

CRIMINAL APPEAL NO. 457 OF 2022

APPELLANT : Sharad S/o. Mahadev Mankar, Aged
about 37 Years, Occ. Labour, R/o.
Fattepur, Shivangaon, Tq. Tiosa,
Dist. Amravati.

//VERSUS//

RESPONDENTS : 1. State of Maharashtra, through the
Police Station Officer, Police Station,
Nandgaon Peth, Dist. Amravati.
2. XYZ (Victim) in Crime
No.308/2020, Police Station –
Nandgaon Peth, Tq. & Dist.
Amravati.

Mr. Mohd. Ateeque, Advocate for the Appellant.
Mrs. S.V. Kolhe, APP for Respondent No.1/State.
Ms. Falguni Badami, Advocate (appointed) for Respondent
No.2.

CORAM : G. A. SANAP, J.
DATED : 30th AUGUST, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order
dated 11.05.2022, passed by the learned Special Judge &

Additional Sessions Judge-2, Amravati, whereby the learned Judge convicted the appellant for the offences punishable under Section 376-AB of the Indian Penal Code, 1860 (for short, "IPC") and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"), and sentenced him to suffer rigorous imprisonment for twenty years and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for six months for the offence punishable under Sections 4 and 6 of the POCSO Act. No separate sentence has been awarded for the proved offence punishable under Section 376-AB of the IPC.

02] BACKGROUND FACTS:

PW-2 (informant) is the mother of the victim girl (PW-1). The crime was registered against the appellant on the report of PW-2. The case of prosecution against the appellant, which can be gathered from the report and other materials compiled in the charge-sheet, is that, on the date of the incident, the victim was 9 years old and studying in 3rd Standard. The informant has three daughters. The informant and her husband are doing labour work on the field. On 25th November, 2020, the informant, her husband, and her elder daughter had gone for work.

The victim and younger daughter were at home. The informant came back from the field at about 4:00 p.m. It is stated that the victim told her that she had gone to play with her friend Sonakshi at her house. Sonakshi is the daughter of the appellant. The appellant was at home. The appellant called her in the kitchen and removed her knickers. The appellant rolled over his hand on her private part and inserted his finger into her vagina. The victim came back to her house. The informant and her family belong to the Buddhist community. The informant was mentally disturbed after hearing the incident, and therefore, immediately they did not go to the police station.

03] On 27th November, 2020, the informant, her husband, and the victim went to the police station. The informant narrated the incident to the police. The Police Officer (PW-4) Kavita Patil recorded her oral report. On the basis of this report, a Crime bearing No.308/2020 was registered against the appellant. The victim was sent for medical examination. The doctor (PW-5) examined the victim and issued the medical certificate. PW-4 carried out the initial investigation. She drew the spot panchanama. The statement of the victim was recorded. Similarly, the victim was sent to the Magistrate for recording her statement under Section

164 of the Code of Criminal Procedure, 1973 (for short, “Cr.PC”). Further investigation was carried out by PW-6 Sohail Shaikh. He collected the birth certificate and caste certificate of the victim. On completion of the investigation, he filed the charge-sheet against the accused in the Court of law.

04] The learned Special Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of the enmity between him and the father of the victim. The prosecution, in order to prove the charge against the accused, examined six witnesses. The learned Judge, on consideration of the evidence, found the said evidence sufficient to prove the charge against the accused and accordingly convicted and sentenced the accused as above. The appellant, being aggrieved by the judgment and order, has come before this Court in appeal.

05] I have heard Mr. Mohd. Ateeque, learned advocate for the appellant/accused, Mrs. S.V. Kolhe, learned APP for respondent No.1/State, and Ms. Falguni Badami, learned advocate for respondent No.2. Perused the record and proceedings.

06] Learned advocate for the appellant/accused submitted

that there was two days delay in lodging the report of the incident. The delay has not been satisfactorily explained. The facts stated in the report as well as in the cross-examination by the informant clearly show that this report was the result of deliberation and, as such, totally embellished. Learned advocate submitted that the explanation put forth for delay in lodging the report is not sufficient to satisfactorily explain the delay. It is fatal to the case of the prosecution. It leaves scope to doubt the false implication of the accused. Learned advocate submitted that the evidence of the victim is vague. It is not sufficient to prove the charge against the accused. Learned advocate took me through the evidence of the informant and pointed out that, in her cross-examination, she has admitted certain vital facts, and therefore, the very edifice of the case of the prosecution has been shaken. Learned advocate submitted that the evidence of the victim and the informant is not sufficient to prove the charge against the accused. Learned advocate submitted that the evidence of the Medical Officer is not sufficient to corroborate the version of the informant and the victim. Learned advocate submitted that the facts deposed before the Court by the informant and the victim coupled with the delay in lodging the report, are sufficient to create a grave suspicion about the case of prosecution. Learned advocate submitted that the minimum

sentence prescribed under Section 376-AB of the IPC and Section 6 of the POCSO Act is 20 years imprisonment. Learned advocate submitted that such a severe punishment cannot be handed down on the basis of such a vague and uncorroborated testimony of the victim. Learned advocate submitted that the learned Special Judge has failed to consider the relevant material, which supports the defence of the appellant. Learned advocate submitted that the evidence on record is not sufficient to prove the charge. Learned advocate submitted that the evidence of the victim and her mother (PW-2) does not inspire confidence.

07] Learned APP submitted that the victim was examined by the doctor and the injury was found to her labia minora. It is sufficient to prove that the accused had inserted his finger into the vagina of the victim. Learned APP submitted that the parents of the victim had no reason to involve their daughter in such an incident, which invites stigmatic consequences for the future of the victim as well as for the family. Learned APP submitted that the delay in lodging the FIR has been properly explained. The explanation is reasonable and, as such, it was accepted by the learned Judge. Learned APP submitted that the incident, as narrated by the victim, was reported to the police by the informant.

Learned APP, in short, supported the judgment and order passed by the learned Special Judge.

08] Learned advocate Ms. Falguni Badami appointed for respondent No.2 has adopted the arguments advanced by the learned APP.

09] In this case, the mother of the victim has stated that, on the date of the incident, the victim was 9 years old. She was studying in 3rd Standard. In her report, she has not stated the birth date of the victim. The victim (PW-1), in her evidence, has stated that she was studying in 3rd Standard, and her birth date is 1st August, 2012. The Investigating Officer, during the course of the investigation, obtained the birth certificate of the victim from the Gram Panchayat, Gurudeonagar, Tq. Teosa, Dist. Amravati, on 1st December, 2020. The certified copy of the birth certificate was issued from the Gram Panchayat on the basis of the record maintained by the Gram Panchayat. The registration number of the birth entry of the victim is '108'. It was registered on 31st August, 2012. In this certificate, the birth date of the victim is recorded as '1st August, 2012'. It is seen that this evidence has not

been challenged by the accused.

10] Perusal of the cross-examination of the witnesses on behalf of the accused would show that neither the birth date of the victim stated by the victim nor the birth certificate has been challenged. The birth certificate produced on record is a public document. The certified copy was prepared on the basis of the record maintained by the Gram Panchayat. It was signed by the Secretary of the Gram Panchayat, who is the public servant. This public record attracts a presumption. It is also relevant and can be considered in view of the provisions of Section 35 of the Indian Evidence Act. This evidence, in my view, is sufficient to prove that, on the date of the incident, the victim was 9 years old and, as such, a child as defined under Section 2(1)(d) of the POCSO Act.

11] It is necessary to minutely appreciate the oral and documentary evidence adduced by the prosecution to prove the charge against the accused. There was two days delay in lodging the report. The explanation has been placed on record for lodging the report. It is, therefore, necessary to see whether the delay has been satisfactorily explained on the basis of the said reason. PW-1 is the victim. She has stated that Sonakshi, the daughter of the appellants,

is her friend. She has stated that the name of Sonakshi's father is Sharad. She calls him Sharad Kaka. She has stated that Sharad Kaka removed her knickers. She has further stated that he put his hand in the place of her urine. She has stated that thereafter she told this incident to her mother. This is the only statement made by her in her examination-in-chief. She has not stated that the accused had inserted finger into her vagina. She has stated that the accused has put his hand in the place of her urine. Her statement was recorded under Section 164 of the Cr.PC. It is at Exh.40. The victim had narrated the incident before the learned Magistrate. The incident narrated by her while recording her statement is contrary to the one narrated by her mother before the police. She has stated that when she went to play at the house of Sonakshi, Sonakshi went to drink water from the fridge. She has stated that, at that time, the appellant took her towards the gas. The appellant put his hand in her knickers and inserted his finger into her vagina. She has stated that the appellant had repeatedly done such act with her. All these facts have not been stated by her in her evidence before the Court. She has also not stated that she was having pain. She has also not stated about further enquiry made by her mother with her. She has also not stated that her mother, on being apprised of the incident, checked her private part. In her cross-examination, she has stated

that she is not able to understand date, month, and year. In her cross-examination, she has admitted that when the police aunty recorded her statement, her relatives were present. She has stated that while going to the Court for recording her statement, her mother and police accompanied her. She has denied the suggestion that she was tutored, and therefore, she made the statement against the accused.

12] PW-2 is the informant. The oral report was lodged by her on 27th November, 2020, at 19:10 hrs. The incident allegedly occurred on 25th November, 2020, at 4:00 to 5:00 p.m. In her report, the informant has stated that since she was in a disturbed state of mind after hearing the incident from the victim and therefore, on that day, they did not go to the police for lodging the report. In her report, she has stated that after coming back to the house from work, the victim complained that she had stomach ache and was feeling pain while urinating. She has stated that on enquiry, the victim narrated the incident to her. The victim is silent in her evidence about any stomach pain or pain while urinating. PW-2 informant, in her substantive evidence before the Court, has stated that the victim told her that the appellant Sharad Kaka, had tried to put his finger in the place of her urine. In her substantive

evidence, she has not stated that the victim told her that the accused inserted his finger into her vagina. She has stated that the victim told her that she had pain at the place of her urine. She has stated that, on that day, she was not feeling well, and therefore, the report was not lodged. This statement is contradictory to the one made in the report. In the report, she has stated that, on account of the incident, she was in a disturbed state of mind and therefore, she did not go to the police station. This witness was subjected to the searching cross-examination.

13] Perusal of her cross-examination would show that the answers given by her have caused more than enough damage to the case of prosecution. It is evident, on perusal of her cross-examination, that the informant has not only made the case of the prosecution doubtful but also created a grave suspicion about the implication of the accused in this crime. It is stated by the informant that her daughter had complained of stomach pain and the pain at the place of urine. She has stated that she did not take the daughter to the doctor. She has stated that since the daughter did not tell her anything about the stomach ache or pain in the place of her urine, and therefore, she did not take her to the doctor. She has further admitted that her daughter did not tell anything to

her on that day and therefore, she did not go to the police station. She has admitted that Mahadevrao Khadse is her relative, and he knows about the police station and Court. She has stated that her husband gave the information about the incident to the police, and the police recorded the same. She has stated that her husband did not read over her report to her and took her signature on it. She has further admitted that the police did not make enquiry with her daughter. She has stated that there is a police Patil in her village. She has categorically admitted that there was discussion in her house about the report given by her husband. She has stated that the police did not record her statement on the day of lodging the report. She has candidly admitted that she and her daughter gave a statement consistent with the report given by her husband. She has also stated that, as per the say of her husband, she gave the evidence in Court. She has admitted that, as per the say of her relatives, she gave evidence in Court. She has categorically admitted that, on the date of the report in the police station, the police did not confront the accused with her daughter. She has stated that her entire deposition and her examination-in-chief is on the say of her husband.

14] It is to be noted that this witness has given multiple

admissions. The admissions given by her are the relevant facts. If the witness gives solitary admission here and there, then it cannot be read out of context. However, if the witness gives such vital admissions, which have bearing on the issue before Court, then the Court has to be very cautious and careful while appreciating the evidence. In my view, perusal of the cross-examination of the informant, the mother of the victim, is sufficient to create a grave suspicion about the occurrence of the incident. There is major inconsistency between the evidence of the victim and the evidence of the informant. It has to be presumed that, on the date of the report, the victim, though present with them, could not narrate the incident to the police, and therefore, it was narrated by her mother. The victim was referred to the doctor for medical examination. The doctor has stated that the history of assault was narrated by the victim. In my view, this further aggravates the problem of the prosecution. The evidence of PW-2 (informant) is sufficient to create a doubt about the occurrence of the incident. The substantive evidence of the victim before Court is very vague. The victim has not narrated all the facts, which have been narrated relating to the incident by the informant before the Court. In my view, in this background, the delay in lodging the report assumes significance in this case.

15] It is to be noted that the delay *per se* cannot be the ground to reject the case of prosecution. However, if there is a delay in lodging the report, then the delay must be satisfactorily explained. The reason or explanation for delay put forth on the scrutiny by the Court must be found to be sufficient. The prompt lodging of the report in such a case may not be expected in all cases. However, a long delay creates a doubt. The Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Om Prakash (2002) 5 SCC 745*** has dealt with this point in great detail. The Hon'ble Apex Court has observed that delay in lodging the first information report quite often results in embellishment which is a creature of an afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

16] In my view, in this case, the vital admissions given by the informant in her cross-examination create a doubt about the occurrence of the incident. The admissions given by the informant in her cross-examination would show that she did not lodge the report, but the report was lodged by her husband. The report was not read over to her, and her signature was obtained on the same

report by her husband. The husband of the informant has not been examined in this case. In my view, therefore, in this case, the delay is fatal to the case of prosecution.

17] The prosecution has relied upon the evidence of the Medical Officer (PW-5), who had examined the victim on 28th November, 2020. The doctor has deposed that the history of assault was narrated by the victim. The history of assault narrated by the victim and recorded by the doctor would show that the victim was comfortable in narrating the incident to the doctor. In my view, in this context, the delay in lodging the report assumes significance. From the date of the alleged incident, near about 48 hours had passed when the victim was examined by the doctor. By that time, the victim was sufficiently tutored by the parents. The doctor has stated that, on examination, he found the following injury:

A] Linear laceration on labia minora on right side near vulval orifice measuring 1 cm in length and pinkish red in colour.

18] The doctor, in his examination-in-chief, has stated that the injury to the victim could be possible due to fingering by the

accused. He has stated that his findings persuaded him to opine that the sexual violence on the victim could not be ruled out. The cross-examination of the doctor needs careful perusal. He has stated that the hymen of the victim was found intact. He has stated that, in his certificate Exh.36, the injury to labia majora is not mentioned. He has categorically admitted that, if there is any urinal infection or any infection to the private part and if the patient scratches the said part, then the injury stated in Exhs.35 and 36 could be possible. He has admitted that in Exhs.35 and 36, he has not given a candid opinion. The doctor has not stated the age of the injury. The victim has stated that she was having pain while urinating. If this statement of the victim is believed, then it would indicate that the fingering was deep. If there was a deep fingering, then the hymen could have torn. There could have been injury to labia majora as well.

19] The victim was examined on 28th November, 2020. Whereas, the alleged incident occurred on 25th November, 2020. The doctor did not mention the age of the injury. Similarly, the doctor has not stated that the pinkish red colour of the injury noticed by him was suggestive of the fact that the injury was caused

on 25th November, 2020. In my view, therefore, the evidence of the doctor is also not sufficient to lend an assurance to the testimony of the victim and her mother. The doctor has categorically admitted that, in case of infection and scratching of the private part, such injury is possible. I am of the view that the evidence of the doctor is not *per se* sufficient to conclude that the injury was caused due to insertion of finger.

20] It is to be noted that, in such a crime, the sympathy of the Court is bound to be with the victim of a crime. However, the conviction and sentence, in such a crime, cannot be based on a sympathetic and moral consideration. The evidence adduced on record must be sufficient to satisfy the occurrence of the incident and the involvement of the accused in the incident. The law provides a stringent punishment for an offence against the child. The minimum punishment provided for such a proved offence is 20 years. It is to be noted that, considering the stringent provisions, the prosecution has to prove the guilt of the accused beyond reasonable doubt. The provisions of Sections 29 and 30 of the POCSO Act have not diluted the fundamental principle of criminal jurisprudence. The burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution. The

prosecution must prove the guilt of the accused beyond reasonable doubt. The principle further postulates that, if there is any doubt or suspicion about the case of prosecution, then the benefit of the same deserves to be given to the accused.

21] In order to invoke the presumption under Section 29 of the POCSO Act, the prosecution, on the basis of the cogent, concrete, and trustworthy evidence, has to establish the foundational facts viz-a-viz the charge against the accused. The presumption is not absolute. Even by this presumption, the negative burden cannot be cast on the accused. The presumption is rebuttable. The accused can be called upon to rebut the presumption if the same presumption is triggered against him on proof of the foundational facts.

22] In this case, the prosecution has miserably failed to prove the guilt of the accused. The evidence of the victim and her mother is not sufficient to prove the charge against the accused. The evidence, on minute scrutiny and appreciation, is found to be shaky and doubtful. Their evidence is not credible and trustworthy. The accused has been sentenced to suffer 20 years rigorous

imprisonment on two counts. In my view, in the teeth of the evidence on record, it is not possible to sustain the conviction and sentence of the appellant. Accordingly, the appeal deserves to be allowed. Hence, the following order:

ORDER

- i] The Criminal Appeal is **allowed**.
- ii] The judgment and order of conviction and sentence of the appellant/accused dated 11.05.2022, passed by the learned Special Judge & Additional Sessions Judge-2, Amravati, in Special Case No.05/2021, for the offences punishable under Section 376-AB of the IPC and under Sections 4 and 6 of the POCSO Act, is quashed and set aside.
- iii] The appellant/accused – Sharad Mahadev Mankar is acquitted of the offences punishable under Sections 376-AB of the IPC and under Sections 4 and 6 of the POCSO Act.
- iv] The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.
- v] The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed for respondent

No.2, as per Rules.

vi] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

Vijay