



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

CRIMINAL APPEAL NO. 578 OF 2019

APPELLANT : Pramod Haribhau Zod, Age : 64
Years, Occupation : Agriculturist,
R/o. Sharma Layout, Kalamb, Taluka
& District Yavatmal.
(Presently in Amravati Central Jail)

//VERSUS//

RESPONDENT : The State of Maharashtra, through
PSO of Police Station Kalamb,
Yavatmal, District Yavatmal.

Mr. P.W. Mirza, Advocate for the Appellant.
Mr. Suraj Hulke, APP for the Respondent/State.

CORAM : G. A. SANAP, J.
DATED : 28th JUNE, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order dated 22.07.2019, passed by the learned Special Judge, Yavatmal, whereby the learned Judge, on conviction of the accused for the offences punishable under Section 376(2) of the Indian Penal Code, 1860 (for short, "IPC") and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short,

“POCSO Act”), sentenced the accused to suffer rigorous imprisonment for 15 years and to pay a fine of Rs.25,000/- and in default to suffer rigorous imprisonment for one year. Separate sentence was not awarded for the proved offence punishable under Section 6 of the POCSO Act.

02] BACKGROUND FACTS:

The FIR was registered on the basis of the report of PW-2, the mother of the victim, dated 31st January, 2015. The case of the prosecution, which can be culled out from the report, is that on 29th January, 2015, at about 4:00 p.m., the victim, aged about 5½ years old, went outside. The informant was at home. At that time, one Pratiksha, who has been examined as defence witness No.1, rushed to her and informed her that the accused had taken the victim into the cattle shed of Satish Zod and was doing something wrong with her. The informant went there, and on the way, she saw the victim in front of the cattle shed. Her slacks were loosened. On being questioned about it by the informant, the victim told her that the person by name Appa loosened it and inserted his finger in her vagina. The informant then brought the victim to the house. Her husband was not at the house. The husband returned in the

evening, and thereafter, she narrated the incident to him. In view of this serious incident, they deliberated with their relatives and ultimately, on 31st January, 2015, went to the Police Station, Kalamb and lodged the report against the accused. On the basis of this report, a Crime bearing No.13/2015 for the offences punishable under Section 376(2) of the IPC, under Section 6 of the POCSO Act, and under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, was registered.

03] The wheels of the investigation were put into motion on the basis of this report. PW-7 conducted the investigation. The victim was sent to the hospital for medical examination. PW-7 drew the spot panchanama. PW-7 seized the cloths of the victim and the accused. PW-7 recorded the statement of the victim and the statements of other witnesses. PW-7 collected the evidence with regard to the date of birth of the victim. On completion of the investigation, PW-7 filed the charge-sheet against the accused.

04] The learned Special Judge framed the charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. His defence is of false implication to save themselves

from prosecution on account of the theft of cotton committed by them from the field of the accused. The prosecution, in order to bring home the guilt against the accused, examined seven witnesses. The learned Special Judge, on consideration of the evidence, found the accused guilty of the charge and sentenced him as above. The accused has filed this appeal against the said conviction and sentence.

05] I have heard Mr. P.W. Mirza, learned advocate for the appellant/accused, and Mr. Suraj Hulke, learned APP for the State. Perused the record and proceedings.

06] Learned advocate for the accused submitted that the identity of the accused, being a person involved in the commission of crime, has not been fully established. Learned advocate submitted that the victim, till the date of the recording of the evidence, was silent about the identity of the accused by his name. Learned advocate pointed out that, admittedly, the accused was not seen on the spot by the mother of the victim when she went to the spot on receipt of the information from Pratiksha. Learned advocate submitted that the Test Identification Parade of the accused was not conducted. Learned advocate took me through the

evidence and pointed out that prior to this incident, the victim girl was not knowing the accused. Learned advocate submitted that there are major omissions, contradictions and inconsistencies in the evidence of the victim and her mother as to the actual occurrence of the incident. Learned advocate submitted that, on the date of the examination of the victim in Court, she was eight years old. Learned advocate submitted that, in view of the omissions, contradictions and inconsistencies in the evidence of the victim (PW-1) and her mother (PW-2), it would be difficult to place implicit reliance on such a child witness. Learned advocate submitted that PW-2, the mother of the victim, has admitted that the accused, his brother, and her two brothers had sat in the house of Sunita Madavi for settlement. It was suggested to this witness that this settlement talk took place three days prior to the lodging of the report. Learned advocate submitted that the defence of the accused is that the said meeting was in connection with the settlement of the dispute on account of the theft of cotton worth Rs.50,000/- from his field by the parents of the victim. Learned advocate submitted that this false report was lodged under the fear of reporting the matter of theft by the accused against the parents of the victim. Learned advocate submitted that this defence has not been properly appreciated. Learned advocate submitted that the

alleged act for which the accused has been convicted and sentenced, if appreciated in juxtaposition with this defence, would make this defence quite probable.

07] Learned advocate submitted that there was two days delay in lodging the report with the police. Learned advocate submitted that it is not the case of the prosecution that the accused had either threatened them or had a sufficient clout in the area to terrorize them from lodging the report. Learned advocate pointed out that the reason for the delay mention the report and the reason for the delay recorded in the FIR is self-contradictory. Learned advocate submitted that, on the date of the report, the accused was 52 years old. Learned advocate submitted that the alleged act of inserting finger in the vagina of the victim is highly improbable and, as such, cannot be believed. Learned advocate submitted that the handwritten report was given to the police. The name of the scribe of the report has not been stated. It is pointed out from the evidence of PW-2 that Vilas Sidam, the husband of her sister, was in the police department and instrumental in lodging the false report to save the informant and her husband from the clutches of the law on account of theft of cotton committed by them.

08] As far as the medical evidence is concerned, learned advocate submitted that the victim was examined after 56 hours from the date of occurrence of the incident. Learned advocate submitted that the allegation made in the report of the insertion of finger in the vagina of the victim was made after due deliberation, and therefore the possibility of inflecting those injuries by the informant and others cannot be ruled out just to falsely implicate the accused. Learned advocate submitted that, therefore, implicit reliance cannot be placed on the medical evidence to conclude that the accused was responsible for all injuries found at the time of the local examination of the victim. Learned advocate further submitted that the possibility of false implication has been probablised on the basis of the defence of the accused and certain admissions given by the witnesses in the cross-examination. Learned advocate submitted that the examination-in-chief of the victim with regard to the identification of the accused was deferred till the completion of the cross-examination of the victim by the advocate. Learned advocate submitted that the learned Special Judge had no power to defer the examination-in-chief on this point after completion of the cross-examination. In order to support his submissions, learned advocate has placed reliance on the following judgments:

1. *Navin Dhaniram Baraiye Vs. State of Maharashtra [(2018) 3 RECCRIR 606].*
2. *Badruddin Rukonddim Karpude & Others Vs. State of Maharashtra [1981 CRI. L. J. 729].*
3. *Dr. Sunil Kumar Sambhudayal Gupta & Others Vs. State of Maharashtra [2010 AIR SCW 7049].*
4. *Panchhi & Others Vs. State of U.P. [1998 CRI. L. J. 4044].*

09] As against this, learned APP submitted that the omissions, contradictions and inconsistencies sought to be relied upon are not major. Learned APP submitted that those omissions, contradictions and inconsistencies do not go to the very core or root of the case of the prosecution to make the evidence of the witnesses doubtful. Learned APP submitted that the procedure followed by the learned Special Judge to defer the examination-in-chief on the point of identification was permissible as per the provisions of Section 36 of the POCSO Act. Learned APP submitted that the learned Judge was duty-bound to ensure that the child was not exposed in any way to the accused at the time of recording of the evidence. Learned APP pointed out from the evidence that, before deferring the examination-in-chief on that point, the learned Judge has recorded a reason by making a note of the fact that the victim was weeping during the course of her

examination-in-chief. Learned APP pointed out that after deferring the examination-in-chief, the entire cross-examination was completed in one go, and after completion of the cross-examination, the chief examination was conducted to the extent of identification of the accused. Learned APP submitted that this procedure followed by the learned Judge was consistent with the mandate of the POCSO Act. Learned APP submitted that the delay has been properly explained. Learned APP submitted that in such a crime, delay is bound to occur because such a crime invites stigmatic consequences for the victim as well as for the family. Learned APP submitted that the medical evidence is cogent, consistent, and reliable. Learned APP submitted that, on the basis of cogent, consistent, and reliable evidence, the testimony of the victim and her mother has been fully corroborated. In the submission of learned APP, the medical evidence lends an assurance to the credibility of the case of prosecution and ultimately the testimony of the victim and her mother.

10] As far as the identity of the accused is concerned, learned APP submitted that the accused was not a stranger to the victim and her family. Learned APP submitted that though the victim has not stated that before this incident she was knowing the accused,

this fact can be confirmed from other evidence and more particularly the evidence of defence witness No.1 Pratiksha. Learned APP submitted that the learned Special Judge has minutely considered the evidence of the prosecution and has recorded cogent reasons for placing implicit reliance on the said evidence. Learned APP submitted that the evidence of the victim in Court of the identification of the accused is substantive evidence and therefore cannot be discarded.

11] Learned APP, relying upon Section 29 of the POCSO Act, submitted that the presumption provided under the said section would come into operation in this case. The learned Judge has observed that this case is a fit case to invoke the said presumption and there is no evidence or probable defence to prove or rebut the presumption.

12] At the outset, the application of Section 29 of the POCSO Act needs consideration. In this context, a useful reference can be made to a decision of the Co-ordinate Bench of this Court in *Navin Dhaniram Baraiye Vs. State of Maharashtra (supra)*. The legal position has been crystallized on the subject in this decision.

It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. The presumption would come into operation only when prosecution is first able to establish facts that would form foundation for presumption under Section 29 of the POCSO Act to operate. Otherwise, all that prosecution would be required to do is to file charge-sheet against the accused under the provisions of the said Act and then claim that evidence of the prosecution witnesses would have to be accepted as gospel truth and further that entire burden would be on the accused to prove the contrary. It is held that such proposition of law or interpretation of presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate constitutional mandate that no person shall be deprived of liberty except in accordance with the procedure established by law. If the evidence and charge-sheet is accepted as a gospel truth and the accused is asked to rebut it, in my opinion, it would be nothing short of casting a negative burden on the accused. The prosecution, before invoking Section 29 of the POCSO Act, is duty-bound to establish the foundational facts to invoke the presumption. In this case, therefore, it would be necessary to see whether the prosecution has adduced sufficient

evidence to establish the foundational facts. It is the cardinal principle of law that the burden to prove the charge is on the prosecution. The prosecution, without discharging its burden on the basis of cogent and concrete evidence, cannot call upon the Court to invoke the presumption under Section 29 of the POCSO Act and based on the same, convict the accused. If such an approach is adopted, then it would be against criminal jurisprudential principles. Section 29 of the POCSO Act is one of the safeguards, but it cannot be said that the presumption under Section 29 of the POCSO Act is an absolute presumption.

13] Keeping this legal position in mind, it would be necessary to appreciate the evidence and find out whether the prosecution, on the basis of the evidence, has proved the foundational facts, meaning thereby the charge against the accused. At the outset, I may deal with the point of delay in lodging the FIR raised by the learned advocate for the accused. Undisputedly, the incident occurred on 29th January, 2015 at 4:00 p.m. The report was lodged on 31st January, 2015, at 8:45 p.m. It is, therefore, undisputed that there are two days delay in lodging the report in such a serious crime. I am conscious of the fact that, in case of sexual assault, depending upon the facts and circumstances, delay

may occur. However, the delay must be properly explained. It is not out of place to mention that the delay in lodging the FIR 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. In case of delay in lodging the FIR in a serious crime, there must be plausible explanation. The delay must be properly explained to the satisfaction of the Court. The Court is required to scrutinize the reasons putforth for delay in lodging the report. On appreciation of the evidence in totality, the Court must be satisfied that the delay has been satisfactorily explained. In this case, it would be necessary to examine and appreciate the reasons for delay putforth by the informant. While appreciating the explanation putforth, the Court has to bear in mind the evidence of the witnesses and all the attending circumstances. Failure to explain the delay is fatal to the case of the prosecution.

14] A handwritten report was lodged by the informant. Exh.56 is the handwritten report given by the informant. The informant has stated that the report was not scribed by her. She has

not disclosed the name of the scribe. Similarly, the Police Officer has not disclosed the name of the scribe of the report. As per the defence of the accused, the informant and her relative, who was in the police department, lodged the false report to save the informant and her husband from the clutches of the law on account of the theft of cotton committed by them from the field of the accused. In this report, while explaining the delay, it was stated that they gave the information about the incident to their relatives, and after deliberation and discussion, she lodged the report against the accused. The FIR is at Exh.57. In column No.8 of the FIR, it is stated that due to mental stress, there was a delay in lodging the report. It is stated in her examination-in-chief that in the evening, when her husband came back from the field, she narrated the incident to him. She has stated that they were scared and weeping and were under mental stress due to the incident. She has stated that, therefore, on 31st January, 2015, the report was lodged. This statement made in the examination-in-chief is contradictory to the one made in the report as to the delay in lodging the report.

15] It needs to be stated at this stage that when the informant went to the spot, she did not find the accused on the spot. She was informed about the incident by Pratiksha, the

daughter of her husband's friend. It is not the case of the informant that the accused, with the help of money and muscle power, pressurized or threatened them not to lodge the report. No allegation has been attributed to the accused with regard to any threat or pressure for not lodging the report. In the ordinary circumstances, the delayed report is lodged on account of the threat extended by the accused to the victim or to family members of dire consequences. It is not also the case of the informant that the accused has a clout in the vicinity, and therefore they were apprehensive of any assault or attack on them. It needs to be stated at this stage that the accused, on the date of the incident, was 52 years old. His wife was doing service. The accused is from a respectable family.

16] As far as the reasons stated in the report are concerned, PW-2 is silent in her evidence about the discussion made with any particular relative before lodging the report. She was expected not only to mention the name of the relative but also the reason for having the discussion with particular relative. It is the defence of the accused that her relative Vilas Sidam is in the police department, and in order to save them from the offence of theft of cotton, this embellished afterthought report was lodged. It is not

out of place to mention that in our conservative society, there is always reluctance to bring in public such an incident. There are variety of factors behind it. The most important factor is the stigmatic consequences of reporting such a crime on the future of the girl. The parents are bound to see that the future of the girl is not jeopardized. Disclosure of such a crime in public can bring disrepute to the family. In my view, these facts are required to be born in mind while considering the point of delay in lodging the report.

17] Be that as it may, the Court must be satisfied that the delay in lodging the report was on account of certain reasons explained to the satisfaction of the Court. The delay in lodging the FIR is a most vital fact against the case of prosecution. In my view, it *prima facie* appears that the reasons stated for lodging the delayed report are self-contradictory. The same are not even supported by other materials. It has come on record in the evidence of PW-2 that, on the date of the incident, there was a holiday to the school, and therefore the victim did not go to the school. There is no evidence to show whether the victim had attended the school on 30th and 31st January, 2015. The Police Officer did not make an inquiry on this aspect. No witness has been examined. It has been

stated by PW-1 that, on account of the trauma suffered by them, they were scared and weeping and were under mental stress. PW-2 has admitted that on 30th January, 2015, her husband, as usual, had gone to his work. They are silent about the relatives who had visited their house during this period and with whom they deliberated upon before lodging the report. If the family was scared and weeping, then the conduct of the father attending his work is not consistent with the reason put forth for delay. In my view, therefore, in this case, the delay has not been properly explained. Similarly, the accused has not been blamed in any manner for the delayed lodging of the report.

18] Learned APP, relying upon a decision in the case of *Malkhansingh and Others Vs. State of M.P. [(2003) 5 SCC 746]*, tried to bring home her point that delay in this case has been fully explained and it has been strongly supported by the circumstantial evidence. In this case, the Hon'ble Apex Court has held that if the delay in lodging the FIR is fully explained and the explanation putforth is supported by other circumstantial evidence, then the delay does not affect the credibility of the FIR. The properly explained delay could not be said to be fatal to the case of prosecution. In this case, the Hon'ble Apex Court has observed

that, in the facts and circumstances, the delay was fully explained and, as such, mere delay in lodging the FIR would not be sufficient to discredit the prosecution case. In my view, the facts, circumstances and evidence, which have been considered hereinabove by me, are sufficient to conclude that the delay has not been properly explained. The explanation put forth is self-contradictory. It is unbelievable. Therefore, the decision relied upon by learned APP is not applicable to this case.

19] The next important point that needs to be addressed is with regard to the identification of the accused being the perpetrator of the crime. Admittedly, the test identification parade was not conducted. It has come on record that the victim did not name the accused while narrating the incident. He was referred as Appa by the victim. It is not the case of the prosecution that the accused was known to the victim prior to the date of the incident. Test identification parade was not conducted to establish the identity of the said Appa being the accused. The victim girl has stated in her evidence that she calls Appa to the person who is older than her father. She has stated that she calls 4 to 5 persons in her locality as Appa. At this stage, it is pertinent to mention that when the mother of the victim went to the spot of the incident, she

did not find the accused on the spot. The evidence of the mother of the victim on the point of the identification of the accused is not direct evidence. The evidence of the mother of the victim would, therefore, not be alone sufficient to establish with certainty the identity of the accused and, as such, his involvement in the commission of the crime. It has come on record that around the spot, there are residential houses. It has come on record in the evidence of PW-7 Investigating Officer that number of persons are residing around the cattle shed, which is the spot of the incident. He has stated that he did not record the statements of the mother-in-law of the informant and Subhash Uike and Nirmala Raut, who were residing near the spot. It has come on record in the evidence panch witness (PW-3) that around the cattle shed of Satish Zod, there are three constructed rooms, and in those three rooms, Nirmala Raut, Raju Raut, and Jyoti Raut are residing. He has stated that at the time of the panchnama, they were residing in those rooms. He has further stated that there are several houses around the said cattle shed. The Investigating Officer has not recorded the statements of the neighbours to establish the presence of the accused on the spot at the time of the incident. The victim, in her entire examination-in-chief, has not stated that the accused was known to her prior to the date of the incident. Her statement was

recorded by the learned Magistrate under Section 164 of the Cr.PC. The 164 statement is at Exh.51. In her 164 statement, she has referred the accused as Appa. She did not mention his name.

20] The incident had occurred on 29th January, 2015. Her statement was recorded on 4th February, 2015. The informant in her report at Exh.56 has stated that Appa touched the vagina of her daughter. She has further stated that Pramod Zod used to give chocolate to her daughter. Her report is silent about the verification of the identity of the accused before lodging the report. It has been stated in the report that Pratiksha came running to her house and told her that her daughter was taken to a cattle shed by Pramod Haribhau Zod. She has stated that she went there immediately and found that her daughter was coming out of the cattle shed with her loosened slacks. The evidence, therefore, shows that during the course of the investigation or enquiry, the Test Identification Parade was not conducted. The identity of the accused was not established through the victim girl. The accused and the informant are not the resident of the same village. The accused is the resident of village Ralegaon. The informant is the resident of village Shingnapur. The distance between Ralegaon and Shingnapur is near about 21 kms.

21] The report shows that, at the time of the recording of the evidence of the victim for the first time, an opportunity was offered to the victim to see the accused and identify him. Learned advocate raised an objection for the procedure followed by the learned Special Judge at the time of the evidence. It is evident that the learned Judge, for the reasons recorded by him, deferred the examination-in-chief to the extent of the identification part. That part of the examination was completed after the cross-examination of the victim by the learned advocate for the accused. Learned advocate submitted that this procedure followed by the learned Judge was not in accordance with the provisions of the Evidence Act where the order of examination of the witnesses has been provided. In my view, this submission cannot be accepted for more than one reason. The learned Judge has recorded sound reasons to defer this part of the examination-in-chief. It is true that under the Code of Criminal Procedure, there is no provision to defer the examination-in-chief. However, there is a provision under Section 231(2) of the Cr.PC to defer the cross-examination of the witness. The learned Judge has recorded that, considering the age of the victim and the fact that if she is asked to see the accused, then she may be scared and may not depose properly during the cross-examination. The learned Judge has recorded that during the

examination-in-chief, she was weeping. Recording all these facts, the prayer made by the learned Prosecutor was allowed. It needs to be stated that this prayer was not made by the learned Prosecutor with intent to tutor the victim as to the identity of the accused. The record reveals that the cross-examination of the victim was conducted in one session. After completion of the cross-examination, as per the direction of the learned Judge, further examination-in-chief was conducted to the extent of the identification of the accused. For the purpose of that identification, the curtain was removed, and then the victim saw the accused and identified him being the same Appa i.e. Pramod Zod, involved in the crime.

22] It needs to be stated that this exercise undertaken by the learned Judge could not be said to be against the provisions of law. It is evident that no prejudice was caused to the accused by following this procedure. It needs to be stated that the POCSO Act is a special Act. In this Act, Chapter IV deals with the procedure for recording the statement of the child. Chapter VIII provides for the establishment of special Courts and the powers of the special courts. Section 36 would be very relevant. Perusal of Section 36 would show that this procedure followed by the learned Judge was

by invoking Section 36. Section 36 reads thus:

“36. (1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.”

23] Perusal of this section would show that a duty has been cast on the Special Court to ensure that the child is not exposed in any way to the accused at the time of the recording of the evidence. In my view, the procedure followed by the learned Judge to defer the examination-in-chief on the point of identification of the accused was well within his power and in discharge of the obligation cast on him under Section 36 of the POCSO Act. In this context, it is necessary to refer the statement of objects and reasons of this Act. The Act has been enacted to protect children from offences of sexual assault, sexual harassment, and pornography and to provide for the establishment of Special Court for the trial of such offences and for matters connected therewith or incidental

thereto. The Act has been enacted keeping in mind the mandate of Article 15(3) of the Constitution of India, which empowers the State to make any special provisions for children. The Act has prescribed stringent punishment for the commission of offence of sexual assault on a child. The Act has provided appropriate mechanism at every stage of proceeding initiated on the report of the child or his parents for protection of the child. Section 36 has been enacted with an object to protect the child from the accused at the time of the evidence. The object of Section 36 is to ensure that the already traumatized child is not unnecessarily exposed to the accused at the time of the evidence. In this background, the deferment of examination-in-chief in this manner could not be said to be contrary to Section 136 of the Evidence Act; rather, it would be consistent with Section 136 of the Evidence Act. Such a deviation from Section 136 of the Evidence Act to the above extent would be fully permissible and justified by invoking the provisions of Section 36 of the POCSO Act. Section 136 of the Evidence Act is, to some extent, a procedural section. This procedural section has to be read and appreciated in conjunction with Section 36 of the POCSO Act, which provides a substantive right to the victim of sexual assault. Section 36, therefore, casts a duty on the Special Court to ensure that the child is not exposed in any manner to the

accused at the time of recording of the evidence. The right of the accused to hear the proceeding has also been ensured by Section 36. There is no grievance by the accused that his right to hear the proceeding was trampled. On perusal of Section 36 of the POCSO Act, it could not be said that the learned Judge has committed a procedural irregularity. Therefore, on this count, the submission of learned advocate for the accused cannot be accepted.

24] It is true that the accused has been identified by the victim before the Court, but in my view, the doubtful circumstances as to the actual identification of the accused during the course of the investigation create a doubt about the involvement of the accused. The accused was arrested after three days of the commission of the alleged crime. The injuries were not found on his person. The scientific evidence does not in any manner prove that he was involved in the commission of the crime. In my view, therefore, the identification of the accused by the victim at the time of the commission of the crime and during the course of the investigation is the most important circumstance. The prosecution has not been able to show any material as to the steps taken by the Investigating Officer during the course of the investigation to establish the identity of the accused through the

victim. In my view, this would go against the case of the prosecution.

25] The next important issue is with regard to the credibility of the evidence of the victim and the informant. The father of the victim has not been examined. Learned advocate took me through the evidence of the victim and the informant and pointed out number of omissions, discrepancies and inconsistencies in their evidence as to the incident. I may now refer those material omissions, discrepancies and inconsistencies in their evidence. It would be appropriate to reproduce paragraph 5 of the cross-examination of the victim. It reads thus:

“5. I had disclosed to police and magistrate that Appa took me to the cattle shed of Satish Zod. I had disclosed to police that Pratiksha came there and after looking everything went away. I had disclosed to police that Appa frightened and told me not to disclose the incident anybody including my parents and thereafter I told yes and he left the place. I had also disclosed to police that thereafter Pratiksha with my mother came there. I had disclosed to police that my mother saw me while I was wearing slack and shown the spot to her. I had disclosed to police that my mother disclosed the incident to my father. I had disclosed to police that Appa gave me chocolate. I had disclosed to the police that Appa ride me on his vehicle. (omission is in respect of vehicle). I

cannot assign any reason as to why those facts are not mentioned in my police statement. I had not stated before police that I and my parents were weeping for two days.”

26] The victim could not assign any reason as to why these facts were not recorded in her police statement as well as the statement under Section 164 recorded by the Magistrate. These omissions have been proved through the Investigating Officer. The Police Officer has categorically stated that all these facts had not been stated by the victim at the time of the recording of her statement. The victim is silent about all the facts stated in paragraph 5 of her evidence, when her statement was recorded by the Magistrate. The omissions are proved to be material omissions. The victim, for the first time before Court, has improved her version. Considering the age of the victim, she could not have made such an improvement without someone's assistance. In my view, the material omissions and inconsistencies in her evidence are sufficient to conclude that it was a net result of tutoring. The child witness is susceptible to tutoring. The child witness is bound to follow the elders. In case of a child witness, the Court must be satisfied that the evidence of such a witness is not the result of tutoring.

27] There are material omissions, discrepancies and inconsistencies in the evidence of PW-2. She has stated that while giving statement, she had disclosed to the police the date of birth of the victim and that, due to the incident, they were scared and weeping and were under mental stress. This fact was not recorded in her report as well as in her statement. She could not assign any reason as to why these facts were not recorded by the police in her statement. In paragraph 14 of the cross-examination, she has stated that while lodging the report, she had disclosed the date of birth of the victim, and on 29th January, 2015, due to a meeting in the victim's school, there was a holiday. She has stated that the victim had shown the spot of the incident to her. She has further stated that the victim used to call the accused as Appa. She has stated that, due to the incident, they were scared and weeping and were under mental stress. She has admitted that all these facts are not recorded in her statement. She could not assign any reason for the same. These are proved to be the omissions.

28] On appreciation of the evidence of PW-1 and PW-2, it appears that their conduct is unnatural. PW-1 has admitted in her evidence that for two days, she and her parents were weeping, and on the third day, she with her parents went to the police station.

The delay in lodging the report, if appreciated in the backdrop of the material omissions, discrepancies and inconsistencies in their evidence, creates a doubt about the case of the prosecution. The conduct appears to be unnatural. This unnatural conduct, coupled with the delay in lodging the report, can create doubt about the case of the prosecution.

29] PW-1 is a child witness. She was 5½ years old on the date of the incident. The child witness is susceptible to tutoring. The Court has to take great care while appreciating the evidence of the child witness. The overall perusal and appreciation of the evidence of this child witness should not leave a scope for tutoring. The Court has to ensure that the child is not used to settle the personal score or to wreck vengeance on account of some enmity or any other reason. In this context, it would be useful to refer to the decision of the Hon'ble Apex Court in *Panchhi & Others Vs. State of U.P. (supra)*. The Hon'ble Apex Court has observed that it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is

susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring. In my view, this legal position has to be borne in mind while appreciating the evidence of the victim. The evidence of the victim on the point of identity of the accused is doubtful. Similarly, her statement was recorded by the Magistrate under Section 164 of the Cr.P.C. Perusal of Section 164 Cr.PC statement would show that it was not an elaborate statement. When she came before the Court to depose, she improved her version. The facts, which she was supposed to tell before the learned Magistrate, were not stated, and the same have been stated for the first time before the Court. The conduct of the mother in the context of 164 Cr.PC statement of the victim appears to be unnatural.

30] At this stage, it would be appropriate, in the above backdrop, to make a useful reference to the decisions of the Hon'ble Apex Court in the cases of *Badruddin Rukonddim Karpude & Others Vs. State of Maharashtra (supra)* and *Dr. Sunil Kumar Sambhudayal Gupta & Others Vs. State of Maharashtra (supra)*. The Hon'ble Apex Court has held that, if the Court is satisfied that the witnesses have improved the prosecution story propounded by them at investigation stage in material particulars,

the Court may not place reliance on the testimony of such witnesses. It is held that the contradictions/omissions in depositions of the witnesses are always fatal to the case of the prosecution, except mere marginal variations in their statements. It is held that the omissions, which amount to contradictions in material particulars, go to the root of the case and materially affect the trial or core of the prosecution's case. The omissions and contradictions can render the testimony of the witness unreliable. In my view, the omissions and contradictions are material improvements, which have been made by the witnesses in their statements before the Court. The reason for delay in lodging the report has been improved before the Court. Therefore, in my view, the reason for the delay appears to be doubtful. The delay in lodging the report has not been fully explained to the satisfaction of the Court.

31] Before I proceed to appreciate the evidence of the Medical Officer, the defence of the accused needs proper appreciation. The accused has disclosed his defence of false implication at the time of the cross-examination of the witnesses as well as at the stage of recording of his 313 Cr.PC statement. He has stated that before 8-10 days of the registration of the crime, the

cotton in his field was stolen, and he came to know that it was stolen by the parents of the victim, and therefore he intended to lodge a report against them. He has further stated that he did not lodge the report as his brothers convinced him not to lodge the report. He has further stated that when the parents of the victim came to know that he might lodge a report against them, they falsely implicated him in this crime. It has come on record in the cross-examination of PW-2, who is the mother of the victim, that her relative Vilas Sidam is in the police department. She was questioned about the incident of theft of cotton from the field of the accused during her cross-examination. She has denied almost all suggestions. However, in that context, she has given one vital admission. She has admitted that the accused, his brother, and her two brothers had sat in the house of Sunita Madavi for discussion. In my view, this admission is sufficient to substantiate the defence of the accused. There was no reason for the accused and these people to go to the house of Sunita Madavi. There was no business transaction or any other transaction between the accused and the informant. The admission given by the informant in her cross-examination lends an assurance to the defence of the accused. Sunita Madavi has not been examined. The accused has suggested that the cotton worth Rs.50,000/- was stolen, and he had

demanded Rs.50,000/- from the parents of the victim and threatened to lodge a report if the amount was not paid. Vilas Sidam, as admitted by her, is her relative and is in the police department. In my view, the admission given by PW-2 as to the settlement meeting at the house of Sunita Madavi indicates that such an incident of theft had occurred, and to sort out that matter, the meeting was arranged. It is to be noted that the delay of two days in lodging the report would assume significance in the backdrop of this defence of the accused. The accused has probablised his defence. Therefore, in my view, in this case, the possibility of false implication cannot be ruled out. The evidence of the victim and her mother is full of omissions, discrepancies and inconsistencies. Implicit reliance cannot be placed on such a shaky and doubtful evidence.

32] The prosecution has relied upon the evidence of the Medical Officer as a corroborative piece of evidence. The victim was examined by PW-4 Dr. Archana Rathod on 31st January, 2015. On local examination, she found certain injuries on the private part of the victim. It is not the case of the prosecution that the accused committed sexual intercourse with the victim. It is the case of the prosecution that he inserted his finger in the vagina of the victim.

In my view, this is one more fact which would create doubt in the mind of the Court about the incident. If the accused had the intention to commit sexual intercourse with the victim, then he would not have simply inserted his finger in her vagina. In the facts and circumstances, if his intention was to commit sexual intercourse, then there was no hurdle as such in his way. If the accused had committed sexual intercourse with the victim, then there would have been some direct evidence to establish his complicity in the crime. The mother of the victim, on being informed about the act by the accused with the victim, did not examine her private part. The victim was not taken to the Medical Officer for treatment. If the injuries found by the doctor had been caused on the date of the incident, then, with certainty, the victim might have been undergoing severe pain. The parents would have taken her to the doctor. The mother did not examine her private part. She did not even tell before the Court that, on examination, she found some swelling or any other injury. The mother, after being informed about such an assault, in the ordinary circumstances, was bound to examine the private part of the girl carefully. It is not her case that the victim complained of pain for two days before the actual examination by the Medical Officer. If the injuries found by the doctor are considered in a proper

perspective, then it would show that the victim would have serious pain. In this fact situation, two days time taken by them for lodging the report, therefore, leaves a scope for doubt. Such injuries could be caused by inserting a finger. The accused did not commit sexual intercourse. If he had taken the victim to the cattle shed with the intention of committing sexual intercourse, then he would not have allowed the victim to leave. This is the most vital and important circumstance, which in my view is sufficient to create doubt as to the occurrence of the incident and the injuries to the victim on the date of the incident on account of the act of the accused. The possibility of manipulation or creating evidence of injury during these two days cannot be ruled out.

33] It is further pertinent to mention that the slacks of the girl was not seized by the police. No reason has been placed on record. Therefore, in my view, if all the evidence is appreciated cumulatively, it shows that the case of the prosecution is not beyond pale doubt. Whenever a doubt is created in the mind of the Court, then the benefit of the same has to be given to the accused. The accused, on the date of the incident, was 52 years old. His wife was doing service. He is from a respectable family. There was no allegation that the accused threatened or pressurized the victim or

the parents of the victim of dire consequences in case the report was lodged to the police. In my view, all these facts and circumstances clearly indicate that there is sufficient doubt about the case of the prosecution, and therefore the benefit of doubt deserves to be given to the accused. The learned Special Judge has failed to properly appreciate all these aspects. Therefore, I conclude that the prosecution has miserably failed to prove the charge against the accused. Hence, the following order:

ORDER

- i] The Criminal Appeal is **allowed**.
- ii] The judgment and order dated 22.07.2019, passed by the learned Special Judge, Yavatmal, in Special (Child) Case No.18/2015, convicting the appellant for the offences punishable under Section 376(2) of the Indian Penal Code, 1860, and under Section 6 of the Protection of Children from Sexual Offences Act, 2012, is set aside.
- iii] The appellant/accused – Pramod Haribhau Zod is acquitted of the offences punishable under Section 376(2) of the IPC and under Section 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 Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

Vijay