



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

CRIMINAL APPEAL NO. 782 OF 2022

APPELLANT : Vijay @ Bablya S/o. Ashok Ingale,
Aged about 30 Years, Occ: Labour,
R/o. Tamasi, Tq. Balapur & Dist.
Akola.

//VERSUS//

RESPONDENTS : 1. State of Maharashtra, through its
Police Station Officer, Police Station
Balapur, Tq. Balapur, Dist. Akola.

2. XYZ (Victim), through its P.S.
Balapur, Distt. : Akola in Crime
No.459/2018.

Mr. S.V. Sirpurkar, Advocate for the Appellant.
Mr. A.R. Chutke, APP for Respondent No.1/State.
Ms. Mitisha Kotecha, Advocate (appointed) for Respondent
No.2.

CORAM : G. A. SANAP, J.
DATED : 9th DECEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order
dated 14.09.2022, passed by the learned Additional Sessions
Judge/Special Judge (POCSO Act), Akola, whereby the learned

Judge convicted the appellant for the offences punishable under Sections 376(3) and 506 of the Indian Penal Code, 1860 (for short, “IPC”) and under Section 3 punishable under Section 4 and under Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), and sentenced him to suffer rigorous imprisonment for 20 years and to pay a fine of Rs.20,000/- and in default to suffer further simple imprisonment for 2 months for the offence punishable under Section 376(3) of the IPC and rigorous imprisonment for 2 years and to pay a fine of Rs.5,000/- and in default to suffer simple imprisonment for 15 days for the offence punishable under Section 506 of the IPC. No separate sentence has been awarded for the offences under Section 3 punishable under Section 4 and under Section 5(m) punishable under Section 6 of the POCSO Act.

02] Background Facts:

The informant (PW-1) is the mother of the victim, who at the time of the incident, was about 4 years old. The case of prosecution, which can be unfolded from the report and other materials, is that on the date of the incident, i.e., on 11th October,

2018, the informant, along with her husband and younger daughter, had gone for work in the morning. She returned back at about 4:00 p.m. The victim-girl came to her and started crying. The informant made the victim sleep. The victim woke up at about 6:00 to 6:30 p.m. and went for urination. At that time, the victim started crying. After urination, the informant made an enquiry with the victim. The victim told that she had sustained injury to her urinal place due to touching of the stick. The informant verified her urinal place and found that it was reddish with swelling. In the night on arrival of the father of the victim, the informant told him about the same. There was no doctor in the village, and therefore they decided to take the victim to the doctor at Balapur on the next day in the morning. The victim was crying whole night due to pain in her private part.

03] It is stated that, on the next day in the morning at about 11:00 a.m., the informant took the victim to the doctor, Smt. Pahurkar, at Balapur. The doctor examined the victim and her private part. On examination of the private part of the victim, the doctor told the informant that the injury to the private part of the victim was not due to touching of the stick. The doctor suspected that someone had committed an offensive act with the victim. The

doctor, Smt. Pahurkar, gave a chocolate to the victim and consoled her. The doctor, Smt. Pahurkar, after taking the victim in confidence, made an enquiry with her. The victim narrated the incident. The victim told the doctor that when her parents had gone to the field yesterday, Shaurya's Baba Bablaya took her in his house. He made her lie down, removed her knickers and lied on her body. Thereafter, she had a severe pain in her urinal place. The victim further told the doctor that the appellant threatened to kill her parents in case she disclosed the incident to anybody. The victim further informed the doctor that the appellant told her that in case an enquiry is made with her about the injury, she should tell her parents that while playing with Shaurya and other children, the children caused injury to her private part by piercing the stick. The doctor, Smt. Pahurkar, treated the victim. The informant called her husband to the hospital. The informant went to Balapur Police Station with the victim and lodged the report against the appellant.

04] On the basis of this report, a crime bearing No.459/2018 was registered against the appellant. The investigation in the crime was conducted by PW-6. PW-6 referred the victim for medical examination. He visited the spot and drew the spot panchanama.

The appellant was also referred for medical examination. PW-6 recorded the statements of the witnesses. On the request of PW-6, the statement of the victim was recorded before the Child Welfare Committee, Akola. PW-6 collected the birth certificate of the victim. On completion of the investigation, he filed the charge-sheet against the appellant in the Court.

05] The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of false implication. It is his contention that he was doing illicit liquor business. The father of the victim was also doing illicit liquor business. In order to remove him from competition, the false report was lodged against him. The victim had sustained injury to her private part while playing with her friends. The prosecution, in order to bring home the guilt of the appellant, examined 7 witnesses. The learned Judge, on consideration of the evidence, found it sufficient to prove the guilt of the appellant. The learned Judge accordingly sentenced the appellant as above. The appellant has challenged the said judgment and order by way of this appeal.

06] I have heard Mr. S.V. Sirpurkar, learned advocate for the appellant and Mr. A.R. Chutke, learned APP for respondent

No.1/State and Ms. Mitisha Kotecha, learned advocate appointed to represent respondent No.2/victim. Perused the record and proceedings.

07] Learned advocate for the appellant submitted that the case of penetrative sexual assault on the victim by the appellant is doubtful. The victim, in her statement at several places, has stated that Shaurya's Baba Bablaya was involved in the incident. The appellant is the uncle of Shaurya. The appellant is handicapped. His both the legs below knee have been amputated. It is submitted that this is a special feature of the appellant. The victim did not tell this special feature of the appellant while narrating the incident to her mother as well as before the Court. In order to rule out the possibility of the involvement of any person in the incident other than the appellant, it was necessary for the victim to tell the special feature and description of the appellant. It is submitted that, on account of this, the identity of the appellant being the perpetrator of the crime has not been established. Learned advocate submitted that the evidence of the informant and the evidence of the victim does not inspire confidence. There are major inconsistencies and discrepancies in their evidence. The informant and the victim have improved their statements before the Court. It is submitted that

their evidence is not reliable and credible. Their credibility has been shaken in their cross-examinations.

08] Learned advocate submitted that the evidence of the doctor, Smt. Pahurkar (PW-2), is not reliable. The doctor, Smt. Pahurkar, was introduced by the police in this case just to help the victim and support the case of prosecution. The statement of PW-2 was recorded after one month from the date of the incident. Learned advocate submitted that the theory that the accused had suggested her to narrate the false account of the incident to her parents, was introduced to falsely implicate the appellant. Learned advocate submitted that the evidence of the doctor, Smt. Pahurkar, and the evidence of the victim is not sufficient to establish the penetrative sexual assault on the victim. Learned advocate submitted that the injury found to the private part of the victim would be caused due to forceful touch of the stick to the private part. This fact has been accepted by the Medical Officer. It is submitted that the evidence is not sufficient to prove the penetration or partial penetration. Learned advocate in the alternative submitted that the offence made out on the basis of the evidence, at the most, would be an attempt to commit rape.

09] Learned APP submitted that the evidence of the informant and the victim is cogent, concrete and reliable. The defence of the appellant is not probable. The victim was threatened by the appellant, and therefore initially she did not disclose this incident to her mother. Learned APP submitted that when the doctor, Smt. Pahurkar (PW-2), examined the private part of the victim, she noticed that somebody had committed an offensive act with the victim. Learned APP submitted that, on the date of the incident, the victim was 4 years old, and therefore she was bound to take the threat given by the appellant to her seriously. Learned APP submitted that Dr. Pahurkar undisputedly had no relations with the informant or enmity with the appellant. Learned APP further submitted that the evidence of the victim has been corroborated by the evidence of the Medical Officer. In the submission of the learned APP, the injuries to the private part of the victim clearly prove the penetrative sexual assault on the victim by the appellant.

10] Learned advocate appointed to represent the victim has, by and large, adopted the submissions advanced by the learned APP. Besides, the learned advocate submitted that there was no delay in lodging the report. The evidence of the informant and the

victim is natural. Learned advocate submitted that the first-hand account of the incident placed on record by the victim cannot be discarded and disbelieved. Learned advocate submitted that the possibility of tutoring of the victim has been completely ruled out.

11] The victim was 4 years old on the date of the incident. The informant, the mother of the victim, has stated that the birth date of the victim is 27th July, 2014. The birth certificate of the victim is on record. Perusal of the cross-examination of the informant and other evidence would show that the appellant has not challenged the evidence adduced by the prosecution to prove the birth date of the victim. Learned advocate for the appellant, in all fairness, conceded that there is no challenge to this evidence. It is, therefore, crystal clear that the victim was 4 years old on the date of the incident and as such a child as defined under Section 2(1)(d) of the POCSO Act.

12] Learned advocate for the appellant has assailed the evidence of the prosecution witnesses and the findings of the learned Judge by making multiple submissions as recorded hereinabove. The appellant and the informant are the residents of the same village. They are residing in the same locality. The

children of the brother of the appellant are the friends of the victim. They play together. The appellant was well-acquainted with the victim. It is the defence of the appellant that he was a competitor of the father of the victim in the illicit liquor business, and therefore, to eliminate him from the competition and earn profit in the said business, he was falsely implicated in this case. In the backdrop of this defence, it would be necessary to see whether the evidence on record is sufficient to prove the incident of penetrative sexual assault on the victim by the appellant.

13] It needs to be stated that when the victim for the first time disclosed the incident to the doctor, Smt. Pahunkar (PW-2), in the presence of her mother, she did not state that either finger or penis was inserted in her vagina. The victim has stated that the appellant removed her knickers and lied on her person, and thereafter she had pain at her urinal place. In her evidence, the victim-girl has stated that the appellant had inserted his finger in her vagina. The informant, in her report, also did not state that the victim told her that the appellant had inserted his finger in her urinal place. It has come on record in the evidence of the informant that, after urination, the victim felt severe pain, and therefore she was crying. She has stated that when she enquired with the victim

about the reason, the victim told her that while playing with the children, Shaurya, the nephew of the appellant, had touched the stick to her private part, and therefore there was pain.

14] It is to be noted that, on the date of the incident, neither the victim disclosed the involvement of the appellant nor the informant had suspicion on the appellant. The informant, in her evidence, has stated that, throughout the night, the victim had a severe pain at her urinal place after urination. The victim was crying the whole night. The real incident came to the fore when the doctor, Smt. Pahurkar, on examination of the private part of the victim, suspected the foul play. It is, therefore, apparent that the incident, which was unfolded for the first time before the doctor, Smt. Pahurkar, by the victim, was not known to the mother of the victim. It has come on record in the evidence of the informant that when Dr. Pahurkar made a detailed enquiry with the victim, at that time, the victim narrated the incident. The informant has stated that the victim told her that the story of injury to her private part by touch of the stick was narrated by her as suggested by the appellant as the appellant had threatened to kill her parents in case she disclosed the incident to her parents. The informant was subjected to searching cross-examination.

15] Perusal of her cross-examination would show that no material has been elicited in her cross-examination to doubt her credibility. As far as the evidence of PW-1 is concerned, it is apparent that it is trustworthy and credible. The informant has not concocted any story. The informant even had not suspected such incident until the victim disclosed the actual incident occurred with her to the doctor. If the victim had not been taken to the doctor (PW-2) by the informant, then this incident would not have come to light. The victim, under the threat of the appellant, would not have even disclosed it to anybody. The evidence of the informant would further establish that the victim throughout the night was reeling under severe pain. She was crying. The informant has stated that in the night there was no doctor in their village, and therefore they decided to take her to the doctor at Balapur on the next day. The evidence of the informant is natural and consistent. She has not exaggerated the incident in any manner.

16] In this context, it would be necessary to consider the evidence of Dr. Vaishali Pahurkar (PW-2). In my opinion, the evidence of Dr. Pahurkar is a very important independent corroborative piece of evidence. Dr. Pahurkar is not related to the informant. Similarly, she has no enmity or grudge against the

appellant. Even the informant had also not expressed suspicion or doubt before Dr. Pahurkar, when she took the victim for medical examination. Dr. Pahurkar has stated that the victim had fever. She gave paracetamol tablet. She has stated that she suggested that if the fever does not subside, then she would give saline to the victim. She has stated that, in fact, she had started the saline to subside the fever. She has stated that when half of the saline was drained out, the victim wanted to go for urination. She, therefore, stopped the saline and sent her to the bathroom. She has stated that, at that time, the victim started crying. She has stated that, at that time, the mother of the victim disclosed that the girl was having pain at her urinal place. The doctor, consistent with her duty, stopped the saline and conducted the medical examination of the victim. She has stated that, on examination of the private part of the victim, she found that there were many bruises on her vaginal part. On enquiry about the injuries sustained by the victim with the mother, the mother said to the doctor that yesterday the victim told her that the kids had forcefully touched the sticks at her vagina while playing. The doctor told the mother that these were not the simple injuries, which could be caused by the stick. The doctor told that there was some offensive act with the victim. She has stated that she took the victim in confidence. She gave a chocolate to console

her. She has stated that thereafter the victim told her that when she was playing in the afternoon, “Shaurya’s Mothe Baba” namely Bablya took her inside the house and made her lie on the ground, and he himself lied on her body. She has further told the doctor that the appellant removed her knickers, and thereafter she felt severe pain at her urinal place. She has stated that, at that time, the girl was crying a lot. PW-2 Dr. Pahurkar has stated that the victim told them that the appellant had threatened her not to disclose this incident to anybody; otherwise, he would kill her parents. She has further stated that the victim had told her that the appellant instructed her to narrate the concocted story suggested by him to her parents. PW-2 Dr. Pahurkar has stated that thereafter she apprised the mother of the victim about the real state of affairs and told her to report the matter to the police. She has stated that thereafter she made a phone call to the father of the victim. The father of the victim came, and thereafter they went to the police station. This witness was subjected to searching cross-examination. Perusal of her cross-examination would show that some omissions have been proved. It is submitted that this witness (PW-2) has improved her version before the Court.

17] I have perused those improvements. I have also gone

through the evidence of PW-2 and her statement. It is evident that, as far as the main part of the incident, which was disclosed to the doctor by the victim, is concerned, the same has not been exaggerated or improved in any manner. The omissions, at the most, could be said to be the evidence by way of elaboration of connected facts. PW-2, a private medical practitioner, is an independent witness. If PW-2 had not examined the victim and noticed the serious injuries, this crime would have gone unearthed. It is crystal clear on perusal of her evidence that for the first time the victim disclosed the incident to the doctor (PW-2). The doctor (PW-2) has stated that she took the victim into confidence, and therefore she disclosed the incident to her. The evidence of PW-2, as far as the injuries to the private part of the victim is concerned, has been fortified by the evidence of the Medical Officer (PW-3). It is true that the statement of PW-2 was recorded after one month. On the basis of this delayed recording of the statement, a case is sought to be made out that this witness was introduced just to support the case of prosecution. In my view, this submission cannot be accepted. The report lodged by the informant is at Exh.24. It was lodged on 12th October, 2018. In this report, all these facts have been categorically stated. It is stated in the report that the victim was examined by Dr. Pahurkar. It is also seen on perusal of

this report at Exh.24 that the part of the incident stated in the report has been fully corroborated by the evidence of PW-2. In my view, therefore, I do not see any reason to discard and disbelieve the evidence of PW-2.

18] Before proceeding to appreciate the evidence of the victim, it would be necessary to consider the evidence of the Medical Officer (PW-3), who had examined the victim. PW-3 has stated that, on 12th October 2018, the victim was referred to him for medical examination by the Investigating Officer. He has stated that Dr. Srividya Tadru also examined the victim with him. He has stated that the history of assault was narrated by the mother of the victim. PW-3 has stated that, on examination, he found abrasion over right thigh medially upper part, size - 2 x 1 cm and abrasion on left thigh medially size 4 x 4 cm on upper part. PW-3 has deposed that, on examination of the private part of the victim, he noticed that the hymen was reddish and inflamed. He has stated that there was contused abrasion, red, tender and swelling over both labia majora of size 4 x 2 cm. He has also noticed another abrasion over right perineal area. It was red in colour. The Medical Officer, on the basis of his findings, opined that the victim was recently subjected to forceful penetrative sexual assault. The

Medical Officer was subjected to searching cross-examination. In the cross-examination, an attempt was made to demonstrate that such injuries could not be caused by insertion of penis. It is also pointed out that the ultrasound sonography was advised by PW-3. The sonography report is not on record. The doctor did not notice active bleeding at the time of the clinical examination. The doctor has stated that the vagina was not torn. The doctor has stated that the vagina was congested. The doctor has further stated in the cross-examination that there was abrasion, which would suggest the tearing but those were on the external part of vulva. The doctor has stated that the hymen was inflamed. In my opinion, the evidence of the Medical Officer is sufficient to conclude that the victim was subjected to penetrative sexual assault. The victim initially did not state that the finger was inserted by the appellant in her vagina. She has stated that when the appellant lied on her body, she felt a severe pain at her urinal place. The evidence of the Medical Officer clearly proves beyond doubt that the victim was subjected to penetrative sexual assault. It is not out of place to mention that even insertion of the finger in the vagina falls within the definition of 'rape' under Section 375 of the IPC as well as penetrative sexual assault under Section 3 of the POCSO Act. The doctor has categorically stated that the victim was recently subjected to

forcible penetrative sexual assault. The doctor has come to this conclusion on the basis of the injuries to the private part of the victim. It is to be noted that the doctor, in his evidence, has stated the size of the injuries to the labia majora. The hymen was inflamed. It was reddish in colour.

19] In this case, the injuries found are sufficient to establish the partial penetration. Explanation 1 to Section 375 of the IPC is very relevant in the context of the findings of the Medical Officer in this case. As per this explanation, for the purposes of Section 375 of the IPC, “vagina” shall also include labia majora. It, therefore, goes without saying that the penetration or partial penetration, touching the labia majora, would constitute the offence of rape. In this case, the hymen was inflamed. The doctor noticed that the hymen was reddish in colour. It, therefore, proves that the penetration was beyond labia majora. If the penetration was not beyond labia majora, then the doctor would not have noticed inflammation of the hymen and reddish colour at the hymen. The injury to the labia majora was of 4 x 2 cm. This injury indicates the penetration. The injuries found are sufficient to conclude that there was penetration or partial penetration.

20] In this context, it would be appropriate to consider the observations of the Hon'ble Supreme Court in the case of ***Aman Kumar and Another Vs. State of Haryana [(2004) 4 SCC 379]***. Paragraphs 7 and 8 of the decision are relevant to address this issue. It is extracted below:

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines IC&K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana (1979) 1 SCC 212. In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. 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 female 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.

8. *The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”*

21] The observations, as noted above, would show that penetration is the *sine qua non* to constitute the offence of rape. However, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. It is observed that even partial or slightest penetration in the labia majora or the vulva or pudendum with or without emission of semen is quite sufficient to constitute the offence as the labia majora is the first part of the genitals to be encountered by the male organ. It is observed that the depth of penetration is immaterial in an offence punishable under Section 376 of the IPC. In my view, the injuries noticed by the Medical Officer (PW-3) to the private part of the victim are sufficient to prove that there was penetration. It could be either by fingering or by insertion of the penis.

22] The Apex Court, in the case of ***Wahid Khan Vs. State of Madhya Pradesh [2010 (2) SCC 9]***, while examining the issue as to whether the rape is a legal conclusion or medical condition, has observed as follows:

20. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) at page 495 which reads thus :

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with

emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

23] In my opinion, while deciding the case on hand, the above observations would be very material and relevant. The observation clearly spells out that the rape is a crime and not a medical condition. Rape is a legal term and not the diagnosis to be made by the Medical Officer treating the victim. The only statement that can be made by the Medical Officer is to the effect, whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. In my view, this observation is very relevant and has to be applied to the case on hand.

24] In the above backdrop, it is necessary to consider the evidence of the victim. The victim, on the date of the incident, was

4 years of age. On the date of the recording of her evidence, she was 7 years of age. The victim, being a child witness, the Court is required to carefully scrutinize her evidence. The victim was found competent to understand the importance of the oath by the learned Judge. The evidence of the victim has been recorded on oath. The statement of the victim was recorded by the Child Welfare Committee during the course of the investigation. The record does not show that the statement of the victim was recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1973. Be that as it may, the fact remains that the victim before the Child Welfare Committee as well as before the Court, has placed on record the first-hand account of the incident and her horrible experience. The victim, in her evidence, has stated that the appellant had put his finger in her vagina. Her statement recorded before the Child Welfare Committee is at Exh.62. Before the Child Welfare Committee, she has stated that the appellant had inserted his finger in her vagina. The incident occurred on 11th October, 2018. Her statement before the Child Welfare Committee was recorded on 20th November, 2018. It is to be noted that the victim, on the date of the incident, was 4 years old. She was not well-versed with the names of the female or male sex organs. The victim did not disclose about fingering to Dr. Pahurkar. Similarly,

the case of fingering has not been stated in the report. It is seen that there are certain improvements in the evidence of the informant. Before the Magistrate, the informant has stated that, on the first date itself, the victim disclosed that Shaurya, the nephew of the appellant, had touched the stick to her vagina. In my view, the omissions and contradictions, which are brought on record, are not material. Those omissions and contradictions are not sufficient to brand the evidence of the informant, Dr. Pahurkar, and the victim as untrustworthy. The witnesses are not supposed to possess photogenic memory. The witnesses are bound to miss on certain aspects while giving evidence. The witnesses are also bound to narrate the same incident in a different way or manner. The way of narrating the incident may not be exactly identical to the one narrated at the stage of the investigation. It is further pertinent to mention that the elaboration of certain material facts stated by the witness at the stage of the investigation could not be said to be an improvement. The elaboration or the explanation of the relevant facts stated by the witnesses could not be dubbed as an improvement. It is to be noted that, if the evidence of the witness is such to change the complete story and tenor of the statement as well as the case of prosecution, then such a statement has to be looked upon with suspicion.

25] In this case, the victim, an innocent four-year-old girl, has narrated the incident occurred with her. She otherwise had no reason to implicate the appellant. Similarly, the victim for the first time disclosed the actual incident to Dr. Pahurkar on the next day. The doctor made an enquiry with the victim, when she felt a severe pain after urination. Dr. Pahurkar, after examining her private part, suspected the foul play. It is to be noted that the detailed examination of the victim by PW-3 has revealed that there were serious injuries to her private part. In this case, the learned Judge has thoroughly appreciated the evidence. The evidence, in my view, is sufficient to prove the incident.

26] It is submitted that the identity of the appellant has not been established beyond doubt. In my view, there is no force in this submission. The victim, while narrating the incident, has stated that the perpetrator of the crime was Shaurya's Baba Bablya. Bablya is the appellant. In my view, therefore, on this count, there is no substance in the submission. The appellant is handicapped. It is submitted that he could not have pulled the victim by holding her hands. The learned Judge in the judgment has observed that the appellant could move from one place to another easily. It has come on record that his both the legs have been amputated below knee.

His knees are intact. The doctor, who examined him, has reported that he is capable to perform the sexual intercourse.

27] In my opinion, the evidence on record, coupled with the attending circumstances, weighs in favour of the case of prosecution and against the appellant. The learned Judge has thoroughly considered the evidence. The findings recorded by the learned Judge are supported by cogent reasons. I do not see any reason to discard and disbelieve the evidence adduced by the prosecution. I do not see any reason to interfere with the well-reasoned judgment and order passed by the learned Judge. As such, I conclude that this appeal is devoid of merits. It deserves to be dismissed. Accordingly, it is **dismissed**.

28] Before parting with the matter, this Court appreciates the able assistance rendered by Ms. Mitisha Kotecha, learned advocate appointed to represent the victim.

29] The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed to represent the victim, as per Rules.

(G. A. SANAP, J.)