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

CRIMINAL APPEAL NO. 560 OF 2022

1. **Rahul Rajabhau Pistulkar (In Jail)**
Aged 22 yrs, Occ: Labour,

2. **Aditya @ Shubham Yevale (In Jail),**
Aged 21 years, Occu. Student:
Both R/o Housing Board Colony,
Ward No.9, Old Pulgaon;
Tah. Deoli, District: Wardha .... APPELLANTS

// V E R S U S //

1. **The State of Maharashtra,**
Through Police Station Officer,
Police Station Pulgaon, Tah. Deoli,
District: Wardha
2. **XYZ, Victim in Crime No.288/2019**
Police Station Pulgaon, Tah. Deoli,
District: Wardha ... RESPONDENTS

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Mr Atharva Manohar, Advocate for appellants.
Ms Swati Kolhe, APP for the respondent No.1/State.
Ms Mohini Sharma, Advocate (appointed) for respondent No.2

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CORAM : G. A. SANAP, J.
DATE : 13/09/2024

ORAL J U D G M E N T :

1. In this appeal, challenge is to the Judgment and order, dated 11.08.2022, passed by the learned Special Judge, Wardha, whereby the learned Judge convicted the appellants/

accused and sentenced them to suffer rigorous imprisonment for a period of 20 years and to pay a fine of Rs.10,000/- each, in default to suffer further rigorous imprisonment for six months for the offence under Section 3(b) punishable under Section 4(2) of the Protection of Children From Sexual Offences Act, 2012 (for short, "the POCSO Act") and also sentenced them to suffer rigorous imprisonment for 20 years and to pay a fine of Rs.10,000/- each, in default to suffer further rigorous imprisonment for six months for the offence under Section 5(m) punishable under Section 6 of the POCSO Act.

2. Background facts:

The informant is the mother of the victim boy. The victim boy on the date of the incident was 4 years old. The crime was registered on the report of the informant dated 27.04.2019. The case of the prosecution, which can be gathered from the report and other materials, is that on 22.04.2019, at about 7.00 p.m., the victim went to play in the garden, which is situated in front of his house. At that time Rahul Pistulkar,

appellant No.1, came to the garden and brought the victim back to his house. At the house of the victim, Rahul told the victim to put on his shoes. Thereafter, he took the victim with him on the pretext of purchasing *Bhingry* at the shop. At that time, the grandmother of the victim was sitting outside the house on Ota. The victim did not come for some time. So mother of the victim went to call him. The victim came back with her mother. He did not disclose any incident to her.

3. On 23.04.2019, in the morning, the victim went to the school. After coming back from school on that day, he did not go to play in the garden. On that day he was riding his bicycle in front of his house. It is stated that on 23.04.2019 at about 11.00 p.m., the victim narrated the incident to the informant. He told that these two Dadas took him behind the temple. They removed his knickers. They told him to bent down and thereafter they put stone in his anus. Thereafter, he cried and asked them as to how he would do the latrine. The victim narrated this incident by gesture. He was crying. He has

stated that thereafter those boys poured water in his anus and made him urinate. He then cried. Therefore, they gave chocolate to him. The husband of the informant was serving at Chandrapur and therefore, he was not at home. The informant narrated this incident to some of the boys of the locality. She did not lodge the report immediately.

4. It is the case of the prosecution that on 26.04.2019 the neighbour of the informant, by name Darshan Lakhe, took the victim with him in the garden and after taking him into confidence, made an inquiry with him about those boys who had inserted the stone in his anus. The victim pointed his finger towards Aditya @ Shubham Yewale and Prashant Uike. Darshan Lakhe and other boys of the locality caught those boys and beat them. The husband of the informant returned from Chandrapur on the next day. The informant, her husband and the victim went to the Police Station and lodged a report. On the basis of this report, crime bearing No.288/2019 was registered against the accused at Pulgaon Police Station, District

Wardha. One boy involved in the incident was juvenile in conflict with law. The investigation in the crime was conducted by Chandrakala Masare (PW-10). The victim was sent for medical examination to the hospital at Pulgaon. The victim was referred to the Civil Hospital at Wardha. The statements of the witnesses were recorded. The investigating officer drew the spot panchanama. The investigating officer seized the clothes of the accused after their arrest as well as the clothes of the victim. On completion of the investigation, the chargesheet was filed against the appellants.

5. Learned Special Judge framed the charge against the accused. The accused pleaded not guilty. Their defence is of total denial as well as false implication because the society people had grudge against them on the ground that they would ride motorcycle on the road and make loud noise. They were source of nuisance to the people of the locality and therefore, they were falsely implicated. The prosecution, in order to bring home guilt of the accused examined 10 witnesses. Appellant

No.2 has examined himself in support of the defence. Learned Judge on consideration of the evidence adduced by the prosecution, found the accused guilty of the charge and on conviction sentenced them as above. The appellants/accused have challenged the judgment and order by way of this appeal.

6. I have heard learned Advocate Shri Atharv Manohar for the appellants and learned APP Smt Swati Kolhe for the State and learned appointed Advocate Ms Mohini Sharma for the victim. Perused the record and proceedings.

7. Shri Atharv Manohar, the learned Advocate for the appellants submitted that the case of the prosecution is resting on a weak foundation. The evidence adduced by the prosecution is not sufficient to prove the charge against the accused beyond reasonable doubt. The identification of appellants/accused, being the perpetrators of the crime, has not been established. The test identification parade in the facts and circumstances of the case was required to be conducted but had

not been conducted. The identification of the appellants/accused by the witnesses, on perusal of their evidence *ex facie* reveals that it is not sufficient to lay the foundation for their identification and as such, to establish their involvement in the commission of crime. Learned advocate submitted that on this count there are major inconsistencies in the evidence of the material witnesses. Learned Advocate further submitted that there was inordinate delay in lodging the report. The incident allegedly occurred on 22.04.2019, but the report was lodged in the evening on 27.04.2019. The delay has not been properly explained. Learned Advocate submitted that the conduct of the informant having bearing with delay in lodging the report is highly improbable. In the submission of the learned Advocate the delay of 4 to 5 days in lodging the report is fatal to the case of prosecution. Learned Advocate submitted that the account of the incident has been exaggerated as well as embellished.

8. Learned Advocate submitted that the medical examination certificate of the victim produced on record is sufficient to doubt the veracity of the victim as well as other witnesses. At the time of examination of the victim, no injury to the anus was noticed. Similarly, there was no injury on the body of the victim. The size of the stone which was inserted in his anus was not stated by the victim. Learned Advocate submitted that there was no bleeding injury sustained by the victim on the date of the incident. The mother of the victim did not find any injury to the anus of the victim as well as the blood on the clothes of the victim. Learned Advocate submitted that the medical certificate and other attending circumstances are sufficient to conclude that the accused have been falsely implicated in this case.

9. Learned APP submitted that the victim on the date of the incident was hardly 4 years old. He had no quarrel or enmity with the appellants. The defence of the appellants is not probable. The mother of the victim had no reason to falsely

implicate them. Delay has been properly explained. Learned APP submitted that the husband of the victim was doing service at Chandrapur. The informant was residing at Pulgaon. The husband came back on 27.04.2019 and thereafter she apprised her husband about the incident and they went to the Police Station and lodged the report. The informant has stated the reasons for delay in the report. Learned APP submitted that failure of the investigating officer to conduct the test identification parade would not be fatal to the case of the prosecution. The identification of the accused by these witnesses in the Court is a substantive piece of evidence. The evidence of the identification of the accused in the test identification parade is not substantive evidence but a corroborative piece of evidence. Learned APP submitted that the victim and other witnesses have identified the appellants being the perpetrators of the crime. They have stated convincing reasons for identifying the appellants being perpetrators of the crime. Learned APP submitted that the victim boy was examined by a medical officer on 27.04.2019

and therefore, the possibility of the injuries getting healed cannot be ruled out. In short, it is submitted that the absence of injuries would not be the ground to discard and disbelieve otherwise cogent concrete and trustworthy evidence of the prosecution witnesses.

10. I have gone through the record and proceedings. Medical evidence does not corroborate the testimony of the victim as well as the testimony of other witnesses. It is the case of the prosecution that the appellants inserted the stone in the anus of the victim. The size of the stone has not been established. Normally the stone is uneven in shape. In case of forceful insertion of the stone in the anus, some injuries are bound to be caused. The stone cannot be smooth and pointed like a finger. If a finger is inserted in the anus, then the injury may not occur. The victim has stated that stone was stuck in his anus and he therefore questioned them as to how he would do the latrine. He has stated that thereafter the accused poured water in his anus. The victim is silent as to when, how and by

whom the stone was removed. It is not the case of the prosecution that the victim on his own removed the stone. It is also not the case of the prosecution that the appellants removed the stone. It evident on perusal of the record that the victim went to home after removal of the stone from the anus. If the stone is removed with the finger, then there would be possibility of causing serious injury. If the stone is forcefully inserted in the anus then while removing the same with the pressure, the person is bound to suffer injury to the anus. If the stone was inserted in the anus with force as stated, then the doctor at the time of examination would have noticed the injuries albeit old healed injuries. In this case, the appellants have admitted the medical certificate. Prosecution did not examine doctor. The medical certificate is at Exh.43. In my view, in this case, even after admission of the medical certificate by the accused, the prosecution ought to have examined the doctor. The doctor would have stated before the Court the method and the instruments used for carrying out the medical examination of the anus of the victim. It is evident on perusal

of Exh. 43 that the victim was referred for expert opinion to Civil Hospital, Wardha. It has come on record that the victim was admitted in the Civil Hospital at Wardha for two days. However, the prosecution has not produced the medical certificate issued by the doctor who had examined and treated the victim at Civil Hospital, Wardha. Medical Officer from Civil Hospital, Wardha was not examined. In my view, medical evidence does not corroborate the case of the prosecution.

11. On the contrary, the medical examination report at Exh.43. provided sufficient ammunition to the defence to assail the overall case of the prosecution and the credibility and trustworthiness of the witnesses examined by the prosecution. I am conscious of the fact that mere absence of the injury could not be the ground to discard and disbelieve otherwise cogent, concrete and reliable evidence adduced by the prosecution. It depends upon the facts of each case and more particularly, the manner of the commission of the offence. In this case, the stone was put in the anus of the victim. The victim did not complain

about pain when he went home. It is not the case of the informant that any time the victim complained of any pain to his anus. The victim informed the mother about the incident on the next day in the night. The victim, as can be seen from the evidence, was not disturbed or frightened in any manner. He even did not cry. He was absolutely normal. In my view, in this background, the medical examination report assumes importance.

12. As far as the test identification parade is concerned, it is now necessary to consider the legal position. Identification of the accused persons in the Court by the witnesses is a substantive piece of evidence. The purpose of conducting the identification parade at the time of the investigation is to establish with certainty, the identification of the culprits when the memory of the witness is fresh, about the incident, description of the accused etc. It is common knowledge that with the passage of time, the memory fades. With the passage of time, the capacity to recall the description of the accused by

the witness gets blurred. It is to be noted that when the accused is not known to the victim or witness, then the identification parade needs to be conducted to establish the identity of the accused. Learned Advocate on this point has placed heavy reliance on the decision of this Court in the case of ***Sanjay vs. State of Maharashtra, Through Police Station Officer reported at 2024 SCC OnLine Bom 2608.*** In this case this issue has been considered in great detail. Paragraph number 11 of this decision is relevant for addressing this question. It is extracted below:-

> *"11. In this case, the prosecution was duty bound to prove the identification of the accused being the perpetrator of the crime. Test Identification Parade was not conducted by the investigating officer. Investigating officer has categorically admitted that during the investigation, it was revealed to her that the accused was not known to the informant and PW-3 prior to the occurrence of the incident. Despite that the test identification parade was not conducted. Before proceeding to appreciate the*

*evidence of PW-3, who has identified the accused in the Court for the first time, it would be appropriate to consider the settled legal position. In this background, useful reference can be made to the law laid down by the Hon'ble Apex Court in the case of Malkhansingh v. State of Madhya Pradesh, (2003) 5 SCC 746. In this case, the Hon'ble Apex Court has held as follows: -*

*"The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the*

*identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. But failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The identification parades belong to the stage of investigation, and there is no provision in the CrPC which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. These parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."*

13. In the backdrop of the exposition of law as above, it is necessary to appreciate the evidence of the prosecution witnesses and find out whether the evidence is sufficient to establish the identification of the appellants, being the perpetrators of the crime. It is the case of the prosecution that the accused were residing in a slum, adjoining to the Housing Board Colony, Pulgaon, where the informant, the victim and other witnesses would reside. There is a garden by the side of the Housing Board Colony. The children from the colony as well as from the adjoining area would come to play in the garden. It is the case of the prosecution that the appellants also used to come to the garden for playing. It is not the case of the informant that prior to this incident the appellants had come to her house or she had an occasioned to see them. The victim has also not stated that prior to the incident he was knowing the appellants. It therefore, goes without saying that prior to this incident the appellants were not known to the informant and the victim. Perusal of the evidence of the informant PW-1 would show that prior to her evidence in the Court she had no

occasion or chance to see the appellants. She had seen the accused in the Court for the first time. In her evidence, she has stated that when the victim narrated the incident to her, she informed about the same to other people in the locality. The incident occurred on 22.04.2019. It is the case of the prosecution that on 26.04.2019 in the night the appellants were pointed out by the victim to Darshan Lakhe, who is PW-4. The informant has not stated that on that day she accompanied the victim and Darshan Lakhe. It is her case that when the victim pointed out two boys, the victim was brought back to home. The boys in the garden assaulted two to three suspects and took them to the Police Station. She has stated that she was also taken to the Police Station and the police made an inquiry with her. This statement is contrary to her report, which was lodged on 27.04.2019 in the night for the first time. It is also not her case that when she went to the Police Station, she had an occasion to see the appellants. In her report as well as in her evidence, she has nowhere stated that on 26.04.2019 or 27.04.2019 she had seen the appellants. PW-1 has stated that

she scolded the victim for accompanying the unknown persons at that time. On her inquiry, the victim told the name of the accused as Rahul. The victim at that time had identified the accused Rahul alone and not accused No.2. She has nowhere stated that she had seen this appellant No.1-Rahul earlier. Test identification parade was not conducted. As far as the evidence of the PW-1 is concerned, on the point of identification of the appellants, being the perpetrators of the crime, is hardly of any use.

14. This would take me to the evidence of PW-3 Yogesh Neware. He has stated that his friend Darshan Lakhe PW-4 had brought the victim to the garden. Darshan asked the victim to point out the bad manner boy out of three boys. The victim pointed a finger towards one boy as a bad manner boy. He has stated that they came to know about this incident one day prior. He has stated that thereafter they made an inquiry with the said boy. They came to know that his name is Prashant Uike. Prashant Uike is a juvenile in conflict with law.

He has stated that Prashant told the names of the remaining two boys who were involved in the crime as Rahul and Shubham. He has stated that they are residing in slum adjoining to the colony. He has nowhere stated in his evidence that the appellants were present on the spot at that time. He has nowhere stated that either the victim or Darshan Lakhe pointed out the appellants to him. He has stated that the juvenile in conflict with law by name Prashant Uike told the names of the appellants. It is evident that the involvement of the appellants is sought to be established on the basis of the statement of the co-accused. In my view, such evidence is not legally admissible.

15. Yogesh Neware (PW-3) has not stated that the victim pointed out the appellants to them at that time. He is also silent that at any time thereafter the appellants were shown to them by the victim or by Darshan Lakhe being the perpetrators of the crime. He has also not stated that he knew the appellants prior to the incident. His evidence on the point

of identification of the accused being the perpetrators of the crime is also doubtful.

16. This would now take me to the evidence of Darshan Lakhe and the victim. Darshan Lakhe has not stated that on 26.04.2019 they have caught the appellants or taken them to Police Station. He has nowhere stated that on that day they caught hold of the appellants. He has stated that the mother of the victim narrated the incident to him. He has stated that therefore, on 26.04.2019 he took the victim to the garden and asked him to point out those bad manner boys. He has stated that the victim pointed out his finger towards one boy, namely Prashant Uike (Juvenile in conflict with law). He has stated that he made an inquiry with Prashant Uike about the remaining two boys involved in the crime. He has stated that on that Prashant Uike disclosed their names as Rahul Pistulkar and Shubham Yeole. He has nowhere stated that in order to confirm their identity and involvement in the crime, he took the victim to them and established their identification.

He has also not stated that the appellants were shown to him by the police at any time during the course of the investigation. He has stated that after this he went back to the house of the informant and narrated to her about the accused. The evidence of the informant would show that on that day two to three boys were caught and assaulted. The informant has not stated the names of those boys. PW-4 has nowhere stated that he was knowing the appellants prior to this incident. Without making such a statement in his evidence, he has identified the appellants before the Court. He has not stated any reason or basis for identifying the appellants for the first time in the Court.

17. In this backdrop, it is necessary to consider the evidence of the victim boy. The victim boy in his evidence narrated the incident. In his evidence he has not stated the names of the appellants. His statement was recorded by the police. In his statement recorded by the police, he did not tell the names of the appellants. This fact would show that the

appellants prior to the incident were not known to the victim. The victim did not know their names. He has stated that he accompanied Darshan Mama to the garden. He has stated that he saw those bad manner boys in the garden. He has stated that he pointed out them to Darshan Mama and others. He has stated that they used to play with him regularly in the garden. So the victim states that he pointed out three bad manner boys to Darshan Mama and others. Whereas Darshan Lakhe (PW-4) and another witness Yogesh Neware (PW-3) have stated that the victim pointed out only one boy Prashant Uike (juvenile with conflict in law). The victim has stated that they used to play with him regularly. He has stated that out of three boys, two boys are present in the Court and therefore, he has identified them. It is to be noted that evidence of this child witness was not properly recorded by the learned Judge on the point of identification. If the victim was knowing these boys prior to the incident by their names, the learned Judge was expected to ask the victim about the names of those boys on being identified by him. The test identification parade was not

conducted. In my view, therefore, the evidence of the prosecution with regard to the identification of the appellants is doubtful. Their involvement, being the perpetrators of the crime, has not been fully established. The investigating officer was required to conduct the test identification parade. It has come on record that initially on 22.04.2019, Rahul, appellant No.1 had come to take the victim to the garden. Rahul was seen by the grandmother of the victim. The grandmother of the victim has not been examined. In my view, in this factual position, the investigating officer was required to take proper care. Learned Judge has also not properly appreciated this evidence. Mother of the victim i.e. PW-1, had not seen the appellants at all. She identified them for the first time in the Court. PW-3 and PW-4 have also not stated that the victim had pointed out the appellants to them being the perpetrators of the crime. PW-3 and PW-4 through the victim did not get confirmation about the involvement of the appellants on the basis of the statement made by the co-accused. The statement made by the co-accused is not legally admissible evidence. In

my view, this is the major flaw in the case of the prosecution.

18. It would be necessary to consider the case of the prosecution with regard to the explanation for delay in lodging the report. The incident as per the case of the prosecution occurred on 22.04.2019. The report was lodged on 27.04.2019 at 14.35 hours. It is stated in the report that on 27.04.2019, the husband of the informant came from Chandrapur and therefore, they went to the Police Station and lodged the report. In the report, it is nowhere stated as to why the report was not lodged till 27.04.2019 from 22.04.2019. Before proceeding to appreciate the evidence on record, it would be necessary to consider the consequences of delay in lodging the report. The Apex Court in the case of ***State of Rajasthan Vs. Om Prakash*** reported at (***2002) 5 SCC, 745*** has observed that the object of insisting upon prompt lodging of a report to the police in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part

played by them as well as the names of eye-witnesses present at the scene of occurrence. It is observed that the delay in lodging FIR quite often results in embellishment, which is a creature of an afterthought. It is further observed that 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. It is settled legal position that delay *per se* is not the ground to throw the case of the prosecution over board.

19. The Apex Court in the case of ***Parminder Kaur Alias P.P. Kaur Alias Soni Vs. State of Punjab reported at (2020) 8 SCC 811*** has observed that it is indisputable, that parents would not ordinarily endanger the reputation of their minor daughter, merely to falsely implicate their opponents. But, such cliches ought not to be the sole basis of dismissing reasonable doubts created and/or defence set out by the accused. As far as delay in lodging the First Information Report

is concerned, it is observed that in cases of sexual offences the Court has to appreciate the entire evidence very carefully. It is held that sweeping assumptions concerning delays in registration of First Information reports for sexual offences, send problematic signal to society and create opportunities for abuse by miscreants. It is held that the Court has to bear in mind the facts of each individual case and the behavior of parties involved, ought to be analyzed by courts, before reaching a conclusion on reason and effect of the delay in registration of the FIR.

20. It would now be necessary to appreciate the evidence on record. The informant was serving as Teacher. She was residing with her mother-in-law and children at Pulgaon, District Wardha. Her husband was serving at Chandrapur. Her husband would come to Pulgaon on the weekend. The incident occurred on 22.04.2019. The victim did not tell about the incident to the informant till night of 23.04.2019. The incident narrated by the victim to the informant would have

shocked the informant. The reaction to such an incident, of the informant, would be very relevant in such a situation. It is not her case that she informed about this incident to her mother-in-law. It is also not her case that she informed her husband about this incident till he returned on 27.04.2019. She has not stated any reason for not going to the police and lodging the report. One can understand that a wife in such a situation would wait for her husband to report the matter to the police. However, her conduct being well-educated woman is not consistent with the conduct of man of ordinary prudence placed in similar situation. In this context, it would be necessary to consider some of the answers given by her in cross-examination. She has stated that on 22.04.2019, 23.04.2019 and 24.04.2019 her husband made a phone call to her. The informant came to know about the incident in the night of 23.04.2019. The informant on her own did not make a phone call to her husband and apprised him about the incident. In the ordinary circumstances, she would have immediately informed her husband about this incident. Assuming for the sake of the

argument that for some reason or another she did not feel it necessary to make a call to her husband and inform him about the incident, she would not have lost the opportunity to inform her husband when she received a phone call from her husband. It is not her case that she informed her husband about the incident and her husband told her to wait till he comes back to Pulgaon. In my view, this is something unnatural and unbelievable. It is against the common course of events in an ordinary situation. The reason which has been stated in the report, in fact, is not a reason for explaining the delay. It is simply stated that on the arrival of her husband from Chandrapur to Pulgaon, they went to lodge the report. In my view, this could not be the reason to explain the delay in lodging the FIR. In this case, therefore, the delay in lodging the FIR in case of such a serious crime is fatal to the case of the prosecution. It is also not the case of the informant that till the arrival of her husband on 27.04.2019 she did not disclose this incident to anybody else. In fact, it has come on record that on 24.04.2019 itself she went to the garden and informed the

people of the locality about it. In my view, therefore, in this backdrop, the delay assumes great significance.

21. It would be necessary to consider the evidence of all the witnesses together to find out whether it inspires confidence or not? In the evidence of PW-1-Informant, there are major inconsistencies and omissions. It has been proved that she has improved her version before the Court. She did not narrate the incident to her mother-in-law. The victim had not sustained the bleeding injury. The informant also did not state that on examination of his anus, she found any injury or swelling to his anus. She has stated that on 26.04.2019 itself she had gone to the police station. The report was not lodged as her husband was not in town. She has also stated that 2-3 boys were caught by the people of the society and they were taken to the police station. A police officer is silent about this fact. If such a crime was reported to the police and the persons involved in the crime had been taken to the police station, then the police would not have allowed them to go away. The

accused were arrested in the night of 27.04.2019 when the report was lodged. This statement of the informant is doubtful. This statement has also not been corroborated by the evidence of independent witnesses PW-3 and PW-4. PW-3 and PW-4 were involved in identifying the miscreants. They have not stated that when the accused were pointed out to them by the victim, they took them to the police station. The informant has not stated that she narrated this incident to her mother-in-law. Similarly, she did not inform her husband about this incident. PW-3 has nowhere stated that they caught hold the accused and beat them. In his evidence, he has stated that on 26.04.2019 itself, he went to the house of the informant and narrated the incident to his father. The father was not admittedly at home. He came on 27.04.2019. He did not make any efforts to go and trace out the appellants/accused. He had not seen the appellants. They were not shown to him. In his cross-examination he has categorically stated that while recording his statement by the police he narrated the incident to the father of the victim prior to 27.04.2019. PW-4 has not stated that they

caught hold the accused and took them to the police station. In his cross-examination, he has stated that he narrated the incident to the father of the victim. He has categorically stated that he narrated the incident to the father of the victim on 26.04.2019 between 9.00 p.m. and 9.30 p.m. He has stated that he narrated the incident to the father of the victim on the phone. This is contrary to the evidence of PW-3. This evidence is not believable for the reason that if such an incident had been narrated to the father of the victim, then he would have at least contacted his wife and made the inquiry. Informant wife is silent about it. The informant has stated that on 27.04.2019, when her husband came back, she narrated the incident to him. It is not her case that her husband told her that he came to know about the incident through PW-3 or PW-4. The victim has not categorically stated the names of the appellants. The victim was 4 year old child at that time. He has narrated the incident before the Court after two years. He was not taken before the Judicial Magistrate for recording his statement under Section 164 of the Code of Criminal Procedure. The record

shows that his statement was recorded by the police and that too belatedly. Certain facts stated by him are contrary to the facts stated by his mother PW-1 and independent witnesses PW-3 and PW-4.

22. It is to be noted that while appreciating the evidence of a child witness, the Court has to take great care. The victim at the time of incident was hardly 4 years old. It is necessary to mention that the child witnesses are prone to tutoring and the pity incident could be blown out of proportion. The child witness is bound to follow the instructions of the elders. The child witness is amenable to tutoring. The child witness of four to six years old is bound to face age related difficulties to narrate an account of the incident. He is bound to commit errors. He may change the sequence of the events. However, the overall evidence is required to be scrutinized to come to the conclusion that the victim child was not tutored. The conduct of the victim is also not consistent. His behavior was absolutely normal on the date of the

occurrence of the incident. He went to the school. He did not complain about any pain. If the stone had been inserted in his anus as stated by him, then he was bound to feel the pain. The stone cannot be put into the anus without applying the force as stated above. The stone is always uneven in shape. The insertion of the stone in the anus is bound to cause the injury. In my view, therefore, the evidence of the victim also cannot be believed on the major point of identification of the accused. There are inconsistencies in the evidence. In the facts and circumstances, I conclude that the evidence is not sufficient to prove the guilt of the accused.

23. Learned Judge relying upon the provisions of Section 29 of the POCSO Act has observed that presumption would trigger against the appellants. It needs to be stated that presumption under Section 29 of the POCSO Act which has been invoked in this case by the learned Judge was not in accordance with law. As far as Section 29 of the POCSO Act is concerned, the presumption under Section 29 of the POCSO

Act is not an absolute presumption. It is a rebuttal presumption. The presumption gets triggered only when the foundational facts are established by the prosecution beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution and thereby support the very foundation of the case of the prosecution. In this case, the very foundation of the case of prosecution *vis-a-vis* the charge against the accused is shaken. Therefore, in my view, the presumption under Section 29 of the POCSO Act would not automatically get attracted to base the conviction of the accused.

24. In view of the above, I conclude that the prosecution has miserably failed to prove the guilt of the accused. The defence of the accused, in the facts and circumstances is probable. The defence of the accused deserves acceptance.

25. Ms Mohini Sharma, learned Advocate appointed to represent respondent No.2, in this appeal is entitled to receive the fee. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fee of the learned appointed Advocate as per rules.

26. The criminal appeal is allowed.

27. The judgment and order of conviction and sentence of the appellants/accused dated 11.08.2022 passed by the learned Special Judge, Wardha in Special Case No. 129 of 2019 is quashed and set aside.

28. The **appellants/accused- Rahul Rajabhau Pistulkar and Aditya @ Shubham Yevale** are acquitted of the offences under Section 3(b) punishable under Section 4(2) and Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

29. The appellants, who are in jail, shall be released forthwith, if not required in any other case.

30. The criminal appeal stands disposed of, accordingly.

(G. A. SANAP, J.)

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