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

CRIMINAL APPEAL NO. 510 OF 2022

APPELLANT : Anil Chhotelal Chhevle, Aged 35 Years, Occupation : Photographer, R/o. Khadan, Mirza Galli, Behind Sindhi Chawl, Nagpur.

//VERSUS//

RESPONDENTS :
1. The State of Maharashtra, through Police Station Officer, Tahsil Police Station, Nagpur.
2. XYZ (Victim), through its Police Station Officer, Tahsil Police Station, Nagpur, in Special Children Protection Case No.85/2017 in Crime No.33/2017.

Amendment carried out as per Court's Order dt. 06.09.2022

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Mr. U.P. Dable, Advocate for the Appellant.
Ms. R.V. Sharma, APP for Respondent No.1/State.
Mr. Abdul Subhan, Advocate (appointed) for Respondent No.2 is absent.

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CORAM : G. A. SANAP, J.
DATED : 18th SEPTEMBER, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order dated 19.05.2022, passed by the learned Extra Joint Additional

Sessions Judge, Nagpur, whereby the learned Judge convicted the accused for the offences under Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") and under Section 376(2)(i) of the Indian Penal Code, 1860 (for short, "IPC"), and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- and in default of fine to suffer rigorous imprisonment for six months on both the counts.

02] BACKGROUND FACTS:

The informant is the mother of the victim girl. The victim girl, on the date of the incident, was 5 years old. The report of the incident was lodged on 5th February, 2017. The prosecution case, which can be gathered from the report and other materials, is that, on the date of the incident, the victim was studying in KG-II. On 4th February, 2017, the victim came back from the school at about 1:45 p.m. After taking meals, she went out to play in the adjoining Mirza Galli. The informant went to her beauty parlour work. She came back at about 5:00 p.m. At that time, her two sisters-in-law were present at her house. One of them told her that at about 4:30 p.m., the victim came back from Mirza Galli while crying. It is further stated that the victim, after changing her cloths,

went to her tuition class. Her sisters-in-law told her to be careful about her daughter. The victim returned to home in the evening at 7:30 p.m. from the tuition. The informant saw the victim. She checked her private part. She found dried blood stains over her genitals. The informant asked the victim about it. The victim was frightened and told her that one uncle, residing in a house in the adjoining lane, took her inside his house on the pretext of giving a chocolate. The said uncle took her into a kitchen room. The said uncle showed some photographs to her. He removed her pant and inserted his finger in her genital area. She felt pain, and therefore, she cried. The accused gave chocolate to her and told her to come to his house in the next week for collecting big chocolate. The accused threatened her not to disclose this incident to her parents; otherwise, he would kill her. She returned home crying. The father of the victim was apprised of this incident by the mother of the victim.

03] It is further case of the prosecution that, on the next day in the morning, her husband called the accused in order to establish the identity of the person responsible for the incident. The victim was present there. The victim identified the accused being the same uncle who had committed the bad act with her.

After establishing the identity of the perpetrator of the crime, the informant, with her daughter and husband, went to the Tahsil Police Station, Nagpur, and reported the matter to the police. On the basis of the report of the informant, a Crime bearing No.33/2017 was registered against the accused at Tahsil Police Station, Nagpur.

04] PW-5 and PW-6 conducted the investigation. The victim was sent for medical examination. The Investigating Officer recorded the statements of the witnesses. The accused was arrested. The cloths of the accused and the victim were seized and forwarded for CA analysis. The statement of the victim as well as her mother were recorded by the learned Magistrate under Section 164 of the Cr.PC. On completion of the investigation, the charge-sheet was filed against the accused.

05] The learned Judge framed the charge against the accused. The accused pleaded not guilty. The defence of the accused is of false implication on account of the enmity between him and the father of the victim. The prosecution, in order to bring home the guilt of the accused, examined six witnesses. The learned Judge, on consideration of the evidence, found the said evidence

sufficient to prove the charge. The learned Judge convicted and sentenced the accused as above. The appellant, being aggrieved by the judgment and order, has come before this Court in appeal.

06] I have heard Mr. U.P. Dable, learned advocate for the appellant, and Ms. R.V. Sharma, learned APP for respondent No.1/ State. Perused the record and proceedings.

07] Learned advocate for the appellant submitted that, in this case, the father of the victim has not been examined. The father was the most important witness to establish the identity of the accused. Learned advocate submitted that the accused, prior to this incident, was not known to the victim. The Investigating Officer did not conduct the test identification parade. The evidence of the informant about the identification of the accused before lodging the report is also doubtful. Learned advocate submitted that the injury found by the doctor to the genitals of the victim by itself would not be sufficient to hold the accused guilty of the charge. Learned advocate submitted that there is no cogent, concrete, and reliable evidence to establish the involvement of the accused in this crime beyond reasonable doubt. Learned advocate submitted that the conduct of the informant and her husband was

not natural. If the accused had committed the crime, then he would not have easily attended the house of the informant. It is submitted that, in the ordinary circumstances, the father would have taken his daughter to the concerned house to establish the identification of the perpetrator of the crime. In the submission of the learned advocate, all these are doubtful circumstances. Learned advocate submitted that the learned Judge has not properly appreciated the evidence and has come to a wrong conclusion.

08] Learned APP submitted that the evidence of the victim is cogent, concrete, and reliable. The victim had no reason to falsely implicate the accused. The identification of the accused before lodging the report and at the time of her evidence is sufficient to establish the complicity of the accused in this crime. Learned APP submitted that the evidence of the informant about the identification of the accused by the victim in her presence cannot be discarded. Learned APP submitted that failure to examine the father would not be fatal to the case of prosecution. Learned APP pointed out that the evidence is sufficient to corroborate the oral testimony of the victim. Learned APP submitted that the learned Judge has properly appreciated the evidence on record and has come to a conclusion as to the guilt of the accused. In the

submission of the learned APP, the well-reasoned judgment and order passed by the learned Judge does not warrant interference.

09] I have minutely perused the evidence on record. I have gone through the documents and the judgment and order passed by the learned Judge. It is pertinent to mention that the father of the victim was the most important witness in this case. It is the case of prosecution that the informant narrated the incident to the father of the victim. When the incident was conveyed to the father of the victim, the identity of the perpetrator of the crime was not known. The parents of the victim were, therefore, on the mission of identifying the accused responsible for such a dirty act with their daughter. It is not the case of the informant that either she or her husband carried the victim to the place where she was subjected to the sexual assault. In ordinary circumstances, the informant and her husband would have taken the victim in confidence, and after taking the victim in confidence, they would have taken the victim to the place, and through the victim, they would have ascertained the house or place where she was subjected to the assault. It has come on record that the accused is residing in the same locality where the informant is residing. The evidence of the informant would show that they knew him being residing in the vicinity. The

house of the accused is not far away from the house of the informant. The victim, except the name of the accused, had narrated the other part of the incident. She had narrated the locality where she was subjected to this act. Therefore, the parents of the victim were expected to take the victim in confidence and take her to the nearby area and ask her to point out the house where she was subjected to sexual intercourse. It is the case of the prosecution that, on the next day, the father of the victim had called the accused to his house and made an enquiry with him about this incident. In my view, this part of the statement *prima facie* appears to be unbelievable. There was no reason for them to call the appellant alone to their house for enquiry. Besides, if the appellant was involved in such an act, he would not have readily agreed to come to the house of the informant. In my view, these are the doubtful circumstances.

10] It is seen on perusal of the evidence of the Medical Officer that, on examination of the victim, she found small abrasion over labia minora of around 0.1 cm. It was red in colour. She found that the surrounding area was of pink colour. The hymen was intact. The age of the injury was within 12 to 24 hours. She has stated that the site of injury was painful during

examination. On the basis of the injury to the genitals, she has opined that the possibility of penetrative sexual assault could not be ruled out. However, she reserved her final opinion till FSL report. The evidence of the Medical Officer corroborates the evidence of the informant and the victim that, at the time of her medical examination, there was injury to her genital. The question is whether this evidence alone is sufficient to establish the complicity of the accused in the commission of the crime. The medical evidence is the evidence of the expert. At the most, the said evidence would be sufficient to come to a conclusion as to the presence or absence of injury to the genitals. But, the said evidence by itself would not be sufficient to establish the complicity of the accused. The doctor has stated that the history of assault was narrated by the mother of the victim. The name of the accused was also stated by the mother of the victim.

11] In the above backdrop, certain facts having bearing with the case of the prosecution need careful consideration. PW-1 is the mother of the victim. The crime was registered on her report. In her examination-in-chief, she has narrated the incident occurred with her daughter. She has stated that the victim had not stated the name of the perpetrator of the crime. She has stated that, on the

next day, the accused was called by her husband to make an enquiry about the incident. The victim was present there, and she identified the accused being the perpetrator of the crime. In her examination-in-chief, she has not categorically stated that, when her husband made enquiry with the accused and at that time he was identified by the victim, she was present in the house. Her evidence is not sufficient to conclude that, when this episode of the identification of the accused occurred in her house, she was present in the house. She has stated in her report about this fact. Her report is also not self-explanatory about this fact. It was stated in the report that, during the course of enquiry with the victim, the names of some of the boys from the locality were told to her, but she did not confirm those persons being the perpetrators in the crime. She has stated that on 5th February, 2017, the accused was called by her husband, and at that time, he was identified by the victim being the perpetrator of the crime. The statement of the informant under Section 164 of the Cr.PC was recorded by the learned Magistrate. It is at Exh.27. This statement was recorded on 17th February, 2017. Perusal of this statement would show that the informant is conspicuously silent about the name of the accused as well as the identification of the accused. In her statement recorded by the learned Magistrate, she has nowhere stated that the accused

was called by her husband in the morning of 5th April, 2017 for the purpose of enquiry about the incident, and at that time, the victim had identified him being the perpetrator of the crime. The statement of the victim was also recorded by the learned Magistrate under Section 164 of the Cr.PC on 17th February, 2017. In her statement, the victim narrated the occurrence of the incident. However, the victim is silent about the identification of the accused in the morning of 5th February, 2017. In my view, this is a very important fact, which has been omitted by them while narrating the incident before the learned Magistrate.

12] The victim, on the date of the incident, was 5 years old. In her evidence before the Court, she has narrated the incident of sexual assault on her in great detail. She has stated that, after inserting the finger in her private part, she felt pain, and therefore, she cried. She has stated that, on the date of the incident, she was knowing the accused and his name. She has stated that, on the next day, her father called the accused to her house, and at that time she identified him being the perpetrator of the crime. She has stated that thereafter her parents took her to the police station for lodging the report. In her cross-examination, she has categorically admitted that, prior to this incident, she was not knowing to the accused.

She has stated that she has identified the accused before the Court because he was shown to her.

13] In my view, the evidence of the informant and the evidence of the victim is not sufficient to address all the doubtful circumstances appearing on record in this case. The father of the victim, in the facts and circumstances of the case, would have been the proper witness to depose about the identification of the accused. The evidence of the mother is not clear on this point. It is not possible to rely on the evidence of the victim on the point of the identification of the accused. Perusal of the record would show that the Investigating Officer, during the course of the investigation, did not even record the statement of the father of the victim. No plausible explanation has been placed on record for the non-examination of such an important witness in this case. It is true that the initial incident was narrated by the victim to her mother. The mother of the victim apprised the father of the victim about the incident occurred with the victim. The most important part in this episode was the identification of the accused. The mother has not played any role in establishing the identification of the perpetrator of the crime. It was the father who had made the enquiry with the neighbours. It was the father who had called the

accused to his house and made the enquiry with him, and at that time, the victim girl identified him. The evidence of the father would have been the best evidence in this case. The test identification parade was not conducted. It is not out of place to mention that the child witness is prone to tutoring. The child witness is bound to narrate the account of the incident as tutored by the elders. In such a case, to rule out the possibility of false implication and tutoring, the Investigating Officer was expected to subject the accused to test identification parade. Such evidence of identification would not have left any scope for speculation or doubt. The evidence adduced by the prosecution and the attending circumstances, which I have highlighted hereinabove, are sufficient to conclude that the identification of the accused being the perpetrator of the crime has not been established beyond reasonable doubt. I have already observed that if the accused was involved in the incident of sexual assault on the victim, then he would not have easily come to the house of the informant. The conduct of the accused would also weigh in his favour. In the facts and circumstances, I am of the view that the material on record is not sufficient to prove the guilt of the accused beyond reasonable doubt.

14] As far as the age of the victim is concerned, the accused has not seriously disputed the same. The victim, as per her mother (PW-1), was born on 16th August, 2011. The victim has deposed before the Court that, at the relevant time, she was studying in KG-II and her birth date is 16th August, 2011. The Investigating Officer, during the investigation, collected the birth certificate of the victim from the Health Department of Nagpur Municipal Corporation. The certified copy of the birth certificate is at Exh.22. The accused has not challenged this document. This documentary evidence, coupled with the evidence of the mother of the victim and the evidence of the victim, is sufficient to prove that, on the date of the incident, the victim was 6 years old and, as such, a child as defined under Section 2(1)(d) of the POCSO Act.

15] The learned Judge, while seeking support to his findings, has observed that the presumption under Section 29 of the POCSO Act would get triggered in this case. In my view, the very edifice of the above finding would collapse, the moment a conclusion is arrived at that the evidence on record is not sufficient to prove the guilt of the accused beyond reasonable doubt. The presumption under Section 29 of the POCSO Act is not an absolute presumption. It is a rebuttable 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 the prosecution viz-a-viz the charge against the accused has been shaken. In my view, therefore, the presumption under Section 29 of the POCSO Act would not trigger automatically.

16] In view of this, I conclude that the evidence is not sufficient to prove the guilt beyond reasonable doubt. The appeal deserves to be allowed. Hence, the following order:

ORDER

i] The Criminal Appeal is **allowed**.

ii] The judgment and order of conviction and sentence passed against the appellant by the learned Extra Joint Additional Sessions Judge, Nagpur, dated 19.05.2022, in Special Child Protection Case No.85/2017, is quashed and set aside.

iii] The appellant/accused – **Anil Chhotelal Chhevle** is acquitted of the offences under Section 5(m) punishable under

Section 6 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2)(i) of the Indian Penal Code, 1860.

iv] The appellant/accused - **Anil Chhotelal Chhevle** 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