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

CRIMINAL APPEAL NO. 181 OF 2019

APPELLANT : Bhaiyya S/o Vijay Chakre,
Aged about 50 years,
R/o Takarkheda, Tq. Chandur Bazar,
Dist. Amravati.

VERSUS

RESPONDENTS : 1] State of Maharashtra,
through the Police Station Officer,
Police Station, Asegaon, Tq. Achalpur,
Dist. Amravati.

2] X Y Z (Victim in Crime No. 5/2017)
Police Station Officer, Police Station,
Asegaon, Tq. Achalpur, Dist. Amravati.

Mr. R. M. Daga, Advocate with Mr. P. R. Agrawal, Advocate for the appellant.
Mrs. M. R. Kavimandan, A. P. P. for respondent no.1/State.
Ms. Mohini Sharma, Advocate appointed for Resp.no.2/victim is absent.

CORAM : G. A. SANAP, J.
DATED : JULY 23, 2024.

ORAL JUDGMENT

1. In this appeal, challenge is to the judgment and order dated 22.01.2019, passed by learned Additional Sessions Judge-1 and Special Judge, Achalpur, whereby the appellant/accused has held the accused guilty for the

offence punishable under Section 376(2)(f)(l) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act" for short) and sentenced to suffer rigorous imprisonment for 14 years and to pay fine of Rs.30,000/- and in default of payment of fine to undergo rigorous imprisonment for one year for the offence under Section 376(2)(f)(l) of the IPC. Learned Judge has not awarded separate sentence for the proved offence under Section 6 of the POCSO Act.

2. BACKGROUND FACTS :-

The wheels of investigation were put into motion on the report dated 09.01.2017, lodged by PW1, who is the mother of the victim girl (PW3). The case of the prosecution, which can be discerned from the report and charge-sheet, is that the appellant at the relevant time was a Teacher at residential Deaf and Dumb School, Asegaon-Purna. The acquitted accused no.2 was the Head Mistress of the said school. PW3 (hereinafter referred to as 'the victim') is a minor, partially mentally retarded deaf and dumb girl of around 12 years of age. The victim was studying in the said school at Asegaon-Purna. The appellant and the victim are residents of village Takarkheda, Tah. Achalpur, Dist. Amravati. It is the case of the prosecution that the victim girl would accompany the accused everyday to the school on his motorcycle. The

accused would take the victim from his house to the school and drop her back at her house. The incident occurred on 05.01.2017. According to the prosecution, on 05.01.2017, as usual, the victim went to the house of the accused to go to the school. The accused was alone at his house. He was taking meal. The accused called the victim inside his house. The accused asked the victim to lie down on *'diwan'* (cot). It is stated that thereafter, the accused committed sexual intercourse with her on three occasions. He inserted his private part in her mouth. After this act, the accused washed the private part and face of the victim and cleaned it with towel. The accused cleaned his private part as well. The accused carried the victim on motorcycle to the school. The victim and the accused returned home from the school at 5.00 p.m.

3. On 05.01.2017, the victim did not disclose the incident to anybody. It is further the case of the prosecution that on the next day morning when the mother (PW1) prepared the victim for school, she was reluctant to go to the school. The mother of the victim, therefore, took the victim along with her to the field. In the afternoon, the victim narrated the entire incident to her mother. In the evening, after returning home, the informant (PW1) disclosed the incident to her husband. On the next day, the husband of the informant went to the accused and questioned him about his act. The accused denied the

allegations. On 09.01.2017, the mother of the victim went to Asegaon police station and reported the matter to the police. On the basis of the report (Exh.35), a crime bearing No. 05/2017 was registered against the appellant and the Head Mistress of the school.

4. PW8 is the Investigating Officer. PW8 forwarded the victim to the Civil Hospital, Amravati for medical examination. The victim was medically examined. The Investigating Officer drew the spot panchanama (Exh.137). PW8 seized the clothes of the victim as well as the clothes of the accused. She seized the bedsheet and towel, which was used by the accused to clean the face and private part of the victim. The samples were collected and forwarded to the Chemical Analyser for analysis. The Investigating Officer collected the documentary evidence with regard to the birth date of the victim. On completion of the investigation, charge-sheet was filed against the accused.

5. Learned Special Judge framed Charge (Exh.26) against the accused. The accused pleaded not guilty. It is the defence of the accused that the brother-in-law of the informant is a member of a prominent political party. The local MLA of the said party had an unaided Deaf and Dumb school at Asegaon. The local MLA wanted to close the school in which accused was working and therefore, the informant was instigated to lodge report against the

accused. The prosecution, in order to prove the charge against the accused, has examined nine witnesses. Learned Special Judge, on consideration of the evidence, held the accused guilty and sentenced him as above. Learned Judge acquitted accused no.2 of all the charges. The appellant/accused is before this Court against this judgment and order of conviction and sentence.

6. I have heard Mr. R. M. Daga with Mr. P.R. Agrawal, learned advocates for the appellant and Mrs. M. R. Kavimandan, learned Additional Public Prosecutor for the respondent-State. None appears for respondent no.2/victim. Perused the record and proceedings.

7. Learned advocate Mr. Daga for the appellant made the following submissions :

The evidence of prosecution is not sufficient to prove the Charge against the accused beyond reasonable doubt. There are major omissions and inconsistencies in the evidence of the informant and the victim about occurrence of the incident and involvement of the accused. The evidence of the victim is not trustworthy because the admissions given by her clearly prove that she was tutored by the informant (PW1) and the interpreter (PW2). Evidence of the Medical Officer (PW9), who examined the victim after four days, cannot be used as a corroborative piece of evidence. There was

inordinate delay in lodging the report. The delay in lodging report is nothing but the result of embellishment. The delay has not been properly explained. The reasons stated in the report for delay are improbable. It is not the case of the prosecution that the accused threatened either the victim or her parents of dire consequences in case the matter was reported to the police or anybody. The reasons stated for delayed lodging of report are nothing but the cause put forth out of sheer imagination to cover up the delay. It is pointed out that as per the DNA report (Exh.170), the semen detected on the knickers of the victim and the blood detected on the bedsheet, did not match with the accused. The DNA report, in the submission of the learned advocate, is sufficient to conclude that the accused has been made a scapegoat in this case after due deliberation. Learned advocate took me through the record and pointed out that near about 50 villagers on 09.01.2017 itself had given a memorandum to Asegaon police station contending that the accused is innocent and he is being falsely implicated. Learned advocate drew my attention to the relevant part of the evidence of the Investigating Officer.

8. Learned Additional Public Prosecutor made the following submissions :

The defence of the accused of his false implication has been rightly discarded by the learned Judge. There is a presumption under Section

29 of the POCSO Act and the said presumption was rightly triggered in this case. Learned Judge has properly appreciated the provisions of Section 29 of the POCSO Act in the context of the facts, circumstances and evidence on record. The delay in lodging report *per se* could not be a ground to discard and disbelieve the otherwise concrete, cogent and trustworthy evidence adduced by the prosecution. The informant and her husband had no personal enmity with the accused and therefore, the defence of false implication is of no significance. The victim, who was partially mentally retarded, deaf and dumb girl, had no reason to name the accused being the perpetrator of the crime. Evidence of the victim, despite searching cross-examination, has not been shaken to create a doubt about her trustworthiness. The overall perusal of the evidence would show that there was no remote probability of tutoring the victim by the informant as well as by the interpreter. The statements of the victim and the informant, recorded under Section 164 of the Cr.P.C. by the learned Magistrate, are consistent with the narration of the incident made before the Court on oath. The medical evidence fully corroborates the testimony of the victim on the point of penetrative sexual assault on her by the accused. As far as DNA report (Exh.170) is concerned, learned APP would submit that in the absence of examination of DNA analyst, the said report cannot be used as a conclusive proof of the facts recorded in the report. In the submission of learned APP, the learned Judge has thoroughly analysed the available material

on record and has recorded cogent reasons to arrive at a conclusion of the guilt of the accused.

9. Before proceeding to appreciate the evidence of PW1 informant, PW2 interpreter and PW9 Medical Officer, it would be appropriate to make a mention of vital circumstances having bearing with the entire controversy. The report was lodged on 09.01.2017. The incident occurred on 05.01.2017. The clothes of the victim were seized on 11.01.2017 vide seizure panchanama (Exh.142). The blood stained bedsheet was seized on 09.01.2017 vide spot *cum* seizure panchanama (Exh.137). The Investigating Officer forwarded all the seized articles and samples to the Chemical Analyser on 19.01.2017 under requisition (Exh.144). The CA reports are part of the record. The carrier of the articles and the samples was not examined. There are three CA reports dated 29.11.2017. First CA report is at Exh.151, second CA report is at Exh.152 and third CA report is at Exh.153. The CA report at Exh.151 would show that the blood was detected on the bedsheet. Similarly, the semen was detected on knickers of the victim. Neither the blood nor the semen was detected on any other articles including towel. The semen detected on the knickers and the blood detected on the bedsheet, was further forwarded for DNA analysis. Exh.152 is the report of blood analysis of the victim. Her blood group is "O". Exh.153 is the report of the analysis of blood of the

accused. His blood group is also "O". The blood and semen detected on the bedsheet and knickers was very important piece of evidence in the case of the prosecution. Similarly, DNA analysis of the same was equally important to go to the root of the case.

10. After having noticed the CA reports at Exh.151, 152 and 153 and particularly the note that the samples were sent for DNA analysis, this Court directed learned APP to obtain necessary information with regard to the analysis of the DNA samples. The inquiry revealed that the DNA report was received in the police station on 11.02.2019 i.e. after the judgment was delivered. The judgment in the case was delivered on 22.01.2019. In order to know the real state of affairs viz-a-viz DNA report, I had directed the in-charge of the police station to file an affidavit as to the steps taken to bring the DNA report to the notice of the Court. An affidavit dated 15.07.2024 has been filed on record. As per the affidavit, the DNA report was kept in the police station. It was not brought to the notice of the trial Court as well as to the notice of this Court until the order 12.07.2024 passed by this Court for production of the DNA report. The Investigating Officer, in terms of the directions of this Court, produced the DNA report dated 31.01.2019 on record. It needs to be stated that the judgment was delivered on 22.01.2019. The DNA analysis report is dated 31.01.2019. It needs to be stated at this stage that neither the

trial Court nor the prosecutor took necessary steps to ascertain the result of the analysis of the samples forwarded to the DNA division of the Regional Forensic Science Laboratory (RFSL), Nagpur. It was the duty of the trial Court as well as the Public Prosecutor, in-charge of the case, to ascertain the factual position. It was the duty of the Investigating Officer to take timely steps by making an application before the Trial Court seeking direction to the RFSL to expedite analysis of the DNA samples. It is noticed by this Court that in number of cases, the DNA samples are not expeditiously analysed for want of DNA Analysts. It is also noticed that even in case of availability of DNA Analyst, timely steps are not taken for expeditious analysis of the samples. In this case, shockingly the DNA report is in favour of the accused. Learned Judge has relied upon the CA reports as a corroborative piece of evidence. In this backdrop, it is necessary to consider the evidentiary value of the DNA analysis report.

11. Learned advocate for the appellant has admitted the DNA report, dated 31.01.2019. The DNA report, by keeping in mind the provisions of Section 293 of the Cr.P.C., has been exhibited and admitted in evidence. It is at Exhibit-170. Since, learned advocate for the appellant has admitted the DNA report (Exh.170), being the non-incriminating material, further statement of the accused under Section 313 of the Cr.P.C. was dispensed with.

In my view, while deciding the fate of this matter one way or the other, the DNA report at Exh.170 cannot be kept out of consideration. It is the case of the prosecution that after penetrative sexual assault upon the victim, she was made to wear the knickers and she was taken to the school by the accused. It is also the case of the prosecution that the bedsheet was on '*diwan*' (cot) where the victim was sexually assaulted and it was having blood stains. The DNA was extracted from semen detected on the knickers of the victim. Similarly, the DNA was extracted from the blood detected on the bedsheet. The DNA profiling of the blood samples of the victim and accused was carried out. The DNA report, in my view, is a very crucial piece of evidence in this case. The DNA analyst has opined that mixed DNA profile obtained from semen detected on exhibit 3 knickers in BAM/266/17 (DNAn172/17) contains DNA profile obtained from blood sample of the victim and unknown male DNA profile, which failed to match with DNA profile obtained from blood sample of the accused i.e. Bhayya Vijay Chakre. As far as the DNA report of blood detected on bedsheet is concerned, the DNA analyst has opined that unknown male DNA profile is obtained from blood detected on exhibit 8 bedsheet in BAM/266/17 (DNAn172/17) and failed to match with DNA profile obtained from blood sample of Bhayya Vijay Chakre. The DNA report (Exh.170) does not show that the blood found on the bedsheet matched with the DNA profile obtained from blood of the victim. In my view, this DNA report is a very vital

piece of evidence. The evidence adduced by the prosecution, which has been made the basis for conviction of the accused, needs proper appreciation in this backdrop.

12. Learned APP submitted that the DNA report cannot be accepted as a gospel truth without examining the DNA analyst. In my view, this submission cannot be accepted for more than one reason. In the context of evidentiary value of the DNA report, it would be useful to refer to the decision of the Hon'ble Apex Court in ***Mukesh and another .vs. State (NCT of Delhi) and others***, reported at ***(2017) 6 SCC 1***. The Apex Court has observed that DNA Technology as a part of Forensic Science and Scientific discipline not only provides guidance to investigation but also supplies the Court accurate information about tending features to establish identification of criminals. After the amendment in the Criminal Procedure Code by the insertion of Section 53-A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. It is held that the DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report has to be accepted.

13. In the case on hand, the prosecution has relied upon the CA reports (Exhs.151, 152 and 153). Learned Special Judge has accepted the evidence of the prosecution with regard to the sampling, sealing, preservation and forwarding of the samples to the CA laboratory. Learned Judge has held that the evidence adduced by the prosecution established the complete link and chain to establish that there was no possibility of manipulation or tampering with the samples in any manner. In this background, I do not see any reason to doubt the quality control and quality assurance of the samples forwarded to the DNA division of RFSL Nagpur for DNA analysis. In my view, therefore, the DNA report at Exh.170 cannot be kept out of consideration. In this backdrop, it would be necessary to appreciate the evidence of the prosecution.

14. The incident occurred on 05.01.2017. The victim did not disclose the incident to her family members on 05.01.2017. She disclosed the incident to her mother on 06.01.2017 in the afternoon. The mother, after coming back from the field with the victim, narrated the incident to her husband. The husband on the next day went to the house of the accused and questioned him about the incident. It is their case that the accused stated that he did not do anything wrong with the victim. The report was lodged on 09.01.2017. It is, therefore, apparent that there was 4 (four) days delay in lodging the report.

The explanation put forth in the report for delay needs due consideration. It was stated in the report that considering the future of the victim and to avoid her defamation in the society, there was delay in lodging the report. The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. It is necessary to consider the law laid down by the Hon'ble Apex Court in ***State of Rajasthan .vs. Om Prakash,*** reported at ***(2002) 5 SCC 745***., wherein the Hon'ble Apex Court has observed that the object of insisting upon prompt lodging of a report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the 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. This principle is required to be borne in mind while appreciating the evidence adduced by the prosecution to explain the delay in lodging report. It is a settled legal position that delay *per se* cannot be a ground to give clean chit to the accused in a heinous crime. However, the delay in lodging report must be explained to the satisfaction of the Court.

Whether the explanation put forth for delay in lodging report is sufficient or not, is a question of fact to be addressed by the Court in the backdrop of the facts, circumstances and evidence brought on record. A minute scrutiny of the evidence on record is required to be undertaken to find out that the reasons put forth in support of the delay are worth acceptable. It is a pure question of fact and has to be addressed keeping in mind the facts and evidence of individual case.

15. Before proceeding to appreciate the evidence of PW1 informant and PW3 victim, it is necessary to state that the father of the victim has not been examined. It is not the case of the prosecution that either the victim or the parents of the victim were pressurized or threatened by the accused or his family members in any manner. It is not the case of the prosecution that after commission of the alleged act, any kind of threat was given by the accused of dire consequences in case the incident was disclosed to anybody. In my view, this is a very crucial aspect, which needs to be borne in mind in this case. Therefore, the accused had no role in any manner, which could be said to be a reason for delay in lodging the report. As per the report, the informant and her family members thought about the future of the girl and the stigmatic consequences of reporting the matter to the police and bringing it in a public domain. In this background, it is necessary to carefully appreciate the

evidence of the victim and her mother.

16. As far as the medical evidence is concerned, the same requires consideration in juxtaposition with the DNA report (Exh.170).

17. PW1 informant has stated that her daughter is a deaf and dumb. She was studying in a Deaf and Dumb School at Asegaon village. She has stated in her report that the accused everyday would carry the victim on his motorcycle to the school and drop her back from the school. She narrated the incident, which was narrated to her by the victim. She has stated that the victim told her that the accused thrice inserted his penis in her private part and once in her month. She has stated that the victim told her that the accused washed her private part and her face. She has further stated that the accused cleaned his private part as well and then she went to the school with the accused. The victim narrated the incident to her on 06.01.2017. Her evidence is silent about inspection of the private part of the victim. It is also silent about any injury having noticed by her on the private part of the victim. Being the mother of the victim, on being confronted with such a situation, was expected to minutely inspect the private part of the daughter and thereby verify authenticity of the incident narrated to her by the daughter/victim. PW1 was thoroughly cross-examined. She has stated that she is studied upto 9th

standard. The report was reduced into writing by her nephew. The nephew has not been examined. She has admitted that on 5th, after returning from the school, the victim was playing with the children of the guest, who had arrived at her house. On 5th, the victim did not disclose anything to the mother. The conduct of the victim was not abnormal in any manner. Her statement was recorded by the police as well as by the Magistrate. As far as her oral evidence before the Court is concerned, it is seen that she has improved her statement before the Court. The omissions from her statement have been recorded in paragraph 6 of her deposition. The defence of the accused was put to her in her cross-examination. She has admitted that Ajay Tayade is her brother-in-law. She has admitted that Ajay Tayade is a political person in the village. She has admitted that he is connected with 'Prahar Sanghatana' of the local MLA. She has claimed ignorance about another school for Deaf and Dumb children belonging to the local MLA at village Asegaon. She has stated that she does not know as to whether after this incident, the school in question where the victim was studying, was closed down. She has denied the suggestion that there was meeting of minds between Ajay Tayade and the local MLA and on their say, the accused was implicated in the crime so that the school should be closed.

18. In this context, it would be appropriate to make a useful reference

to the evidence of the Investigating Officer (PW8). She has admitted that on 09.01.2017, the villagers had given a memorandum under their signatures at police station. The said memorandum given by the villagers was shown to her in the Court. However, she has claimed ignorance about it. It is at Exh.156. She has admitted that the copy of the memorandum placed on record bears seal of the police station in token of receipt of the same. She has admitted that the local people had come to the police station and gave the said memorandum. The Investigating Officer, in short, has admitted that the people of Takarkheda village had come to the police station and gave memorandum. In this context, perusal of the memorandum becomes necessary. The memorandum is dated 09.01.2017. It was submitted by 44 villagers. In this memorandum, the villagers have stated that the report lodged against the accused was false and frivolous. They have stated that the report was the outcome of political rivalry. They informed to the police that action should not be taken against an innocent man. In my view, this evidence of the Investigating Officer and the memorandum are required to be borne in mind while appreciating the evidence of PW1 on the point of delay.

19. It is true that the accused has not examined any villager in support of his defence. In my view, it would not make any difference because the Investigating Officer has admitted that the villagers had given the

memorandum to the police station on 09.01.2017. In this context, in my view, the delay assumes great significance. The delay if not properly explained and if it suggests that it is nothing but an afterthought embellishment of the incident, then it is fatal to the case of the prosecution. The conduct of the victim girl after the alleged incident, as can be seen from the record, was not abnormal in any manner till she narrated the incident to her mother. It is their case that the victim told her that the accused thrice inserted his private part in her vagina. He also inserted his private part in her mouth. The accused is a fully grown person. The victim, on the date of the incident, was 12 years old. In my opinion, therefore, if there was penetration by a full grown man in this manner, there ought to have been profuse bleeding from the vagina as well as unbearable pain. The victim would not have been able to walk in that case. The victim has stated that she went to the school with the accused. She did not behave abnormally in the school. She did not inform her class teacher about the incident and also about the pain she had felt on that day. After coming back to home, she behaved normally. She went to play with the children. She did not complain of any pain. In my view, all these facts are very crucial. In this backdrop, it would be necessary to analyse the evidence of PW3 victim.

20. PW3 victim is a deaf and dumb girl. She was not able to hear and speak and therefore, the services of an Interpreter were availed. PW2 is an

Interpreter. The services of the Interpreter were availed at the time of recording the report and the statement before learned Magistrate as well as at the time of recording the evidence. PW2 an Interpreter has narrated the incident in her evidence. She reiterated almost all the facts stated in the report lodged by the mother of the victim (PW1). The report is based on the information provided by the victim (PW3). The evidence of the victim was recorded in question-answer form. It needs to be stated that the learned Judge was required to take proper care and precaution while recording evidence of the victim. Learned Judge has video recorded the evidence of the victim. The victim has stated that after going to the school after the alleged incident, she narrated the incident to her friends, who have been examined as PW4, PW5 and PW6. It needs to be stated at this stage that PW4, 5 and 6 have not supported the version of the victim. PW4, 5 and 6 are also deaf and dumb girls. According to the victim, she narrated the alleged act committed by the accused to her friends. Her friends PW4, 5 and 6 have not supported her on this material aspect. Perusal of the evidence of the victim (PW3) in entirety would show that she was tutored by the Interpreter and her mother. She has stated that the day on which the incident occurred was Thursday. She is a partially mentally retarded girl. In my opinion, it is highly unbelievable that such a girl would recollect the day of the occurrence of the incident.

21. The accused was a teacher in a Deaf and Dumb School at Asegaon. There is hardly any dispute about the fact that everyday the accused used to carry the victim on his motorcycle to the school and drop her at home from the school. The victim was studying in 4th standard. The victim in her cross-examination has stated that the accused inserted his penis in her private part thrice and once in her month. She has stated that she disclosed the incident to her friend Suhani for the first time. In her examination-in-chief, she has identified her knickers. She has also identified the accused. Her cross-examination is very crucial. Perusal of her cross-examination would show that she was tutored. She has admitted that her mother and the interpreter told her about the facts to be deposed before the Court. Similarly, she was given an understanding as to what was to be stated before the Magistrate. She has admitted that since she did not want to go to the school on the next day, she blamed her teacher. She has stated that the accused is a good person and daily he was taking her to the school. She has stated that after lodging the report, the school was closed. She has categorically stated that the accused did not do anything wrong with her. She has admitted that no incident took place as alleged and therefore, she did not disclose it to anybody. This question was repeated, but her answer did not change. It is pertinent to note that the child witness is a very easy pray for tutoring. The child is bound to follow the elders. The child victim in this case was under the control of the mother and the

interpreter. In my view, overall perusal of the evidence of the victim creates a doubt in the mind of the Court as to the occurrence of the incident and involvement of the accused. Three friends of the victim, to whom she allegedly narrated the incident, did not support the case of the prosecution. Appreciation of the evidence of PW1-mother and PW3-victim, coupled with the aspect of delay in lodging report and the reasons explaining delay, create a doubt in the mind of the Court. The Investigating Officer has admitted that a memorandum was given by the villagers of village Takarkheda, stating that the accused is a good person and he was falsely implicated in the crime on account of political enmity.

22. In my view, in this background the evidence of the Medical Officer (PW9) is required to be appreciated. PW9 has stated in her evidence that on 09.01.2017, she was attached to Civil Hospital, Amravati as a Gynaecologist. She examined the victim. The history of assault was narrated by the victim. On examination, she found laceration measuring about 3 cm on both sides of labia manora. The hymen was torn in 5 and 7 O'clock position. It was pinkish red in colour which suggested that its age was within 7 days. It is evident that at the time of examination of the victim, certain injuries were found by PW9. In my view, even if it is assumed that the injuries as stated by PW9 were present, the same by itself would not be sufficient to held the

accused guilty of the offence of rape. The vital evidence i.e. DNA report is sufficient to rule out the possibility of involvement of the accused being the perpetrator of the crime. If the accused had committed sexual assault on the victim girl as alleged, then the report of DNA analysis of the semen would have matched with the blood profile of the accused. In my view, therefore, much weightage cannot be given to this medical evidence as against the accused. In my view, the evidence adduced by the prosecution, if appreciated in juxtaposition with the DNA report, would create a doubt about the case of the prosecution with regard to the occurrence of the incident and involvement of the accused.

23. Learned Special Judge has observed in the judgment that the material on record is sufficient to trigger the presumption under Section 29 of the POCSO Act. 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 get automatically attracted/triggered.

24. In the facts and circumstances, I conclude that the delay in lodging report is fatal to the case of the prosecution. The defence of the accused has been fortified by the DNA report. The CA reports in the teeth of the DNA report cannot be used as a corroborative piece of evidence. The involvement of the accused being the perpetrator of the crime has been completely ruled out on the basis of the DNA report. In my view, this vital evidence in the form of DNA report cannot be kept out of consideration. If the DNA report is taken into consideration and used as it is, then it is fatal to the case of the prosecution. It is consistent with the hypothesis of innocence of the accused. As such, the appeal deserves to be allowed.

25. Accordingly, the Criminal Appeal is allowed.

(i) The judgment and order of conviction passed by learned learned Additional Sessions Judge-1 and Special Judge, Achalpur, dated 22.01.2019 in Special (POCSO) Case No. 49/2017 is quashed and set aside.

(ii) Appellant – Bhaiyya S/o Vijay Chakre is acquitted of the offence punishable under Section 376(2)(f)(l) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

(iii) Appellant – Bhaiyya S/o Vijay Chakre is in jail. He be released forthwith if not required in any other crime.

26. The appeal stands disposed of in the aforesaid terms.

(G. A. SANAP, J.)

Diwale