IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 303 OF 2022

Kisan s/o Bhaiyyalal Harinkhede
Aged 48 years, Occupation:- Mason,
R/o- Ward No.3, Gidhadi, Tq. Goregaon,
District Gondia .... APPELLANT
(In jail)

//V E R S U S//

1. State of Maharashtra,
Through PSO. Goregaon,
Tah. and District: Gondia

... RESPONDENT

2. XYZ mother of the victim in
Crime No.257/2017, registered with
P.S.O., Goregaon, District : Gondia

Mr Mahesh Rai, Advocate for appellant.
Mrs. R.V. Sharma, APP for respondent No.1/State.
Ms S.H. Bhatia, Advocate (Appointed) for respondent No.2.

CORAM : G. A. SANAP, J.
DATE : 12.09.2024

O R A L J U D G M E N T :

1. In this appeal, challenge is to the judgment and order dated 28.03.2022 passed by the learned Ad-Hoc Special Judge-1, Gondia, whereby the learned Judge convicted the

appellant for the offences punishable under Section 376 (2)(i) of the Indian Penal Code (for short, "the I.P.C.") and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act") and sentenced him to suffer rigorous imprisonment for a period of 20 years and to pay a fine of Rs.10,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 6 of the POCSO Act. No separate sentence has been awarded under Section 376 (2)(i) of the I.P.C.

2. The facts are as follows:-

The informant (PW-2) is the mother of the victim girl, who on the date of the incident was three years and eleven months old. The incident occurred on 04.11.2017. The case of the prosecution, which can be gathered from the report and other materials, is that on 04.11.2017, the victim was playing with Meena, Trupti, Gattu, Sheela and Dada in lane between two houses. The mother had gone to the field for harvesting the

crop. She came back at 3.30 p.m. After returning from the field, she was washing her lunch box. At that time the victim came to her crying and told her that while playing with Meena, Trupti, Gattu, Sheela and Dada she went for urin. While she was urinating, the accused came there and put his finger in her place of urin. She started crying. It is stated that after hearing this account of an incident from the victim, when she and her sister-in-law were discussing this incident, her father-in-law came there and asked them about the subject of their talk. At that time the informant narrated the incident that had occurred with the victim to him. On hearing this account of the incident, father-in-law went to house of the appellant and questioned him. Thereafter, the daughter of the appellant, by name Sonali, 16 years old, came to their house and started pulling the victim and slapped her. The informant narrated this incident to her husband. They went to the police station and the informant lodged the report. On the basis of the report, crime bearing

No.257 of 2017 came to be registered against the appellant.

3. Sachin Thorat (PW-10) carried out the investigation. He referred the victim for medical examination. He recorded the statements of the witnesses. He drew the spot panchanama. He seized the clothes of the victim and the clothes of the accused. On the request of the investigating officer, the learned Magistrate recorded the statements of the victim, the informant and Meena. On completion of the investigation, PW-10 filed the charge-sheet against the accused in the Court.

4. Learned Sessions Judge framed the charge against the accused. The accused pleaded not guilty. It is his defence that he had constructed the house. It was the allegation of the informant that while constructing the house he encroached on their plot. On account of this enmity, he has been falsely implicated. The prosecution, in order to bring home guilt of the

accused, examined eleven witnesses. Learned Judge, on consideration of the evidence, held the accused guilty of the charge and convicted and sentenced him as above. Being aggrieved by the judgment and order, the appellant has come before this Court in appeal.

5. I have heard Mr. Mahesh Rai, learned Advocate for the appellant and Mrs. R.V. Sharma, learned APP for respondent No.1/State. and Ms S.H. Bhatia, learned Advocate appointed for respondent No.2. Perused the record and proceedings.

6. Learned Advocate for the appellant submitted that except the interested version of the victim and her mother, there is no other corroborative evidence. An important witness Meena, who according to the prosecution was an eye witness to the incident, has not supported the case of the prosecution. The prosecution has not examined the child witnesses. Similarly,

the prosecution has not examined other material witnesses, viz. the father-in-law of the informant and the sister-in-law of the informant. Learned Advocate submitted that the medical evidence clearly shows that the accused was falsely implicated in this case. The doctor did not find any injury on the body of the victim as well as to her private part. It is submitted that if incident had occurred as alleged, then doctor would have noticed some injury to the private part of the victim. Learned Advocate submitted that the medical report makes the defence of the accused probable. As far as the evidence of the victim and her mother is concerned, learned Advocate submitted that the victim was tutored. On the date of the incident, she was hardly three years and eleven months old. There are major inconsistencies in the evidence of the victim and her mother on material points. Learned Advocate further pointed out that, as per the case of the prosecution, apart from the victim, three to four children were playing with the victim. The accused in

such a situation would not have committed such an act. The case of the prosecution therefore, cannot be believed. Learned Advocate submitted that the evidence of the victim and her mother creates a doubt about the occurrence of the incident. The accused is the cousin father-in-law of the informant. It is submitted that the case of the prosecution is totally unbelievable.

7. Learned APP submitted that the defence of the accused is not at all probable. The informant, even for the sake of settling her personal score with the accused, would not have involved her daughter in such an incident. Such incident after coming into the public domain invites stigmatic consequences. Learned APP submitted that the absence of injury to the private part of the victim could not be a ground to discard and disbelieve the evidence of the victim and her mother. Learned APP submitted that independent witness Meena, who at the relevant time was playing with the victim, has not fully

supported the case of the prosecution. However, learned APP pointed out that part of her evidence which supports the case of the prosecution cannot be discarded and disbelieved. Learned APP took me through the judgment and order passed by the learned Judge and submitted that the learned Judge has recorded cogent and concrete reasons in support of his findings. Learned APP submitted that the well reasoned judgment and order passed by the learned Ad-hoc Special Judge does not warrant interference.

8. Ms S.H. Bhatia, learned appointed advocate to represent respondent No.2 has adopted the arguments advanced by the learned APP.

9. I have carefully perused the oral evidence adduced by the prosecution. I have also gone through the record and proceedings. I have perused the judgment and order passed by the learned Judge. The victim on the date of the incident was

three years and eleven months old. This fact has been proved independently by examining witness from the gram panchayat. Sanju Shahare (PW-9) has produced before the Court Gram Panchayat record where the entry of the birth and birth date of the victim was made. The accused has not challenged this evidence. Similarly, the accused has not raised any dispute about the age of the victim. The victim on the date of the incident was three years and eleven months old.

10. Before proceeding to appreciate the evidence of the victim and her mother, it is necessary to consider the evidence of medical officer Dr. Aarti Kumari (PW-5). It is the case of the prosecution that the incident occurred on 04.11.2017 at about 3.30 to 4.00 p.m. It is stated in the First Information Report that the incident had occurred at 4.00 p.m. The report of the incident was lodged in the night. The First Information Report was registered at 00.57 hours of 05.11.2017. The victim was examined by a medical officer on

05.11.2017 at 1.30 a.m. It would show that within 10 hours from the occurrence of the incident, the victim was examined by medical officer. It is the case of the prosecution that the accused, who is 49 years old, inserted his finger in her vagina and on account of the same she had severe pain. She cried on the spot as well as went crying to her home. Doctor (PW-5) has stated that the history of assault, at the time of examination of the victim, was narrated by the mother of the victim. It is evident that the history of assault was not narrated by the victim. The victim has deposed before the Court. The manner in which the victim has deposed before the Court would show that the victim, on the date of the incident, was capable to narrate the history of assault to the doctor. The doctor has categorically stated that there was no injury to the genitals of the victim. The hymen was intact. There was no injury to labia majora or labia minora of the victim. There was no bleeding. There was no scratch mark. A perusal of the cross examination

of the doctor is very relevant at this stage. The doctor has stated that if a finger is inserted in the private part of the child of 3 years old, then the child would have unbearable pain. Doctor has admitted that in such a case it may cause some amount of bleeding. Doctor has also admitted that in such a case the victim may face difficulty while walking. Doctor has admitted that if there is a vaginal infection, then itching may occur after urination. The evidence of the doctor in totality is required to be borne in mind while appreciating the evidence of the victim and her mother.

11. It is to be noted that the absence of injury to the private part of the victim *per se* is not sufficient to discard the evidence adduced by the prosecution. However, in such a case, the evidence on analysis must be found to be credible and trustworthy. The evidence must be of sterling quality. Perusal of the evidence of the doctor would show that there was no injury or even redness to the genitals of the victim. While

appreciating the defence of the accused by invoking the test of preponderance of probability**,** all these factors, in my view, would assume significance. The absence of injury, despite inserting a finger in the vagina of the victim, is a strong circumstance against the prosecution and in favour of the accused.

12. The victim, on the date of the incident, was 3 years and eleven months old. The record shows that her evidence was recorded without administering the oath. She was not able to understand the importance of the oath. However, the learned Judge found her to be a competent witness on the basis of his inquiry. As far as the competence of the victim is concerned, I do not see there is any material to conclude that the victim was not competent to understand the questions put to her. It would now be necessary to minutely and carefully peruse the evidence of the victim. The victim has stated that at the time of incident, she was studying in 3rd standard. She has

stated that at the time of the incident she was playing with utensils in the lane between two houses. She has stated that Trupti, Dadu and Meena were playing with her. While narrating the incident, she has stated that Kisan Kaka came there and put his finger in her place of urine. She has stated that he removed her underwear. She has stated that at that time she felt pain. The victim in her evidence has not stated that while playing she went towards the side of the wall for urin. The evidence of the victim would show that while she was playing with other children, the accused came there and inserted his finger in her place of urine. She has stated that the accused removed her underwear. In my view, this evidence of the victim appears to be unbelievable. Meena, who has been examined before this Court as a prosecution witness, at the relevant time she was 11 years old. She has not supported the case of the prosecution. The prosecution has not placed on record any evidence with regard to the age of Trupti and Dadu.

It is hard to believe that the accused in the presence of four to five children, would commit such a silly act with the victim. The accused would not have dared to commit such an act in the presence of the children, including Meena, who was 11 years old at that time.

13. The victim, in further part of her evidence, stated that she went to the home and told the name of the accused to her mother and thereafter they went to Police Station. In her evidence, she has stated that she has come to the Court for giving 'Bayan'. It is hard to believe that a child of four years old would know that statement made before the Court is called 'Bayan'. Further cross-examination of this witness would show that she was tutored by police as well as her parents. In her evidence, she has stated that Pranay and Sheela were also playing with her. So the evidence would show that apart from the victim, five more children were playing with her in the lane. The victim has categorically admitted that when she had come

to the Court on earlier two occasions, police explained to her as to what statement she should give in the Court. She has stated that police questioned her and at the time of answering the question, her mother was also speaking. She has stated that she obeyed her mother. Her evidence is silent about any injury or severe pain after this incident. She has also not stated that either she or her mother told the doctor that she had pain on account of this act of the appellant. Her statement under Section 164 of the Code of Criminal Procedure (for short 'the Cr.P.C.') was recorded by the Magistrate. While recording her statement, she did not state before the Magistrate that the accused inserted his finger in her vagina. She has stated that the accused had put his hand in her vagina. She is also silent while giving a statement to the Magistrate that after the alleged incident she cried. She is also silent that after this incident she had pain in her private part. It needs to be stated that while appreciating the evidence of the child witness, the Court has to

take great care. The Court must be satisfied on appreciation of the evidence of child witness that there was no possibility of tutoring. The victim was obeying the command of her mother. The absence of injury to the genitals of the victim is a strong circumstance against the prosecution and in favour of the accused. Similarly, the victim has stated that police had read over the statement to her before giving evidence. Certain facts which have been stated in the report by the informant, the mother of the victim, have not been stated by the victim in her substantive evidence. It is not out of place to mention that child is prone to the tutoring. The child may follow the commands of the parents or elders and present before the Court the tutored account of the incident. The Court has to take great care while appreciating the evidence of the child witness.

14. At this stage, it is necessary to state that it is the case of the prosecution that the accused had removed her underwear on the spot of the incident. The victim has stated that the

accused put his hand in her private part. The underwear has not been seized. The police has seized only the frock and slacks. If the underwear was removed, as stated by the victim, then the prosecution was required to place on record any evidence as to what happened to the said underwear. It is not the case of the informant that the victim came to the house crying, holding the underwear in her hand. On the other hand, the mother of the victim has stated that at that time the victim was wearing frock and slacks. The evidence of the victim is contrary to the case of the informant.

15. It is necessary to consider the evidence of the informant. The informant, mother of the victim, has stated that she has gone to the field for cutting the crops and she came back home at 3.30 p.m. She has stated that when she was washing the lunch box, the victim came crying and told her that Kisan Kaka had put a finger in her private part. She has stated that at that time the victim had gone for playing with Meena.

She has not stated in her evidence that apart from Meena other children were also playing with the victim. She has stated that she told this incident to her sister-in-law. Her father-in-law came there and her sister-in-law narrated the incident to her father-in-law. The statement made on this aspect by her in the report is contrary. She has stated that on inquiry by her father-in-law, she narrated the incident to him. She has stated that thereafter she made a phone call to her husband. She has further stated that when her father-in-law questioned the accused about this incident, the daughter of the accused came to her house and slapped the victim. The victim has not stated in her substantive evidence that the daughter of the accused had come to their house and slapped her. In her cross-examination, she has stated that crop cutting operation continued till 5.00 p.m. She has categorically admitted that the accused had constructed a new house in the year 2015. It was suggested to her that the accused had encroached upon a

portion of her property and on that count there was a dispute between them. The witness has denied this suggestion. The accused has stated that after construction of the house by him in 2015, there was a dispute on account of the alleged encroachment made by him on the portion of the plot of the informant. The case of the informant that the daughter of the accused came to her house and slapped the victim is totally unbelievable. The informant, her father-in-law and her sister-in-law were present at the house. The daughter of the accused in their presence would not dare to assault the victim. It is not the case of the prosecution that the accused took the victim to any secluded place and committed this act. It is the case of the prosecution that the victim while playing with the other children, went to urination and there the accused removed her underwear and inserted his finger in her vagina. In my view, this case of the prosecution itself is unbelievable. The accused first and foremost would not have dared to commit such an act

in presence of four to five children. Meena, who was present on the spot at the time of the incident, was 11 years old. The incident is unbelievable on account of the fact that, if such an incident had occurred in the presence of four to five children, the children would have made hue and cry and accompanied the victim to her house. It is not the case of the informant that other children accompanied the victim to her house. It is stated that the victim after this act had started crying on the spot. The alleged act would not have gone unnoticed by the children. In my view, these are vital circumstances, which create a doubt in the mind of the Court as to the credibility and trustworthiness of the evidence and the case of prosecution. The accused on the date of the incident was 49 years old. He is the cousin grandfather of the victim. In my view, considering their relationship and the age, the incident narrated by the informant appears to be unbelievable. Medical evidence does not support or lend assurance to the evidence adduced by the prosecution.

In my view, if such an incident had occurred then there ought to have been some injury to the labia minora or labia majora. Absence of injury or even redness or swelling to the private part of the victim creates doubt about the trustworthiness of the evidence of the victim and her mother. Perusal of the evidence of the victim shows that she was sufficiently tutored. In this case except the oral evidence of the victim and her mother, there is no other evidence.

16. PW-3 Meena is the friend of the victim. She has not supported the case of the prosecution. Perusal of her evidence would show that whatever statements she had made during the course of the investigation was on the say of the mother of the victim. In her cross-examination, she has stated that the accused did not do anything to the victim in front of her. The prosecution has not examined other children. Similarly, the record is silent about recording their statement by the police as well as by the Magistrate. Learned Judge,

placing implicit reliance on the testimony of the victim and her mother, has handed down the sentence of 20 years to the accused. It is to be noted that the provisions of the POCSO Act in the matter of sentence are very stringent. Section 29 of the POCSO Act also provides for presumption of certain facts. In my view, while considering the applicability of the law, which provides stringent punishment, the Court has to be very careful and cautious. The Court in such a case must be satisfied that the evidence on record is sufficient to prove the case beyond reasonable doubt. This principle of criminal jurisprudence that the prosecution has to prove the guilt of the accused beyond reasonable doubt has not been diluted even by the incorporation of Sections 29 and 30 in the POCSO Act. Presumption under Section 29 of the POCSO Act is not an absolute presumption. In order to trigger the presumption against the accused, as provided under Section 29 of the POCSO Act, the prosecution is duty bound to prove the

foundational facts. In the absence of proof of foundational facts viz-a-viz charge, the negative burden cannot be cast on the accused to prove otherwise.

17. On going through the record and proceedings, I am satisfied that defence of the accused is probable. The mother of the victim has admitted that in the year 2015 the accused had constructed his house. The accused has categorically stated in his statement recorded under Section 313 of the Cr.P.C. that the informant alleged that while constructing the house he had made an encroachment on her property and therefore, there was a dispute between them. On material aspects, the evidence is not believable. There are major inconsistencies and discrepancies in the evidence.

18. In the facts and circumstances, I am of the view that evidence on record is not sufficient to prove the guilt of the accused beyond reasonable doubt. The facts and circumstances

clearly make the case of the prosecution unbelievable. In view of this, I conclude that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. The appellant is therefore, entitled to acquittal. The appeal is accordingly allowed.

19. Ms H.S. Bhatia, 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.

20. The judgment and order dated 28.03.2022, passed by the learned Ad-Hoc Special Judge-1, Gondia, in Special Child Case No.09/2018, convicting the appellant for the offences punishable under Section 376(2)(i) of the I.P.C. and under Section 6 of the POCSO Act is quashed and set aside.

21. The appellant/accused – Kisan s/o Bhaiyyalal Harinkhede is acquitted of the offences punishable under Section 376(2)(i) of the IPC and under Section 6 of the POCSO Act.

22. The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.

23. The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

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