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

CRIMINAL APPEAL NO. 242 OF 2021

APPELLANT : Kishore Vitthalrao Shendre, Aged about 26 Years, Occu. Labour, R/o. Sai Nagar Slums, Sahur, Tah. Ashti, Wardha.

//VERSUS//

RESPONDENTS :
1. State of Maharashtra, through Police Station Officer, Police Station, Ashti, Wardha.

Respondent No.2 added as per the Court's Order dt. 28.07.2022.

2. XYZ (Victim) through its complainant Crime No.203/2016, registered with Police Station Ashti, Dist. Wardha.

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Mr. Mir Nagman Ali, Advocate with Ms. Gulafshan Ansari, Advocate for the Appellant.
Mrs. M. R. Kavimandan, APP for Respondent No.1/State.
Ms. Mohini Sharma, Advocate (appointed) for Respondent No.2 is absent.

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CORAM : G. A. SANAP, J.
DATED : 13th AUGUST, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order dated 30.07.2018, passed by the learned Special Judge (POCSO),

Wardha, whereby the learned Judge held the accused guilty of the offences punishable under Sections 376(2)(i) and 452 of the Indian Penal Code, 1860 (for short, "IPC") and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"). He has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for six months for the offence punishable under Section 376(2)(i) of the IPC; rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/- and in default to suffer simple imprisonment for one month for the offence punishable under Section 452 of the IPC. The accused, though convicted for the offence punishable under Section 4 of the POCSO Act, no separate sentence has been awarded.

02] BACKGROUND FACTS:

The victim girl, aged about 16 years old on the date of the incident, is the informant. The report of the incident was lodged by the informant on 20th June, 2016 at Ashti Police Station, District Wardha. The victim has stated that on 20th June, 2016, at 10.00 a.m., her mother, brother, and sister had gone out for labour work. The victim was alone in the house. The victim and one old

lady, who is called grandmother by the victim by name Shakunabai, a neighbour of the victim, were sitting in the house. After some time, she started her household work. It is stated that when she was pouring the water from the pot and bucket into the water tank at about 2.00 to 2.30 p.m., the accused came from her behind. He caught hold her hand. Shakunabai was sitting on the cot. The accused drove Shakunabai out of the house. He was under the influence of liquor. The accused pulled her into the house. The accused closed the doors of the house. He laid her on the ground. The accused removed his pant and then removed her knickers and Salvar. The accused gagged her mouth with his hand and committed sexual intercourse with her. The accused committed this act for one hour. She kicked the accused and then the accused released her. The accused put on his cloths and ran away from the backside door. It is stated that thereafter she put on her cloths and came out of the house. It is stated that since Shakunabai had raised alarm, the people from the locality had gathered in front of the house. The victim went to the house of her neighbor, Jijabai, who is the daughter of Shakunabai, and narrated the entire incident to her. The mother of the victim came back from work at 5.00 p.m. She narrated the incident to her mother. After some time, her elder sister Laxmi and her brother came back. She narrated the incident

to them as well. The victim, her sister, and her brother went to Ashti Police Station and reported the matter to the police. On the basis of this report, a Crime bearing No.0203/2016 was registered against the accused for the above offences.

03] Initial investigation was carried out by PW-4 (P.I.) Vishnu Yadaorao Karale. P.I. Karale visited the spot of the incident. He drew the spot panchanama. He seized the cloths of the victim and the samples from the spot. The accused was arrested on the next day. He was sent for medical examination. His cloths were seized. The statement of the victim was recorded by the Child Welfare Committed as well as by the learned Magistrate. Further investigation was carried out by PW-9. He collected the documents with regard to the birth date of the victim. He forwarded the victim for medical examination on 11th July, 2016. After completion of the investigation, he filed charge-sheet against the accused.

04] Learned Special Judge framed the charge against the accused. The accused pleaded not guilty to the charge. The defence of the accused is of false implication on account of a dispute between him and the family of the victim. The prosecution examined 9 witnesses to prove the guilt of the accused. Learned

Special Judge, on consideration of the evidence, held the accused guilty of the charge and sentenced him as above. Against this order of conviction and sentence, the appellant has filed this appeal.

05] I have heard Mr. Mir Nagman Ali, learned advocate for the appellant and Mrs. M. R. Kavimandan, learned APP for the State. Perused the record and proceedings.

06] Learned advocate for the appellant submitted that the evidence of the victim (PW-3) is not consistent. There are major discrepancies in her evidence to doubt her credibility. There are major inconsistencies in the evidence of the victim (PW-3) and her elder sister (PW-7) Laxmi on the point of the delayed medical examination of the victim on 11th July, 2016. The learned advocate took me through the evidence of the victim (PW-3) and submitted that the facts stated by her in her cross-examination clearly suggest that the accused was falsely implicated in this case. Learned advocate submitted that the medical examination of the victim conducted after 20 days from the date of the incident by itself would be sufficient to discard the evidence of the doctor and the medical examination report. Besides, learned advocate submitted that the doctor (PW-8), on examination of the victim on 11th July,

2016, had not given a concrete opinion that the findings of the examination suggested that the victim was subjected to sexual assault. Learned advocate submitted that the opinion given by the doctor as to the possibility of sexual assault on the basis of his findings is not supported by any other evidence. Learned advocate submitted that in the absence of independent corroborative evidence, the doubtful evidence of the victim cannot be made the basis of conviction and sentence of the accused. Learned advocate submitted that the doctor, who had examined the accused, did not record a finding that the accused was capable to perform the sexual act. Similarly, the doctor has not recorded in his report at Exh.75 that the examination of the penis of the accused shown the signs of recent intercourse by the accused. Learned advocate pointed out that the learned Special Judge has glossed over the inconsistencies and the discrepancies in the evidence. Learned advocate submitted that the presumption under Section 29 of the POCSO Act was wrongly invoked against the accused, inasmuch as the prosecution has failed to establish the foundational facts relating to the charge against the accused.

07] Learned APP submitted that the victim otherwise had no reason to falsely implicate the accused by inviting the stigmatic

consequences of such a crime. Learned APP submitted that the evidence of the victim is cogent, concrete, and trustworthy. The elder sister of the victim has supported the evidence of the victim on material aspects. There is no reason to discard and disbelieve the evidence of the victim and the evidence of her elder sister (PW-7). Learned APP submitted that the opinion given by the Medical Officer is a most reliable corroborative piece of evidence. The medical evidence is sufficient to lend an assurance to the evidence of the victim. Learned APP submitted that the refusal of the victim to undergo the medical examination on 20th June, 2016 and 21st June, 2016, would not be a sufficient ground to conclude that the account of the incident narrated by her before Court is not truthful. Learned APP pointed out that the reason putforth for the initial refusal by the victim for her medical examination has been found to be worth believable by the learned Judge. In the submission of learned APP only on the ground of her initial refusal to undergo the medical examination, her evidence, which is otherwise credible and trustworthy, cannot be disbelieved and discarded. Similarly, the evidence of her sister, on this count, cannot be disbelieved.

08] I have minutely scrutinized the evidence and the

available record. On minute scrutiny of the evidence, I am satisfied that there are numerous circumstances evident from the record to create a doubt about the trustworthiness of the evidence of the victim and her elder sister (PW-7). These are vital circumstances to doubt the occurrence of the incident itself. The most vital circumstance can be seen from the report lodged by the victim. The victim girl in her report has categorically stated that Shakunabai was sitting in her house. She has stated in her report that when the accused dragged her inside the house, the accused forcibly drove out Shakunabai from the house. It is stated that the accused pushed Shakunabai outside the house and closed the door of the house. She has stated that the accused committed rape on her for one hour. This would show that for one hour, she and the accused were inside the house. She has stated in the report that when the accused ran away from the backside door, she opened the front door of the house. It is stated that when she came out of the house, she found that Shakunabai, who was driven out of the house by the accused, had raised alarm, and therefore, the people from the locality had gathered in front of her house.

09] It is to be noted at this stage that for the completion of sexual intercourse, one hour is not required. As per the statement

of the victim, she and the accused were inside the house for one hour. The victim was dragged inside the house forcibly by the accused in the presence of Shakunabai. Shakunabai was driven out of the house by the accused. It is stated that the accused was under the influence of liquor. Shakunabai is the neighbour of the victim. Jijabai (PW-5) is the daughter of Shakunabai. As per the case of prosecution, Jijabai was present in her house. After the incident, the victim narrated the incident to Jijabai. Jijabai has not supported the case of prosecution. The people had gathered in front of the house of the victim because Shakunabai raised alarm when she saw that the victim was forcibly dragged inside the house by the accused. In my view, this fact is sufficient to create doubt about the occurrence of the incident. It is not the case of the prosecution that, for one hour, Shakunabai did not raise alarm. Shakunabai, in the backdrop of the abovestated serious incident, naturally would have raised alarm immediately after coming out of the house of the victim. Jijabai was at home. She would have immediately gone to her house. The victim has stated that the people had gathered in front of her house. If the incident had occurred as narrated by the victim and the people had gathered because of the alarm raised by Shakunabai, then the people would have broken open the door of the house, entered into the house, and saved the victim.

10] Perusal of the report would show that the people did not even bother to knock on the door of the house of the victim. The victim saw the people in front of her house when she opened the door of the house after one hour. The victim has categorically stated that the people had gathered because of the alarm raised by Shakunabai. In my view, this is a very vital circumstance to doubt the occurrence of the incident in the manner stated by the victim. On the date of the incident, Shakunabai was 90 years old. Statement of Shakunabai was not recorded. She has not been examined as a witness by the prosecution. Jijabai has been examined as a witness. Jijabai has not supported the case of prosecution. The victim did not tell the names of the people who had gathered in front of her house. The prosecution has not examined any other independent witness to fortify the contention of the victim that the incident, as stated in the report, occurred, and on raising alarm by Shakunabai, they had gathered in front of the house of the victim.

11] It would now be necessary to appreciate the evidence of the victim and her elder sister (PW-7). It would also be necessary to see whether the material facts emerging in their evidence support the defence of the accused or not. The victim girl has

reiterated in her evidence the incident narrated in the report. Her elder sister (PW-7) has reiterated the facts relating to the incident narrated to her by the victim. It is the defence of the accused that, on account of the grazing of the goats, there was a quarrel between him and victim's family. She has admitted that there was only one place near the village for grazing the goats and on that count, there was a dispute between them. It is the case of the prosecution that the report of the incident was lodged in the night of 20th June, 2016. The police visited the spot of the incident in the night and drew the spot panchanama. The police seized the cloths of the victim and collected samples from the spot. It has come on record that, on the date of the lodging of the report, the victim girl did not consent for medical examination. She has narrated the reason for declining the medical examination. The reason stated by her for declining the medical examination and the reason for declining the medical examination narrated by her elder sister in her evidence are self-contrary. In my view, it is sufficient to create a doubt in the mind of the Court.

12] Admittedly, the medical examination of the victim was conducted on 11th July, 2016. It was after 20 days from the date of the incident. The victim, in her evidence, has stated that the

brother of the accused Chetan had come to the police station and requested for compromise of the dispute. She has stated that, on account of the request made by the brother of the accused for compromise, she did not give her consent for medical examination. In her examination-in-chief, she has further stated that she was ready for medical examination, but the police constable Nisha wrote on the paper that the victim was not ready for examination and obtained her signature on the said document, Exh. 52. In her examination-in-chief, she has further stated that the Police Officers suggested them to compromise the dispute between her and the accused by saying, “Tumhala Pan Dhak Aahe, Amhala Pan Dhak Aahe." She has stated that, on account of this suggestion by the police, she did not consent for medical examination. It is, therefore, apparent that in para No.3 of her examination-in-chief, she has stated three reasons for declining the medical examination. She has further stated that, after 20 days, she was sent for medical examination.

13] In the above context, it would now be necessary to consider the reason stated by her elder sister (PW-7) Laxmi for declining the medical examination by the victim. She has stated that the incident was narrated to them by the victim. She has stated

that her brother Someshwar suggested to lodge a report with the police, but they were not ready. She has stated that they were not ready because they were of marriageable age. She has stated that since her brother and his friends insisted, they went to lodge the report. She has stated that, after lodging the report, police immediately came to their house. She has further stated in her examination-in-chief that the victim, for the first time, did not consent for medical examination, thinking that they were girls, and therefore, it would not be proper on their part to consent for medical examination. She has categorically stated that after two days of lodging of the report, the victim consented for medical examination. She has stated that, at that time, she accompanied the victim to the hospital, and in the hospital, the victim was examined by the doctor.

14] It is, therefore, apparent on minute scrutiny of the evidence of the victim (PW-3) and her elder sister (PW-7) that the reasons stated for declining the medical examination of the victim are self-contradictory. In my view, this is sufficient to create a doubt about their credibility and trustworthiness. In this context, it would be necessary to peruse the document at Exh.52. Exh.52 is the certificate issued by the Medical Officer, when the victim refused

to undergo medical examination on 21st June, 2016. The Medical Officer has recorded in the presence of constable Nisha that the victim did not consent for her medical admission and for her medical examination by the doctor. The elder sister of the victim made an endorsement on the certificate stating that the victim is not willing to undergo the medical examination. It was recorded that they have no complaint against the police or against the doctor in this connection. The reason for declining the medical examination was not mentioned by the elder sister of the victim. Perusal of this document would show that, without recording any reason, the victim did not consent for medical examination. In my view, this document is sufficient to discard the evidence of the victim to the extent of the reason for declining the medical examination.

15] Perusal of her cross-examination would show that certain facts admitted by her would be sufficient to create a sufficient doubt with regard to her credibility. In her cross-examination, she has stated that one Police Patil Kishor Raut had accompanied them to the police station and gave the information to the police, and then the report was lodged. In her further cross-examination, she has stated that Kishor Raut was pressurizing her to give a

statement. In her voluntary statement, she has stated that Kishor Raut was pressurizing her to take back the report. In her examination-in-chief, she has stated that the brother of the accused had come to the police station and gave a proposal for settlement. She has stated in the examination-in-chief that, on account of the proposal for settlement given by the brother of the accused, she did not consent for medical examination. In her further cross-examination, she has stated that they have goats. She has also stated that the accused also has goats. She has stated that there is only one place in the village for grazing the goats. She has categorically stated that, on account of the grazing of the goats at the said place, there used to be quarrels between their families. In further part of her cross-examination, she has categorically admitted that, on account of this, she had lodged a report against the accused. She has further stated that the police had not taken her to the doctor. She has stated that the police had obtained her signature on some blank papers. She has further stated that the police had explained her how to give evidence. She has admitted the presence of Shakunabai in her house. She has stated that there are houses around their house. She has stated that her statement under Section 164 of the Cr.PC was recorded by the Magistrate. It is necessary at this stage to state that her statement was not shown to

her. Her statement was not exhibited. Similarly, the accused was not granted an opportunity to explain the same. Similarly, her statement recorded by the Child Welfare Committee was also not shown to her. It was also not exhibited. The perusal of the judgment would show that without exhibiting these two statements of the victim, these statements have been considered by the learned Special Judge. These two statements were not put to the accused in his examination under Section 313 of the Cr.PC.

16] On minute scrutiny of the evidence of the victim, in the backdrop of the above stated factual position, it is evident that there is scope to doubt her credibility. The facts noted above, if considered in totality, would be sufficient to doubt the occurrence of the incident in the manner narrated by the victim. It is true that the report of the incident was lodged on the very same day. In my view, merely because of this, the tainted and doubtful evidence would not be sufficient to take the case of the prosecution forward. The self-contradictory and inconsistent statements made by the victim are sufficient to create doubt about her credibility and trustworthiness. The evidence of her elder sister, if appreciated in the context of the evidence of the victim, would show that the said evidence is not direct evidence. She was not a witness to the

occurrence or any part of the occurrence of the incident. On the material aspects, there are inconsistencies in the evidence of the victim and PW-7. On minute scrutiny of the evidence of the victim and her elder sister (PW-7), a sufficient doubt has been created about the credibility and trustworthiness of their evidence.

17] The evidence of the Medical Officer (PW-8) assumes importance in the above backdrop. The Medical Officer (PW-8) has deposed that on 11th July, 2016, she examined the victim. The victim, on the date of examination, was 16 years old. She has stated that the victim narrated the history of the assault. It is evident that the history of assault narrated before the doctor by the victim is also inconsistent with the facts stated in the report. It is seen that, while narrating the history of assault, the victim has stated that the incident occurred on 21st June, 2016 at 2.00 p.m. This is contrary to the contents of the report of the victim. As per the report, the incident occurred on 20th June, 2016. The victim was examined after 20 days from the date of the incident. The Medical Officer has stated that, on examination of the victim, she found that the victim was stable. She noticed one abrasion over her lower back admeasuring 5cm x 0.01cm with ill-defined margins and brown in colour. The abrasion was more than 10 days old. The Medical

officer, on local examination, found that there was an injury to the hymen of the victim. She has stated that the edges of the hymen were smooth, having a tear at 10 o'clock position and 2 o'clock position. She has stated that it suggested that it was an old healed tear. The doctor has referred the victim for radiological examination. She was examined by the Radiologist. The Medical Officer (PW-8) has stated that the victim was in the hospital for four days for her medical examination. She has stated that the victim was diagnosed as the case of adjustive disorder in case of rape surviver.

18] It is seen on perusal of the medical certificate that the age of the injuries was not mentioned in the certificate. The doctor, in her evidence before the Court for the first time, has stated that the abrasion was more than 10 days old. The doctor has not stated a word about the age of the injury to the hymen. The initial reluctance on the part of the victim to undergo the medical examination and her medical examination after 20 days, in my view, is the most vital circumstance against the case of prosecution. The doctor in this case was, therefore, required to mention categorically the age of the hymen tear. There is no evidence that

during this period of 20 days, the victim was either admitted in the hospital or there was no chance or possibility to indulge in sexual intercourse with any other person. This delay of 20 days for her medical examination goes against the case of prosecution. While addressing such an issue, the preponderance of probability is required to be borne in mind. The possibility of sexual assault on the victim during this period of 20 days cannot be ruled out. The doctor, on examination, was required to give a concrete opinion. The doctor was made aware on the basis of the police requisition that the alleged rape was committed on 20th June, 2016 at about 2.00 p.m., and the victim was examined by her after 20 days on 11th July, 2016. In my view, the evidence of the doctor and her report cannot be accepted as conclusive proof of the factum of the sexual assault on the victim on 20th June, 2016. It is further seen that the victim was diagnosed as the case of adjustive disorder in the case of rape surviver. The learned Judge, while recording her evidence, has also observed that she was very slow in understanding. In my view, the cumulative consideration of all these circumstances would show that there is a scope to doubt the veracity of the victim and her elder sister. The evidence of the Medical Officer in the fact situation could not be said to be a concrete corroborative evidence.

19] The accused was examined by the Medical Officer on 22nd June, 2016. The doctor, in his report, has stated that there is nothing to suggest that the above said person is not capable to do the intercourse. The purpose of the examination of the accused was to find out whether he was capable to perform sexual act as well as to find out whether he had indulged in a sexual intercourse in the recent past or on 20th June, 2016. The medical certificate of the examination of the accused at Exh.75 is silent about the presence or absence of the smegma on the penis of the accused. The doctor has not categorically stated about the test performed to determine that the accused was potent. The medical certificate of the examination of the accused, therefore, does not corroborate the version of the victim. The doctor, who had examined the accused, was not summoned as a witness. The prosecution has not placed on record a plausible explanation for the same. The medical certificate at Exh.75 was admitted in evidence on the basis of the evidence of the Investigating Officer.

20] It is to be noted that the CA reports of the analysis of the samples, the cloths of the accused and the victim do not show that the result of analysis connected the accused with the commission of the crime. It is further seen that the history of assault of the

incident narrated by the victim to the doctor and recorded in the medical certificate was not put to the accused in his examination under Section 313 of the Cr.PC. The evidence on record, in my view, is not sufficient to prove the charge against the accused beyond reasonable doubt. The accused cannot be convicted and sentenced by relying upon such a tainted evidence. The victim in a crime of rape is bound to deviate from her version here and there. Minor omissions and contradictions cannot be read out of context, and based on the same, the evidence cannot be discarded. However, if the contradictions, inconsistencies, and discrepancies are material in nature, attacking at the very root of the case of prosecution, then the same cannot be glossed over. The material discrepancies in the evidence of the prosecution witnesses are bound to support the defence of the accused.

21] The learned Judge, on the basis of the evidence, has recorded a finding that, on the date of the incident, the victim was 16 years old. As far as the evidence of the age of the victim is concerned, the same has not been seriously challenged by the accused. The prosecution, by adducing cogent, concrete, oral and documentary evidence, has proved that the victim was 16 years old on the date of the incident and, as such, a child as defined under

Section 29 of the POCSO Act. The prosecution examined PW-6 Village Development Officer to prove the birth date of the victim. Exh.83 is the birth certificate of the victim issued by Gram Panchayat Sahur. Exh.82 is the receipt regarding the information provided by the father of the victim with regard to her birth date. The birthdate of the victim recorded in the public record is 15th September, 2000. Similarly, the Radiologist has stated that the radiological age of the victim is between 16 to 18 years. In the teeth of the concrete documentary evidence, the margin of error on the lower side recorded by the Radiologist is required to be considered in this case.

22] 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 trigger automatically.

23] In this case, on minute perusal of the evidence of the prosecution witnesses, I am satisfied that it leaves a scope to doubt their credibility and trustworthiness. The accused has been sentenced to suffer rigorous imprisonment for ten years on the basis of such evidence. In my view, the learned Special Judge has not taken proper care. The oral evidence has not been corroborated by the medical evidence. In my view, therefore, the evidence is not sufficient to prove the charge. The accused, in the teeth of such doubtful evidence, cannot be held guilty of the charge. As such, I conclude that the prosecution has failed to prove the guilt of the accused. The accused, therefore, is entitled to get the benefit of doubt. The appeal, therefore, 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 learned Special Judge (POCSO), Wardha, dated 30.07.2018 in Special (Ch. Act) Case No.78/2016 is quashed and set aside.

iii] Appellant – Kishor Vitthalrao Shendre is acquitted of the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and under Secs. 376(2)(i) and u/s. 452 of the Indian Penal Code.

iv] Appellant – Kishore Vitthalrao Shendre is in jail. He be released forthwith if not required in any other crime.

v] The appeal stands disposed of in the aforesaid terms.

(G. A. SANAP, J.)

Vijay

Signed by: Mr. Vijay Kumar
Designation: PA To Honourable Judge
Date: 06/09/2024 19:07:59