



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

CRIMINAL APPEAL NO. 284 OF 2020

APPELLANT : Manohar S/o. Tikaram Kapgate,
Aged about 45 Years, Occu. Business
(Pan Kisok), R/o. Palasged, Tah.
Korkheda, Distt. Gadchiroli.

(At present he is in central jail at
Nagpur).

//VERSUS//

RESPONDENTS : 1. The State of Maharashtra, through
P.S.O. of Police Station Purada, Tah.
Kurkheda, Distt. Gadchiroli.

Amendment carried out as
per Court's Order dt.
19.09.2022. 2. XYZ (Victim/Complainant) in Crime
No.34/2017, Police Station Purada,
Distt. Gadchiroli.

Mr. Sameer S. Das, Advocate for the Appellant.
Mr. Suraj Hulke, APP for Respondent No.1/State.
Ms. Archana P. Murrey, Advocate (appointed) for Respondent
No.2/Victim.

CORAM : G. A. SANAP, J.
DATED : 5th AUGUST, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order
dated 27.02.2020, passed by the learned Additional Sessions

Judge/Special Judge, Gadchiroli, whereby the learned Judge held the accused guilty of the offences punishable under Sections 448 and 376(2)(i) 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 one year and to pay a fine of Rs.1,000/- and in default to suffer simple imprisonment for ten days for the offence punishable under Section 448 of the IPC; rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- and in default to suffer simple imprisonment for one year for the offence punishable under Section 376(2)(i) 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 First Information Report (FIR) in this case was registered on the report of respondent No.2 (hereinafter referred to as the “victim”). The victim and the accused are the residents of Palasgad, Tah. Kurkheda, Dist. Gadchiroli. It is stated that, on 28th October, 2017, the mother of the victim (PW-2) had gone to the

field. Her maternal uncle, Roshan Modarkar (PW-3), had come to their house. He had also gone to the field. The victim was alone at her house. It is stated that at 1:00 p.m., the victim was inside the house. The doors of the house were closed. The accused knocked on the door of the house. The victim opened the door and saw the accused. The accused, after opening the door by the victim, entered into the house and closed the door from inside. It is stated that the accused caught hold the hand of the victim. She raised a shout. The accused crammed the Odhani in her mouth. The accused tied her hands with Odhani. The victim, therefore, could not resist. The accused thereafter removed her cloths as well as his cloths. The accused thereafter committed forcible sexual intercourse with the victim. It is alleged that, after some time, her maternal uncle Roshan came from the field. He knocked on the front door of the house. The hands of the victim were tied, and therefore, she could not open the door. The maternal uncle went to the backside and knocked on the backside door. The accused, in the meantime, untied the hands of the victim. The victim opened the door of the house. The maternal uncle entered into the house. The accused, taking advantage of the situation, ran away from the backside door. She thereafter narrated the incident to her maternal uncle. She also narrated the incident to her mother when she came back from the

field after being informed about the incident by her maternal uncle. On the next day, i.e., on 29th October, 2017 at about 2:15 hrs., they went to Purada Police Station and lodged the report. On the basis of this report, a Crime bearing No.34/2017 was registered against the accused.

03] Police Sub-Inspector Sukhdev Prakash Gode (PW-9) carried out the investigation. The victim was sent to the Government Hospital for medical examination. PW-9 arrested the accused. The accused was sent for medical examination. PW-9 went to the spot and drew the spot panchanama. The cloths of the accused, the cloths of the victim and other articles were seized under panchanama.

04] After completion of the investigation, the investigation revealed the involvement of the accused in the crime and therefore the charge-sheet was filed against him. The learned Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of a dispute with the family members of the victim. The prosecution, in order to bring home the guilt against the accused, examined 9 witnesses. The accused has examined 3 witnesses in his defence. The learned

Judge, on the analysis of the evidence, held the accused guilty and sentenced him as above. The appellant/accused is before this Court in appeal.

05] I have heard Mr. Sameer S. Das, learned advocate for the appellant/accused, Mr. Suraj Hulke, learned APP for respondent No.1/State and Ms. Archana P. Murrey, learned advocate (appointed) for respondent No.2/victim. Perused the record and proceedings.

06] Learned advocate for the accused submitted that the evidence of the victim (PW-1), her mother (PW-2) and her maternal uncle (PW-3) does not inspire confidence. The victim, her mother, and her maternal uncle have narrated the inconsistent account of the incident. Learned advocate submitted that there are major omissions and inconsistencies in their evidence. Learned advocate took me through the record and pointed out that the victim, her mother, and her maternal uncle have admitted that on the same day at 11:30 a.m., some incident had occurred, and in the said incident, the accused was beaten by the maternal uncle of the victim. It is pointed out that these witnesses have admitted that the accused had gone to the police station with his friends to lodge the

report against the maternal uncle of the victim. Learned advocate submitted that the victim, her mother, and her maternal uncle have admitted that on the same day in the evening they had gone to the police station to report the matter to the police. Learned advocate submitted that the report was lodged on the next day i.e. 29th October, 2017 at 13:00 hrs. Learned advocate would submit that the 24-hour delay in lodging the report in the fact situation is fatal to the case of prosecution. The delay in lodging the report creates doubt about the occurrence of the incident.

07] Learned advocate submitted that the evidence of the Medical Officer (PW-7), even if accepted at its face value, in the backdrop of the doubtful evidence of the victim, her brother and her maternal uncle would not take the case of the prosecution forward. Learned advocate submitted that there are number of doubtful circumstances proved on record and the same are sufficient to create doubt about the case of prosecution. Learned advocate further submitted that the birth certificate of the victim was produced by the mother of the victim at the time of her evidence in the Court. Learned advocate submitted that the procedure adopted by the learned Judge to allow the production of the document at the time of the evidence is contrary to the law.

Learned advocate took me through the birth certificate at Exh.33 and pointed out that the said certificate was obtained from Gat Gram Panchayat, Palasgad on 26th March, 2019. It is pointed out that this certificate was not collected by the Investigating Officer, and therefore it was not part of the charge-sheet, which was filed on 17th January, 2018. Learned advocate submitted that, therefore, the authenticity of this certificate is doubtful. Learned advocate submitted that this procedure followed by the learned Judge while granting permission for the production of the birth certificate through the witness at the time of the evidence is contrary to the law. This procedure adopted by the learned Judge has caused prejudice to the defence of the accused. Learned advocate submitted that the learned Judge has failed to properly appreciate the evidence of the material witnesses and has committed a grave error in holding the accused guilty.

08] Learned APP submitted that the evidence of the victim (PW-1), her mother (PW-2), and her maternal uncle (PW-3) is consistent, and therefore there is no reason to discard and disbelieve the said evidence. Learned APP submitted that even if it is assumed for the sake of argument that some incident had occurred on the same day at 11:30 a.m., the same by itself would

not be sufficient to discard the evidence of the witnesses as to the occurrence of the incident in question at 1:00 p.m. Learned APP submitted that the accused had threatened the victim of dire consequences in case she disclosed the incident to anybody, and therefore the report could not be lodged on 28th October, 2017. Learned APP would submit that even if it is assumed that on 28th October, 2017, the victim, her mother, and her maternal uncle had gone to the police station, the said fact by itself would not be sufficient to conclude that the report lodged was concocted and as a result of due deliberation to embellish the incident. Learned APP submitted that the learned Judge has taken into consideration the evidence and has properly appreciated the same. Learned APP submitted that the evidence of the Medical Officer has corroborated the version of the victim as to the sexual assault with her by the accused. Learned APP submitted that the accused has not seriously denied the birth date, and therefore the submission made by learned advocate for the accused that the birth certificate has no authenticity cannot be accepted.

09] Learned advocate appearing for respondent No.2/victim has adopted the submissions advanced by learned APP for the State.

10] I have carefully gone through the evidence and available records. The accused has examined 3 witnesses in his defence. It is the defence of the accused that he has been falsely implicated on account of the enmity. In this case, the seized cloths of the accused and the victim had been sent to RFSL, Nagpur. The CA reports are on record. The CA reports do not render any assistance or corroboration to the case of prosecution in any manner. The medical evidence has been relied upon as the most important corroborative piece of evidence to seek support to the testimony of the victim (PW-1), the testimony of her mother (PW-2), and the testimony of her maternal uncle (PW-3). In this case, minute scrutiny of the evidence of the victim, her mother, and her maternal uncle is necessary. Learned advocate for the accused has pointed out number of omissions and inconsistencies in their evidence to buttress his submission that the accused has been falsely implicated in this case by the maternal uncle of the victim.

11] The victim (PW-1) had lodged the report at Exh.26 on 29th October, 2017 at 13:00 hrs. The victim, in her evidence, has reiterated the facts stated by her in her report. She has stated that on 28th October, 2017, at about 1:00 p.m., the accused came to her house. She had closed the door of her house and was sitting in the

house. She heard the knock on the front door, and therefore she opened the door. She saw that the accused was standing in front of the door. She questioned the accused about the purpose of his visit. She has stated that at that time, the accused entered into her house and closed the door from inside. She has stated that the accused crammed the Odhani in her mouth. She has further stated that the accused tied her hands with another Odhani. She has further stated that the accused removed her cloths and his cloths as well. She has stated that thereafter, the accused committed rape on her. She has stated that, after some time, her maternal uncle returned back from the field. Her maternal uncle knocked on the backside door. She has stated that at that time, the accused untied her hands. She has stated that the accused at that time threatened her not to disclose the incident to anybody; otherwise, she would be killed. The accused at that time caught her hair and pushed her head against the door. She has stated that when her maternal uncle saw the accused, he ran away from the front door of the house. She has stated that thereafter, her maternal uncle went to the field to call her mother. She has stated that her mother came to the house, and she narrated the incident to her mother. She has categorically stated that thereafter, her uncle went to call the accused. The accused came to her house, and at that time, her maternal uncle questioned

the accused as to why he had come to their house when the victim was alone in the house. The accused denied having entered into the house.

12] As far as the examination-in-chief of the victim is concerned, if it is considered along with her report at Exh.26, it would show that there are major inconsistencies in her evidence and in her report. In her report, she has stated that after entering into the house, the accused first tied her hands, and thereafter, he crammed another Odhani in her mouth. In her evidence, she has stated that the accused first crammed the Odhani in her mouth and then tied the hands with another Odhani. In her report, he has stated that when her maternal uncle came from the field, he knocked on the front door. In her evidence, she has stated that her maternal uncle knocked on the backside door. In her evidence, she has stated that, after realizing the presence of her maternal uncle, the accused had untied her hands and she opened the door. She has stated that the accused had threatened to kill her in case she disclosed the incident and his name to her maternal uncle. This fact is missing from her report. Perusal of her examination-in-chief would show that she has nowhere stated that she had disclosed the incident to her maternal uncle when he entered into the house. She

has stated that thereafter, her maternal uncle went to the field and called her mother. In her report, she has stated that when her maternal uncle entered into the house, the accused ran away from the backside door, and she narrated the incident to her maternal uncle. These are the major inconsistencies in her evidence.

13] The cross-examination of the victim is very relevant. Perusal of her cross-examination would show that she has admitted about one incident at about 11:30 a.m. to 12:00 noon on 28th October, 2017. She has stated that on 28th October, 2017, she along with her maternal uncle, at about 11:30 a.m. to 12:00 noon, had gone to the house of the accused to call him. At that time, the accused was taking meals. It is further admitted that when the accused was coming to her house, her maternal uncle was standing on the main road. She has admitted that her maternal uncle beat the accused. She has further admitted that, at that time, Suresh Darro came there. She has further admitted that Suresh Darro asked her whether the accused had come to her house. They apprised Suresh Darro about the incident. On listening them, Suresh Darro told them that he was not satisfied and suggested them that they should not create a mountain out of a molehill. In further part of cross-examination, she has admitted that on the very

same day, the accused had gone to the police station along with Ratansing Halami, Duryodhan Sakharam Puram and Ishwar Rambhau Masram for lodging the report against her maternal uncle with regard to the incident of beating to the accused by him. She has further admitted in her cross-examination at para No.14 that on 28th October, 2017, she had gone to the police station for the first time. In further part of her cross-examination, the material omissions have been brought on record.

14] Perusal of the cross-examination of the victim would show that, on the date of the incident itself, she had gone to the police station. She has admitted that on the same day, between 11:30 a.m. and 12:00 noon, a dispute had taken place between the accused and her maternal uncle, and her maternal uncle beat the accused. She has also clearly admitted that the accused had gone to the police station with his friends to lodge a report against them with regard to this beating. In my view, the inconsistencies noticed above in her evidence and in her report, as well as these admissions, are very crucial for testing her credibility.

15] In this context, it would be necessary to consider the evidence of her mother (PW-2). Undisputedly, PW-2, the mother

of the victim, was not at home. She was called by her brother (PW-3) from the field. She has stated that her brother Roshan was with her in the field. She has stated that the victim was not well on that day and therefore she told her brother to go to home and make enquiry with the victim. She has stated that, after some time, he came back from the village and narrated the incident to her. She has stated that her brother told her that when he went to the house, the accused was found inside the house with the victim. She has stated that her brother told her that the accused had tied the hands of the victim with Odhani and crammed one Odhani in her mouth. Her brother further informed her that the accused ran away from the spot when the door was opened. She has stated that thereafter, she went to the house and found that the victim was present in the house. She enquired with the victim. The victim narrated the incident to her. As far as the incident of penetrative sexual assault is concerned, the examination-in-chief of PW-2 is silent. She has nowhere stated that the victim told her that the accused had committed rape on her. The victim has stated that she did not narrate the incident to her maternal uncle. She narrated the incident to her mother only.

16] In this case, the evidence of the witnesses as to the occurrence of the incident of rape needs minute scrutiny. The mother of the victim has not specifically stated that the victim told her that the accused had committed forcible sexual intercourse with her. She has further stated in her examination-in-chief that at that time she told the victim and her brother to call the accused. She has stated that thereafter, they went to call the accused, and the accused came to their house. She has stated that thereafter, she questioned the accused as to why he entered into her house when the victim alone was at the house. She has stated that the accused told her that he had not come to their house. She has stated that thereafter, they went to the police station, and the police made enquiry with her. Her cross-examination would show that there are major omissions and inconsistencies in her evidence. She has admitted in her cross-examination that Suresh Darro had come to the spot for intervening the dispute. She has admitted that Suresh Darro had questioned the victim as to whether the accused had come to her house. She has stated that, on the very same day, the accused, along with Ratansing Halami, Duryodhan Sakharam Puram, and Ishwar Rambhau Masram, had gone to the police station for lodging the report against her brother (PW-3). She has stated that when they came to know that the accused had gone to

the police station, they also went to the police station.

17] In para No. 4 of the cross-examination, she has given a very crucial admission. She has admitted that when she and her brother came to the house, her brother alone narrated the incident to her. This answer is inconsistent and contradictory to the version of the victim as well as the version of Roshan (PW-3). She has further admitted that the victim, her brother, her husband, and the villagers had gone to the police station. She has categorically stated in para No.6 of her cross-examination that in the evening, at 7:00 p.m., she had gone to the police station. She has categorically admitted that, on the next day, the police recorded her statement. The evidence of this witness clearly shows that apart from the incident narrated by the victim of the sexual assault, one more incident had occurred on the very same day between 11:30 a.m. and 12:00 noon. She has admitted that the accused had gone to lodge the report against her brother to the police station with his friends. She has also admitted that they had also gone to the police station on the very same day.

18] In this context, it would be necessary to peruse the evidence of Roshan (PW-3), the maternal uncle of the victim and

the brother of PW-2. He has stated that, on the date of the incident, he was present with her sister in the field, and the victim was alone at the house. She was not feeling well. He has deposed that her sister sent her to the house because the victim was not well. He has stated that at about 1:00 p.m., he went to the house of her sister and gave a call to the victim. He knocked on the door. The doors were closed from inside. He went to the door on the other side. The door on the other side was also closed from inside. He peeped into the house through the window. He has stated that he saw the accused in the house. He has stated that he saw that the hands of the victim were tied with Odhani and one Odhani was crammed in her mouth. He has stated that her legs were also tied with Odhani. He has stated that when he went to the door on the other side and on opening of the said door by the victim, he saw that the accused ran away from the door on the other side of the house. He has stated that thereafter, he went to the field to call her sister. He has further stated that he went inside the house and made an enquiry with the victim, and the victim narrated the incident to him. He has stated that the victim told him that the accused had committed forcible act on her. He has stated that the accused had committed sexual intercourse with the victim. He has further stated that, after returning from the field with his sister, he

went to the house of the accused to call him. He has stated that he questioned the accused as to why he had entered into the house of her sister. The accused denied this fact. He has stated that the accused went to the police station because he realized that he would face the consequences for his misdeeds. He has stated in his examination-in-chief that they also went to the police station.

19] It is to be noted that, in his examination-in-chief, he has not categorically stated that the victim told him that the accused had committed sexual intercourse with her. He has stated that the victim told that the accused committed forcible act on her. The victim is silent about the narration of the incident of sexual assault on her by the accused to PW-3. He has stated that she narrated the incident to her mother for the first time. The evidence of the mother is silent about this aspect. The mother (PW-2) has not stated that the informant told her that the accused had committed sexual intercourse with her. There are major inconsistencies on this point in the evidence of PW-1, PW-2 and PW-3. In my view, this is a very crucial aspect.

20] In his cross-examination, PW-3 has stated that, it did not happen that on the relevant day, at about 11:30 a.m. to 12:00

noon, he beat the accused. However, he has admitted that he and the victim had gone to the house of the accused to call him. He has admitted that, at the relevant time, the accused was taking meals. He has further admitted that the accused told them that he would come to their house after completing his meals. He has stated that, after completing his meals, the accused came to the house of her sister. He has stated that he met the accused at the door of the house of her sister. He has admitted that, at that time, there was an altercation between him and the accused. He has admitted that, at that time, he gave one slap to the accused. He has admitted that, at that time, Suresh Darro asked the victim whether the accused had entered into the house. He has denied the time of this incident, but the evidence of PW-1 and PW-2 is sufficient to conclude that this incident had occurred at about 11:30 a.m. to 12:00 noon on the date of the incident. In his cross-examination, he has further admitted that the accused, along with his friends, had gone to the Purada Police Station for lodging the report against him. He has stated that thereafter they had gone to the police station in the evening at about 7:00 p.m.

21] In my view, careful perusal of the evidence of PW-1, PW-2 and PW-3 would show that, on the material aspect, there are

major inconsistencies in their evidence. On minute perusal of their evidence, it is crystal clear that the first incident had occurred at about 11:30 a.m. to 12:00 noon. It is not their case that, prior to the incident at 11:30 a.m., the accused had committed sexual intercourse with the victim. Therefore, there was no reason for PW-3 and the victim to go to the house of the accused and to call him. They have admitted that PW-3 beat the accused. It is their case that the second incident of rape occurred at 1:00 p.m. on the same day. In my view, this is unbelievable. It creates doubt in the mind of the Court. If the incident as stated had occurred in the morning, then there was no reason for the accused to go to the house of the victim at 1:00 p.m. It is further pertinent to note that, considering the fact that the said incident was fresh in the mind of the victim, she would not have at all opened the door. It appears that there is something fishy about this incident. It needs to be stated that if the incident as narrated by the witnesses had occurred, then there was no reason for these witnesses to narrate two versions of the same incident. The evidence of PW-1, PW-2 and PW-3 on minute scrutiny is found to be doubtful. It does not inspire confidence. The trustworthiness and credibility of their evidence has been shaken.

22] In the above context, delay of 24 hours in lodging the report assumes importance. The Hon'ble Apex Court in the case of *State of Rajasthan Vs. Om Prakash (2002) 5 SCC 745* has dealt with this point in great detail. The Hon'ble Apex Court has observed that delay in lodging the first information report quite often results in embellishment which is a creature of an afterthought. 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.

23] Perusal of the report would show that no explanation or reason has been stated in the report for the 24-hour delay in lodging the report. The evidence on record clearly shows that in the incident occurred at 11.30 a.m. to 12.00 noon, PW-3 had beaten the accused. They have admitted that the accused, along with his friends, had gone to the police station to lodge the report against them. They have stated that, on the very same day in the evening at 7:00 p.m., they went to the police station. In my view, this admission given by PW-1, PW-2 and PW-3 is very relevant. If the incident, as serious as narrated by them, had occurred with the victim, then they would have reported the same to the police on

28th October, 2017 at 7:00 p.m. itself. They have not placed on record any other reason for not lodging the report of the said incident at that time. The report was lodged on the next day, and that too at 1:00 p.m. In my view, the intervening circumstances are required to be borne in mind while considering the explanation, if any, for delay in lodging the report.

24] In this case, there is no explanation at all in the report for the delay in reporting the matter to the police station. In my view, in this case, considering the fact that the victim, her mother, and her maternal uncle had gone to the police station on 28th October, 2017 at 7:00 p.m., it would be sufficient to conclude that, on that day, they were not serious about reporting the matter. This lack of seriousness could be due to number of reasons. One of the reasons could be the knowledge that the accused was not involved in any such act. In my view, therefore, in this case, 24-hour delay in lodging the report is fatal to the case of prosecution. The delay has not been examined. It is to be noted that, immediately after reporting the incident to the mother of the victim by PW-3, she had come to the house. They questioned the accused, as stated by them. They have further stated that the accused denied the incident in toto. Therefore, they could have gone to the police and

immediately lodged the report with the police. There was no hurdle of any nature in their way in reporting the matter to the police on the very same day. In my view, this is a very vital aspect which will go against the case of prosecution.

25] The next important witness is the Medical Officer (PW-7). PW-7 has deposed that she had examined the victim. She has stated that the history of assault narrated by the victim was recorded by her. In her report, the history of assault narrated by the victim and recorded by PW-7 at Exh.48 is concerned, it would show that the victim has improved her statement while narrating the history of assault before the doctor. Certain facts missing from the report were narrated by her before the doctor. The doctor, on local examination of the victim, found the injuries on her body. It is the defence of the accused that the victim was beaten by her maternal uncle. The doctor has not given a concrete opinion. The opinion was reserved subject to receipt of the CA report. She found that the hymen was ruptured. The doctor found that there was reddish congestion around the hymen and neuroid discharged. On separation of labia, she found that the vagina was congested and tendered. She has found that it was possible to insert two fingers tip in the vagina. This fact at the most would show that she was

subjected to sexual intercourse. The question is whether the accused was the author of all these injuries. In my opinion, the evidence of the victim, her mother, and PW-3 is not sufficient to attribute the authorship of these injuries to the accused. In my view, therefore, the evidence of the Medical Officer even if accepted at its face value, by itself would not be sufficient to prove the charge against the accused.

26] Learned advocate for the accused has challenged the authenticity of the birth certificate of the victim produced on record at Exh.33 for the first time by the mother of the victim on 28th March, 2019. The victim, in her evidence, has stated that her birth date is 9th December, 2010. She has stated in her cross-examination that the birth date was not mentioned in the report at Exh.26. PW-3, the mother of the victim, in her examination-in-chief has not stated the birth date of the victim. At the time of her evidence, she produced certified copy of the birth date of the victim, issued on 26th March, 2019, by the Secretary of the Gram Panchayat Palasgad, Panchayat Samiti Korkheda. This certified copy of the birth certificate was obtained two days prior to the date of her evidence. The certified copy of the birth certificate was not part of the charge-sheet. It is not the case of the prosecution that

certified copy of this birth certificate was provided to the accused. The accused has challenged this birth certificate.

27] In this context, perusal of the evidence of the Investigating Officer (PW-9) would be very relevant. In his evidence, he has stated that, at the time of the investigation, he had collected the birth certificate of the victim. He has stated that the birth certificate is already marked as Exh.33. The certified copy of the birth certificate was not collected by the Investigating Officer at the time of the investigation. The copy of the birth certificate was obtained by PW-2 two days prior to the recording of her evidence. This certificate was not part of the charge-sheet. The evidence of the Investigating Officer would, therefore, show that the birth certificate collected by him was not seen and referred by him at the time of his evidence. He has not stated that the birth certificate collected by him was compiled in the charge-sheet. Perusal of the record would show that one photocopy of the birth certificate is part of the record. It was obtained from Gat Gram Panchayat, Palasgad on 30th June, 2009.

28] It needs to be stated that the victim was not referred for radiological examination. The radiological age of the victim was

not determined. The prosecution, in such a case, is duty-bound to prove that the victim girl was below 18 years of age on the date of the incident and, as such, a child as defined under Section 2(1)(d) of the POCSO Act. The certified copy of the birth certificate was produced by the mother of the victim. Learned Judge allowed the production without following the proper procedure. The birth certificate at Exh.33 was the vital document to substantiate the case of prosecution. The Investigating Officer was required to collect the birth certificate during the course of the investigation and file it with the charge-sheet. The prosecution cannot produce such a vital document at the stage of the evidence of the witnesses. The prosecutor conducting the case was required to take proper care. The evidence collected by the Investigating Officer, relevant to substantiate the charge against the accused, is required to be produced with the supplementary charge-sheet. The provisions of Section 173(8) of the Cr.PC empower the Police Officer to conduct further investigation in respect of the offence after filing of the report under sub-section 2 of Section 173 of the Cr.PC. Sub-section 8 provides that the Police Officer is required to forward to the Magistrate a further report or reports regarding such evidence collected in further investigation and for that purpose the provisions of sub-sections 2 to 6 are applicable in relation to such

report or reports. Learned Judge did not keep this provision in mind. He allowed production of the important document by the witnesses at the stage of the evidence. Therefore, there is substance in the submission of learned advocate for the accused that there is no evidence with regard to the authenticity of this birth certificate. In my view, therefore, on this count also, the prosecution has failed to adduce sufficient evidence to prove that, on the date of the incident, the victim was below 18 years of age.

29] 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.

30] 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 is not 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.

31] Before parting with the matter, I must place on record my appreciation for the assistance rendered by learned advocate for the accused, learned APP for the State and learned advocate appointed for respondent No.2. Hence, the following order:

ORDER

- i] The Criminal Appeal is **allowed**.
- ii] The judgment and order dated 27.02.2020, passed by the learned Special Judge, Gadchiroli, in Special (POCSO) Case No.03/2018, convicting the appellant for the offences punishable under Sections 448 and 376(2)(i) of the Indian Penal Code, 1860, and under Section 4 of the Protection of Children from Sexual Offences Act, 2012, is set aside.
- iii]. The appellant/accused – Manohar S/o. Tikaram Kapgate is acquitted of the offences punishable under Sections 448 and 376(2)(i) of the IPC and under Section 4 of the POCSO Act.
- iv] The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.
- v] The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed for respondent No.2, as per Rules.
- vi] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)