



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

CRIMINAL APPEAL NO. 80 OF 2022

APPELLANT

: Umesh S/o Dilip Sanghele,
Aged about 33 years, Occu. Sweeper,
R/o Mangaldas Baba Nagar, Murtizapur,
Tq. Murtizapur, Dist. Akola.

VERSUS

RESPONDENTS

: 1] State of Maharashtra,
through Police Station Officer,
Police Station, Murtizapur City, Dist. Akola

2] X.Y.Z. (Victim) Crime No. 301/16
P.S. Murtizapur, Dist. Akola.

Mr. F. T. Mirza, Senior Advocate appointed for the appellant.
assisted by Mr. Paresh S. Thakur, Advocate.
Mr. Saurabh C. Joshi, A. P. P. for the respondent no.1/State.
Ms. Falguni Badani, Advocate appointed for respondent no.2 absent

CORAM : G. A. SANAP, J.

DATED : SEPTEMBER 10, 2024.

ORAL JUDGMENT

1. In this appeal, challenge is to the judgment and order dated 06.12.2021, passed by learned Additional Sessions Judge, Akola whereby the learned Judge convicted the appellant of the offences punishable under Section 4(2) and under section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the

POCSO Act” for short) ; and under sections 376(2)(i), 363 and 354-A of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay fine of Rs.10,000/- (Rupees Ten thousand only) and in default to suffer further SI for 2 (two) months for the offence u/s 3, punishable u/s 4(2) of the POCSO Act; to suffer rigorous imprisonment for 5 (five) years and to pay fine of Rs.10,000/- (Rupees Ten thousand only) and in default to suffer further SI for 2 (two) months for the offence u/s 7, punishable u/s 8 of the POCSO Act ; to suffer rigorous imprisonment for 7 (seven) years and to pay fine of Rs.10,000/- (Rupees Ten thousand only) and in default to suffer further SI for 2 (two) months for the offence punishable under Section 363 of the IPC ; and to suffer rigorous imprisonment for 3 (three) years and to pay fine of Rs.5,000/- (Rupees Five thousand only) and in default to suffer further SI for 1 (one) months for the offences punishable under Section 354-A of the IPC. No separate sentence is imposed for the offence punishable under Section 376(2)(i) of the IPC.

2. BACKGROUND FACTS

The informant (PW2) is the mother of the victim (PW1). On the date of the incident, the victim was six years old. The report of the incident, occurred on 19.11.2016, was lodged on 30.11.2016 at

Murtizapur City police station. The case of the prosecution, which can be gathered from the report and other documents compiled in the charge-sheet is that the father of the victim has a salon shop. The informant (PW2) has two sons and two daughters. The victim, on the date of the incident, was studying in 1st standard. It is stated that on 19.11.2016, the victim and her brother went to play near the salon shop of the father. When they were playing there, one unknown person came there and showed money to the victim. He lured the victim on the pretext of giving chocolate. The brother of the victim warned her not to fall pray to the said person. Her brother was then engrossed in his play. After some time, he came to the salon shop and inquired with his father about the victim. The victim was not there. On the advise of the father, he went to the home to make an inquiry about the victim. The victim was not found at home.

3. It is stated that after some time, the victim came to the salon shop. She was in a frightened state of mind. The father took the victim to his house. The victim narrated the incident to her mother. She has stated that the appellant lured her by showing money. He took her to an isolated place known as '*khandhar*'. There the appellant

inserted his finger in her vagina. The appellant kissed her. The appellant committed this act at the point of knife. When she raised hue and cry, the appellant fled from the spot. She gave description of the appellant. She told that the appellant was having black complexion and a fatty nose.

4. It is stated that after 9 – 10 days of this incident, when the victim was going on a bicycle with her father, she saw the said person standing near a pan stall. The victim pointed out the said person to her father. The father went towards the said person and inquired with him about his name. He told his name as Umesh and after seeing the victim with the father, ran away from the spot.

5. After identifying the appellant by the victim along with her father, on 30.11.2016, they went to the police station and the mother lodged the report against the appellant. On the basis of the said report, a crime bearing No. 301/2016 was registered against the appellant. The police sent the victim for medical examination. The appellant was arrested on 01.12.2016. He was also sent for medical examination. The Investigating Officer recorded the statements of the witnesses. During

the course of the investigation, the appellant made a statement and expressed his desire to point out the place where he had concealed the knife. On the basis of his disclosure statement, the knife was recovered from his house. After completion of the investigation, the Investigating Officer filed charge-sheet against the appellant.

6. Learned Additional Sessions Judge framed the charge (Exh.24) against the appellant. The appellant pleaded not guilty. His defence is of false implication in this crime because he had opposed one Mr. Nizam in the Nagar Parishad elections. Mr. Nizam is the friend of the father of the victim. The prosecution, in order to bring home the guilt of the appellant/ accused, examined eight witnesses. Learned Judge, on consideration of the evidence, found the same sufficient to prove the charge and convicted and sentenced the appellant as above. The appellant has questioned the correctness of this judgment in the present appeal.

7. I have heard Mr. F. T. Mirza, learned Senior Advocate appointed for the appellant, assisted by learned advocate Mr. Paresh S. Thakur ; and Mr. Saurabh C. Joshi, learned Additional Public

Prosecutor for the respondent State. Learned advocate Ms. Falguni Badani, appointed for respondent no.2/victim was absent. Perused the record and proceedings.

8. Learned Senior Advocate took me through the oral and documentary evidence adduced by the prosecution. Learned Senior Advocate submitted that there are major inconsistencies and discrepancies in the evidence of the prosecution witnesses on material points. There was inordinate delay in lodging the report. The evidence on record shows that after 4-5 days of the incident, the victim and her parents had gone to the police station. It is submitted that the report could have been lodged immediately against an unknown person. The brother of the victim and the victim are tutored witnesses. Learned Senior Advocate submitted that therefore, it would be very difficult to place implicit reliance on their evidence and to base the conviction on such doubtful and untrustworthy evidence. Learned Senior Advocate submitted that the medical evidence is not sufficient to corroborate the version of the victim. The Medical Officer (PW6) has not stated the age of the alleged injuries. The injuries found by the Medical Officer are not sufficient to prove that the accused had inserted a finger in the

vagina of the victim. Learned Senior Advocate submitted that the evidence of recovery of knife is doubtful. The knife was not shown to the victim at the time of her evidence. Learned Senior Advocate submitted that knife, which was recovered at the behest accused, is a kitchen knife. The case of the prosecution that the accused was carrying a kitchen knife with him and used the same in commission of the crime, is completely unbelievable. Learned Senior Advocate submitted that the provisions of the POCSO Act and the Indian Penal Code provide for stringent punishment for the offences. Learned senior Advocate submitted that in order to prove the charge, where the stringent provision with regard to the sentence is made, the Court has to be very careful and cautious. Learned Senior Advocate submitted that the learned Judge has failed to take into consideration all these facts and circumstances and as such has come to a wrong conclusion. Learned Senior Advocate further submitted that the accused was not known to the victim and her parents prior to this incident. Learned Senior Advocate submitted that the Test Identification Parade was not conducted at the time of the investigation to establish the involvement of the accused in the crime beyond reasonable doubt. Learned Senior Advocate submitted that even the description of the accused stated

before the Court is self-contradictory. It is pointed out that the evidence of identification of the accused in the Court is also not consistent.

9. Learned Additional Public Prosecutor submitted that the delay has been properly explained. The accused was not known to the victim and therefore, after ascertaining/establishing the identity of the accused through the victim, the report was lodged. The delay has been satisfactorily explained. Learned APP submitted that failure to conduct test identification parade by the Investigating Officer would not be fatal to the case of the prosecution. Learned APP submitted that the evidence of identification of the accused before the Court is a substantive piece of evidence and therefore, the said evidence deserves acceptance. Learned APP further submitted that the evidence of the victim and other witnesses is consistent on material aspects touching the incident. In the submission of learned APP, the evidence of the victim (PW1) and other witnesses has been corroborated by the evidence of the Medical Officer (PW6).

10. With the able assistance of the learned Senior Advocate, I have gone through the oral and documentary evidence on record. I

have perused the impugned judgment and order passed by the learned Additional Sessions Judge. On re-appreciation of the evidence, I am satisfied that the prosecution has failed to prove the guilt against the appellant beyond reasonable doubt. There are number of factors in this case, which go against the case of the prosecution and make the case of the prosecution doubtful. The delay in lodging report is the most important factor in this case. The incident allegedly occurred on 19.11.2016. The appellant was not known to the victim and her parents. It is not the case of the parents of the victim that with the support of the victim, they tried to trace out the appellant in the locality. It is the case of the prosecution that on 30.11.2016, while the victim was proceeding on bicycle with her father, she saw the appellant standing near a *pan thela* and she identified him. It is stated that the father of the victim went to the appellant and made an inquiry with him about his name. The appellant told his name as Umesh. It has come on record in the evidence of the victim (PW1) that after 3-4 days of the incident, she went to the police station. She has categorically stated that at that time her mother and father had accompanied her to the police station. She has further stated that on the 4th day of the incident, she went to the police station and the police made an inquiry with her about the

incident. She has categorically stated that on the very same day, she was sent for medical examination. She has further stated that she went to the police station. The report of the incident was lodged on 30.11.2016. The incident, as alleged, occurred on 19.11.2016. The victim has categorically stated that within four days of the incident, she had accompanied her father to the police station to narrate the incident to the police.

11. It is to be noted that by applying any standard, the incident narrated to the police by the victim was serious. The parents were expected to lodge the report against an unknown person. In the ordinary circumstances, if such an incident had occurred, then they would have immediately lodged the report to the police against an unknown person. The evidence with regard to the identity of the appellant on the particular date, is also doubtful. In this case, the informant (PW2), the mother of the victim, has stated in the report that they wanted to search the appellant and therefore, the report was not lodged immediately. When they came to know about the appellant and his name, they lodged the report against the appellant. The mother and the father of the victim are silent about the search of the appellant taken

by them within 10 days. Therefore, the reason for delay in lodging the report appears to be unbelievable. The delay has not been satisfactorily explained. It is also not the case of the parents of the victim that they approached their relatives and apprised them about the incident. It is the case of the prosecution that the victim had narrated the description of the appellant to the police. In the ordinary circumstances, the parents would have apprised the relatives about the incident and also about the description of the appellant. The appellant is a resident of Murtizapur itself. It is the case of the prosecution that when the appellant was standing at one pan shop near the shop of her father, the victim saw him and identified him. This fact would show that the appellant was frequently visiting the said area. It is further pertinent to mention that if the appellant had committed such an act with the victim, then he would not have come back to the said area. Failure on the part of the parents to lodge the report of the incident after 12 days of the incident, is a doubtful circumstance. The delay, *per se*, is not sufficient to give benefit of doubt to the accused. However, in case of delay in lodging the report, the reasons must be pleaded on record. On the basis of the reasons, the delay must be explained to the satisfaction of the Court. In my view, if the evidence of the victim, her parents and

the brother is considered together, it would show that it creates an element of doubt in the mind of the Court about the occurrence of the incident.

12. It is now necessary to see the actual incident narrated by the victim and other witnesses. The victim was examined on oath as PW1. On the date of her evidence, she was 9 years old. She has stated that she and her brother Ayafaz went to the shop of their father. They went for playing. She has stated that one man showed money to her and took her to a '*khandhar*' (an isolated small house). She has stated that then he pointed a knife at her neck and then did fingering at her urinal place. He kissed her. She has stated that at that time she started crying and shouting and then the accused fled away. She has stated that thereafter she came back to the shop of her father and told him that one man had lifted her. She has stated that her father then brought her to the house. Her father went away and then she narrated everything about the incident to her mother. She has stated the description of the said person. He was having fat nose and dark complexion. She has further stated that after 10 days of the incident, while proceeding on a bicycle with her father, she saw that man at one pan thela. She pointed

out said person to her father. Her father went near him. She has stated that as soon as he saw them, he ran away. She has stated that they took search of that person, but he was not found.

13. In her evidence, the victim (PW1) has nowhere stated that the accused inserted his finger in her urinal place. She has also not stated that the accused took a bite. It is evident on perusal of her examination-in-chief that she did not narrate the incident to her father. She has not stated that she went to his shop crying. She has stated that after dropping her at home, her father went away and then she narrated the incident to her mother. In her examination-in-chief, she has not stated that her father inquired with the said person about his name and the said person told his name as Umesh. The evidence of the parents and the brother of the victim is contrary to her version. It is also seen on perusal of her cross-examination that on material points, there are improvements in her evidence. Her evidence would show that the place where she was playing with her brother, was not an isolated place. There was movement of the people on the road. It has come on record that there are 3-4 shops adjoining to the shop of her father.

14. As far as identification of the appellant is concerned, she

has stated in her evidence that she had seen the appellant at the time of the incident. She had seen him for the second time near pan thela. It is undisputed that the test identification parade of the appellant was not conducted during the course of the investigation. The test identification parade of the accused during the course of the investigation is necessary to establish the identity of the accused beyond reasonable doubt. The object of the test identification parade is to show/identify the accused when his description or face is fresh in the minds of the witnesses. It is common knowledge that with the passage of time, the memory fades. If the test identification parade of the accused is conducted before the memory of the witnesses fades, or the description or face of accused gets blurred in the mind of the victim or witnesses, then it can lend an assurance to the testimony of the witnesses with regard to the involvement of the accused in the crime. The decision to conduct the test identification parade is the prerogative of the investigating officer. The informant and the witnesses have no control over it. In such a crime, the investigating officer was required to conduct the test identification parade of the appellant. I am conscious of the fact that the evidence of the test identification parade is not the substantive piece of evidence. The evidence of the identification of the accused by the

witnesses in the dock is the substantive piece of evidence.

15. In this case, the victim on the date of the incident was six years old. The appellant was totally stranger to her. She narrated the description of the appellant to her parents. However, the parents on the basis of this description of the appellant, provided to them by the victim, did not lodge the report against an unknown person. The description of the appellant has been stated in the report. It is apparent on the face of the record that the report was lodged after twelve days of the incident. It is the case of the prosecution that on the 10th day of the incident, the victim saw the appellant in front of a pan shop and there she identified him on the basis of his description. In such a serious crime, the Investigating Officer was expected to conduct the test identification parade of the appellant. Failure to conduct the test identification parade, in my view, is a serious drawback in the case of the prosecution. It has come on record that the brother of the victim had also seen the appellant when he had shown money to the victim and called her to the said place. The test identification parade of the appellant, with certainty, would have lend an assurance to the evidence of the victim and her brother. This is a vital defect in the case of the prosecution.

16. It would be necessary to consider the evidence of the mother of the victim PW2. She has stated that at about 4.30 pm, her son came to the house and made an inquiry about the victim. She told him that the victim had not come to the house. Her son thereafter went away. After half an hour, the victim came along with her husband. She was crying. She has stated that she made an inquiry with the victim and the victim narrated the incident to her. The victim has nowhere stated that when she went home with her father, she was crying. She has stated that the victim told her that the appellant took her to an isolated place and pointed a knife at her neck. She has further stated that the appellant gave a bite to her. The appellant removed her *salwar* and inserted his finger in her vagina. The victim has nowhere stated that the appellant removed her *salwar*. She has stated that the victim told her the description of the appellant. She has stated that the appellant was fat, having dark colour and big nose. She has stated that after 10 days of the incident, the victim while proceeding with her husband on bicycle, saw the appellant and told her father about him. She has stated that the appellant was accosted by her husband. The appellant disclosed his name as Umesh. This evidence is contrary to the evidence of the

victim. The victim has not stated in her evidence that her father made an inquiry with the appellant and he disclosed his name as Umesh. In her cross-examination, PW2 has stated that after 3-4 days of the incident, they had not gone to the police station with the victim. This evidence is contrary to the evidence of the victim. PW2 has stated in her cross-examination that her husband did not lodge the report, but her husband and the victim accompanied her at the time of lodging the report. Her statement that the appellant gave a bite to the victim has been proved to be an improvement. In her substantive evidence, PW2 has not stated any reason for not lodging the report against an unknown person on the basis of the description provided by the victim, immediately.

17. PW3 is the elder brother of the victim. He has stated that one black and fat man having big nose had called his sister on the pretext of giving money. He has stated that he told his sister not to go there. He has stated that he was then engrossed in his play and the victim was also engrossed in her play. He has stated that after some time he started looking for his sister, but she was not found anywhere. He has stated that therefore, he went to the shop of his father and made inquiry about the victim. The victim was not found at the shop and

therefore, on the say of his father, he went home to make inquiry with the mother about the victim. The victim was not at home. He has stated that after 10-15 minutes the victim returned back to the shop crying. He has stated that his father asked the victim as to why she was crying. She did not disclose anything to the father. Thereafter, he and the father brought the victim to the house and there the victim narrated the incident to her mother. He has identified the appellant as the same person, who had called his sister on the pretext of giving money. The identification of the appellant in the court was also unique. The learned Judge has recorded in the evidence that the appellant was sitting at serial number 4 along with accused persons in the other matters. In my view, this sort of identification of the accused in the court is not expected. Such a trial has to be conducted in-camera. The evidence was recorded in the presence of the accused in other cases. The cross-examination of PW3 is very relevant. He has stated that he had gone to the police station for identification of the accused. He has stated that he had seen the accused first time in the police station and second time in the Court. He has stated that at about 8.00 p.m., he had gone to the police station. There are certain improvements in his evidence.

18. PW5 is the father of the victim. He has stated that the victim and his son were playing by the side of the shop. After some time, his son came to the shop and made an inquiry about the victim. He told him that the victim had not come to the shop. He sent his son to the house to make an inquiry. He has stated that the victim was not found at the house. He has stated that after some time, his daughter came there. She was smeared with dust. He has stated that he told her to narrate the incident to her mother. She went home and narrated the incident to her mother. His evidence shows that he did not accompany the victim to the house. He has further stated that the victim narrated the incident as has been deposed by her before the Court. He has stated that he took search of the accused, but he was not found. As far as the description of the accused is concerned, he has nowhere stated in his examination-in-chief that either the victim or his wife told him the description of the accused. In his further evidence, he has stated that after 10 days that man was seen at a pan shop by the victim. The victim pointed out that man to him. He, therefore, inquired with the said person about his name. He disclosed his name as Umesh. This evidence is contrary to the evidence of the victim. The victim has nowhere stated that her father inquired with the said person about his

name and he told his name as Umesh. He identified the said person in the Court. In his cross-examination, he was questioned about the reason for not lodging the report immediately after the incident. He has stated that after 10 days, he went to the police station and lodged the report. In his cross-examination, it was suggested to him that he was close to the Nizam family and the Nizam family was contesting Nagar Parishad elections and the appellant had opposed him. It was suggested that because of that, he lodged a false report against the appellant. He has denied the suggestion. It is seen on perusal of the evidence of all these witnesses that there are major inconsistencies and discrepancies in their evidence. On material points, they have improved their version. The conduct of the parents in not lodging the report against an unknown accused on the basis of the description provided by the daughter, was a serious matter. Similarly, identification of the appellant by the victim after ten days is also unbelievable. The evidence of the witnesses as to the incident of the identification on the 10th day of the incident, is also inconsistent. The victim has nowhere stated in her examination-in-chief and cross-examination that the appellant had inserted finger in her vagina. The victim has stated that after 2-4 days of the incident, she went to the police station and she was examined by

the Doctor. In my view, all these inconsistencies are sufficient to create a doubt about the credibility and trustworthiness of the witnesses.

19. The next important witness is the Medical Officer (PW6). The Medical Officer had examined the victim on 01.12.2016. The Doctor, on medical examination of the victim, observed that there was redness around the hymen. It was inflamed and congested. On the basis of these findings, the Doctor opined that it was consistent with the history of digital penetration into the vagina. There was no external injury over the body or genitals of the victim. The history of assault was narrated to the Doctor by the victim. The victim was examined after twelve days of the incident. She has stated that redness around introit is possible due to itching. She has further stated that in cases of digital penetration, the redness depends upon the force used. She has stated that if the injury is fresh, then the redness will remain for 72 hours. A separate report regarding answers to the queries made by the police officer has been given. This report is sufficient to conclude that no injuries were found over genitals. In my view, this medical evidence cannot be used as a concrete piece of evidence to corroborate the incident occurred 13 days prior to the examination. It is the case of the prosecution that a finger was inserted by the appellant in the vagina of

the victim. The answers given by the Doctor in her cross-examination would show that the injury noticed could not be co-related with the incident as stated by the victim.

20. The next important part of the case of the prosecution is the recovery of the knife at the instance of the accused. In my view, this evidence with regard to the recovery is *ex-facie* unbelievable. The knife recovered is a kitchen knife. The knife was not shown to the victim. The length of the knife is 5” (inches). The length of the blade of the knife is 2.5” (inches). Such a knife would not ordinarily be carried by a person. There were no identification marks over the knife. The knife was found in the house of the accused. It is stated that it was kept in a bed, which was kept in the kitchen. It is to be noted that the kitchen knife is always available in any kitchen. The evidence, in my view, is not believable. It appears to be a handy work of the Investigating Officer to create some evidence to fortify the case of the prosecution.

21. As far as the evidence with regard to the birth date of the victim is concerned, the learned advocate for the accused has admitted the same. On the basis of the said evidence, the prosecution has proved

that the victim was six years old on the date of the incident. The victim was '*child*' as defined under Section 2(1)(d) of the POCSO Act. In my view, merely because of this, the conviction cannot be recorded against the accused. The learned Judge, in this case, has placed heavy reliance on the provisions of Section 29 of the POCSO Act.

22. Learned Additional Sessions 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.

23. In view of the above, I conclude that the prosecution has failed to prove the guilt against the accused beyond reasonable doubt. The accused, on the basis of such shaky and doubtful evidence, cannot be handed down the conviction of 20 years. As such, the appeal deserves to be allowed.

24. Before parting with the matter, it is necessary to place on record the appreciation of the Court for the valuable assistance rendered to the Court by learned Senior Advocate Mr. Firdos Mirza, appointed to represent the appellant. His junior advocate Mr. Paresh S. Thakur, has also extended the valuable assistance to the Court.

25. The Criminal Appeal is allowed.

i] The judgment and order of conviction and sentence, passed against the appellant by learned Additional Sessions Judge, Akola, dated 06.12.2021 in Sessions Trial No. 17/2017, is quashed and set aside.

ii] Appellant – Umesh S/o Dilip Sanghele is acquitted of the offences under Sec. 3 punishable under Sec. 4(2) and under Sec.7 punishable under Sec.8 of the Protection of Children from Sexual Offences Act, 2012 and under Sections 376(2)(i), 363 and 354-A of the Indian Penal Code.

iii] Appellant – Umesh S/o Dilip Sanghele is in jail. He be released forthwith if his presence is not required in any other crime/case.

iv] Learned Senior Advocate Mr. Firdos Mirza, appointed to represent the appellant, is entitled to receive the fees. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fees to the learned Senior Advocate, as per the Rules.

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

(G. A. SANAP, J.)

Diwale