



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

CRIMINAL APPEAL (APEAL) NO. 47 OF 2022

Kailas S/o. Rama Dawar (Jail)

Aged about 22 yrs, Occ: Laborer,

R/o. Wasali, Tq. Sangrampur,

Dist. Buldhana

(Accused in Jail)

... APPELLANT

// VERSUS //

1. **State of Maharashtra,**
through P.S.O., P.S. Hiwarkhed,
Tal. Telhara, District Akola

2. **XYZ (Minor),**
Aged about 12 Yrs., Through her
Natural Guardian
R/o. Wari, Hanuman, Taluka
Telhara, Dist. Akola

... RESPONDENTS

Amendment
carried out as per
courts order
dated 24.01.022

Mr. A. S. Londhe, Advocate for the appellant
Ms Ritu Sharma, APP for the respondent/State
Ms Sonal Tripathi, Advocate for respondent No.2

CORAM : G. A. SANAP, J.

DATE : 05/09/2024

ORAL JUDGMENT :

1 In this appeal, the challenge is to the judgment and
order, dated 27.08.2021, passed by the learned Special Judge
and Additional Sessions Judge, Akot, Dist. Akola, whereby the

learned Judge, convicted the accused for the offence punishable under Sections 328 and 376(2)(i) of the Indian Penal Code (for short 'the IPC') and Section 3 read with Section 4 of the Protection of Children From Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentenced him to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/- and in default of payment of fine to further suffer imprisonment for six months for the offence punishable under Section 328 of the IPC and further sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.15,000/- and in default of payment of fine to further suffer imprisonment for one year for the offence punishable under Section 3 read with Section 4 of the POCSO Act. No separate punishment has been awarded for the offence punishable under Section 376(2)(i) of the IPC.

2 Background facts:

The informant is the mother of the victim girl, who at the time of the incident was 7 years old. The case of the

prosecution, which can be gathered from the First Information Report and other record, is that the informant has four sons and seven daughters. The victim is her youngest daughter. Her eldest daughter is married and residing near her house. On the date of the incident i.e. on 14.09.2018, the victim went to the house of her sister by name Sundari. The children of Sundari were at the house. They took meals together. The victim at about 8:00 p.m. went to sleep at the house of Sundari. The son of the informant went to the house of Sundari at about 10:00 p.m. He found that the victim was lying in an unconscious condition. He came back to the house and informed her. The informant went to the house of her eldest daughter. She found that the victim was lying in an unconscious condition. She regained consciousness on 15.09.2018 at about 7:00 a.m. The victim at that time told her that the son-in-law of their neighbour had come to the house of her eldest daughter. The name of her neighbour is Pocha Chavhan. The name of his

son-in-law, who is accused in this case, is Kailas Dawar R/o. Wasali. Kailash Dawar administered pills to the victim. The victim became unconscious. The accused Kailash also offered pills to Sumitra, the daughter of Sundari, but she threw away the pills. The victim tried to run away from the spot, but the accused caught hold her. The victim told the informant that the accused removed her clothes and committed sexual intercourse with her. The informant took the victim to the police station and lodged the report. The crime bearing No. 206 of 2018 was registered at Hiwarkhed Police station against the accused.

3 The victim was referred for medical examination by the police. The mother of the victim did not consent for the medical examination of the victim. The investigating officer went to the spot and drew the spot panchanama. He arrested the accused. The accused was sent for medical examination. The investigating officer recorded the statements of the

witnesses. The statements of the victim and her mother were recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1973 (For short 'the Cr.P.C.'). The samples collected during the course of the investigation were sent for analysis. On completion of the investigation, the investigating officer filed the chargesheet against the accused.

4 Learned Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of the dispute between his father-in-law and the family of the informant. The prosecution, in order to bring home guilt against the accused, examined ten witnesses. Learned Judge, on consideration of the evidence, found the evidence sufficient to prove the charge against the accused and accordingly convicted and sentenced him as above. The appellant/accused has questioned the correctness of this judgment and order by filing this appeal.

5 I have heard learned Advocate Mr. A. S. Londhe
for the appellant, learned APP Ms Ritu Sharma for the State
and learned appointed Advocate Ms Sonal Tripathi for
respondent No.2. Perused the record and proceedings.

6 Learned Advocate for the appellant submitted that
the evidence on record is not cogent, concrete and reliable. The
charge has not been proved beyond reasonable doubt. There are
major inconsistencies and contradictions in the evidence of the
prosecution witnesses. There was a delay of 20 hours in
lodging the report. Learned Advocate submitted that the
evidence of the informant and the evidence of the victim
cannot be believed at all. Learned Advocate submitted that the
children of Sundari, by name Sumitra and Bharat, were
admittedly present in the house when the accused went there.
It is submitted that the case of the prosecution that, in the
presence of Sumitra and Bharat, the accused committed a sexual
intercourse with the victim, who was in an unconscious

condition, is completely unbelievable. Learned Advocate submitted that the medical examination of the victim was carried out after two years. The evidence of the medical officer is hardly of any use to take the case of the prosecution forward. Learned Advocate submitted that the evidence, which is full of inconsistencies and discrepancies, has been made the basis of conviction. Learned Advocate further submitted that there is also no evidence to prove that, on the date of the incident, the victim was a child below 18 years of age.

7 Learned APP submitted that pursuant to the order passed by the Court, the victim was examined, after two years, by the medical officer. Learned APP took me through the evidence of the medical officer and medical certificate to buttress her submission that it is sufficient to corroborate the evidence of the victim. Learned APP pointed out that even after examination of the victim, after two years, the old healed hymen tear was noticed by the medical officer. In the

submission of the learned APP, the opinion of the medical officer that the possibility of sexual intercourse with the victim cannot be ruled out deserves acceptance. Learned APP submitted that the learned Judge has thoroughly scrutinized the evidence and on being satisfied that it inspires confidence, has relied upon the same to convict and sentence the accused. Learned APP submitted that in the ordinary circumstances, the mother had no reason to involve her daughter in such an incident to take revenge against the accused on account of so called enmity. Learned APP, in short, submitted that the evidence on record is sufficient to prove the charge against the accused. Learned APP submitted that the learned Judge has properly considered the evidence on record and has recorded the cogent and concrete reasons in support of his findings.

8 Learned appointed Advocate who represent the victim/respondent No.2 has adopted the submissions advanced by the learned APP for the State.

9 I have minutely scrutinized the evidence adduced by the prosecution. I have also perused the judgment and order passed by the learned Judge. It is the case of prosecution that, on the date of the incident, the victim was 7 years old. It is seen that the mother of the victim as well as the victim are silent about the birth date of the victim. The informant, the mother of the victim, has stated that the victim was 7 years old on the date of the incident. The victim at the time of her evidence has stated that she was studying in 1st standard. In a case, which is registered under the POCSO Act, it is the primary duty of the investigating officer to collect the legally admissible evidence with regard to the birth date of the victim. PW-10, the investigating officer, has deposed in his evidence that at the time of the investigation he had written a letter to the Headmaster of the School and obtained the birth certificate of the victim. The requisition letter sent to the Headmaster is at Exh. 60. The certificate obtained is dated 17.09.2018. Perusal

of the record would show that this certificate was not exhibited. However, perusal of this certificate would show that it was issued by the Headmaster of Zilla Parishad Primary School, Wari, Bhairavgad Panchayat Samiti, Telara, Dist. Akola.

10 In order to prove the age of the victim, on the date of the incident, the prosecution has examined PW-6, a Headmistress of the Zilla Parishad Primary School, Wari, Bhairavgad. The Headmistress has produced on record the school admission register. She has deposed that on 13.07.2018 the victim was admitted in 1st standard. The date of birth recorded in the school register is 30.05.2011. The photocopy of the school register is at Exh. 41. The relevant entry is at Sr. No. 1078. She has stated that the date of birth of the victim was recorded as per the certificate issued by the Anganwadi. The original certificate issued by Anganwadi is at Exh. 42. The school register is the primary evidence. A certified extract of the said register is on record. It was produced by PW-6.

Perusal of this record would show that the birth date of the victim is 30.05.2011. The prosecution on the basis of this evidence has proved that on the date of the incident, she was about 7 years old. She was a child as defined under Section 2(1)(d) of the POCSO Act.

11 Before parting with this aspect, I must place on record that the Judge has committed a procedural error while recording the evidence of PW-6. The witness had produced the original school register. The entry from the school register with regard to the admission of the victim is the primary evidence. Learned Judge on production of the admission register was required to give exhibit number to the relevant entry from the original register. After giving exhibit number to the entry from the register, the learned Judge on the request of the witness would have returned the same to the witness on furnishing usual undertaking. It is to be noted that in a given case on account of such a procedural mistake miscarriage of justice can occur.

It is to be noted that in a crime, the stage of investigation and the stage of recording of evidence are very important. The learned Judge did not even look into the birth certificate of the victim obtained from the school by investigating officer. It was not exhibited. The entire copy of the page of the register has been given exhibit number. It needs to be stated at this stage that a mistake committed while recording the evidence cannot be corrected in a subsequent proceeding.

12 It is seen that the accused has not seriously disputed this certificate. The evidence of the Headmistress, on that count, has gone unchallenged. The original register was produced before the Court. There was a procedural mistake on the part of the Judge. The certified copy of the relevant page is on record. It can be made use of by the prosecution to prove the age of the victim. It is therefore evident that on the date of the incident the victim was 7 years old and as such a child as

understood by Section 2(1)(d) of the POCSO Act.

13 The next important issue is with regard to the medical evidence. Initially, the mother of the victim did not consent for her medical examination. No reason was stated by the mother of the victim for not subjecting the victim for medical examination in such a serious crime. The record shows that, at the stage of the trial, the learned Judge passed the order and directed the doctor to medically examine the victim. She was examined after two years from the date of the incident. It needs to be observed that by that time much water had already flown under the bridge. The evidence of PW-8, who had examined the victim, needs consideration in this background.

14 PW-8 Dr. Nilopher Sheikh is the medical officer who had examined the victim on 03.03.2020. She has stated that the history of assault was narrated by the mother of the victim. She has stated that the victim, at that time, was

conscious and was able to speak. She has stated that she made an attempt to talk to her, but she was unable to give details. She has stated that, on local examination of the victim, she noticed that there was evidence of an old hymenal tag tear as well as evidence of an old healed hymenal edge. There was no fresh injury. The doctor has opined that the possibility of sexual intercourse or assault could not be ruled out. It is necessary to state at this stage that the doctor did not mention the age of the hymen tear. The victim was examined after two years from the date of the alleged incident. The doctor was therefore required to categorically state the age of the hymen tear. The doctor, in her cross-examination, has stated that the hymen tear injuries noticed by her could be caused by a variety of reasons, such as horse riding, cycling and fingering etc. She has stated that fresh injuries of the hymenal edge take 7-8 days to heal. She has stated that, however, the scar remains there. The doctor, in this factual background, was required to give a candid opinion.

The doctor has only stated that the possibility of sexual assault can not be ruled out. In order to attribute these injuries to the accused/appellant it was necessary for the doctor to state the age of the injury. The age of the injury can be decided on the basis of a clinical examination. The doctor did not take trouble to ascertain the age of the injury. It is the case of the accused that there is enmity between him and the family members of the victim and therefore to take revenge he has been falsely implicated in this case. In order to dispel the possibility of false implication it was necessary on the part of the medical officer to give a candid and categorical opinion. The requisition for medical examination of the victim categorically stated the date of the occurrence of the incident. The possibility of causing such injury after the alleged incident can not be ruled out. The injury could be possible due to various reasons mentioned in the cross-examination by the doctor. Similarly, the possibility of the sexual assault on the girl after the alleged incident also

cannot be ruled out. The evidence of the medical officer, as discussed above, needs to be born in mind while appreciating the evidence of the victim, her mother and other witnesses.

15 PW-1 is the mother of the victim. The mother of the victim is not an eyewitness to any incident. She has stated that the victim had gone to the house of her daughter Sundari for sleeping. She has stated that her son Sunil came to her and informed that the victim was lying unconscious in the house of the Sundari. She has stated that therefore she went there in the night at 10:00 p.m. and found that the victim was lying unconscious. She has stated that the clothes were not on her body. She brought her back to house in the same condition. She has stated that the victim regained consciousness on 15.09.2018, in the morning at 8:00 a.m. She has stated that, after regaining consciousness, the victim narrated the incident to her. In my view, the evidence of this witness cannot be

believed for more than one reason. Her conduct *prima facie* appears to be inconsistent and unnatural. If the incident, as stated, had occurred, then she would have immediately taken her daughter to the doctor. She did nothing till next morning. Her evidence is silent about the presence of the children of her daughter Sundari in the house where the alleged incident took place. In her evidence, she has stated that she made an inquiry with Bharat and Sumitra, the children of her daughter Sundari. They told her that the accused had given one pill to Sumitra, but she threw away the said pill. She did not consume it. She has stated that Sumitra told her that the accused gave four pills to the victim forcibly. She has further stated that Sumitra told her that the victim had tried to run away, but the accused caught hold her and pulled her in the room and forcibly administered pills to her. It is to be noted that all these facts had not been stated in the report. Even if it is assumed that this is a correct statement of a fact, even then it creates doubt about

the occurrence of the incident. If such an act had been committed by the accused with the victim, then the children would have run towards the informant and apprised her about the incident. It has come on record that the victim went to the house of Sundari at about 6:00 p.m. It has come on record that Sumitra had prepared the meal and they took the meal together. It therefore shows that Sumitra and Bharat were not too small to ignore such an assault on the victim by the accused. It is to be noted that if such an incident had occurred, then immediately after noticing the victim in an unconscious condition she would have inquired with Sumitra and Bharat. She did not do that. In my view, this evidence as to the occurrence of the incident by the informant is highly improbable and as such, cannot be accepted.

16 The statement of the informant under Section 164 of the Cr.P.C. was recorded by the learned Judicial Magistrate

First Class, Telara on 13.10.2018. In her statement, recorded by the Magistrate, she has nowhere stated that the accused committed penetrative sexual assault on the victim. She has only stated that the accused administered pills to the victim and thereafter, the victim felt dizziness. The accused removed her clothes. She has further stated that after eating the pills the victim had pain in her stomach and thereafter, she went to the police station and lodged the report. Her statement under Section 164 recorded by the Magistrate is conspicuously silent about the sexual assault on her daughter by the accused. In my view, this is a very relevant circumstance to create a doubt about her evidence and as such, the occurrence of the incident as stated by her.

17 PW- 2 is the victim. In her evidence, she has stated that on the date of the incident she had gone to the house of Sundari to play with Bharat and Sumitra. She has stated that

Bharat had gone to attend the Ganpati festival. She has further stated that Sumitra and she were present in the house. They prepared the vegetable (sabji). She has stated that at that time the accused came there. He questioned her whether she would eat a tablet. He gave her a tablet. She consumed the tablet. She has stated that thereafter she felt dizziness. She has not stated that the accused forcibly administered pills to her. She has stated that thereafter the accused sat on her thighs and committed intercourse with her. She has stated that thereafter she became unconscious. She has further stated that thereafter Bharat went to call her mother. She has nowhere stated that the accused drove out either Bharat or Sumitra from the house. This fact would show that while all this incident was going on Bharat and Sumitra were all along present in the house. She has stated that next morning she narrated the incident to her mother. The evidence of the victim, if considered in a proper perspective, would show that the case of the prosecution

appears doubtful. Bharat and Sumitra were present in the house. Bharat has been examined before the Court. He is 14 years old. Sumitra has not been examined. Bharat and Sumitra, as can be seen from the evidence, were expected to raise hue and cry when such an act was committed by the accused. They were expected to go to the house of the informant and narrate the incident to her. It is stated that the accused had tried to administer pill to Sumitra, but she ran away from the house.

18 The statement of the victim under Section 164 of the Cr.P.C. was recorded by the Judicial Magistrate First Class, Telara on 03.10.2018. It is at Exh. 23. Perusal of this statement would show that she is silent about the act of sexual assault on her by the accused. She has stated before the Magistrate that the accused administered pills to her and sat on her legs. She has stated that after eating pills she became unconscious. In her cross-examination, she has stated that apart from Sumitra and

Bharat, Sharda was also present in the house of Sundari. She has stated that on that day Sumitra had prepared the meal and they together took the meal. She has stated that she, Sumitra and Sharda slept in the house together. She has stated that, after taking the meal, within ten minutes they went to sleep. She has further stated that when she woke up next morning, her clothes were as it is. In my view, the evidence of the victim is also doubtful. It is not sufficient to take the case of the prosecution forward.

19 The next important witness is Bharat. PW-4 Bharat on the date of the incident was 14 years old. He has stated that, on the date of the incident, his parents had gone out of the village. He has stated that, on the date of the incident, the victim had come to their house at 6:00 p.m. He has stated that he asked the victim and his sister Sumitra to prepare the meal. He has stated that he came back to the house after attending a

festival at 9:30 p.m. He has stated that the door was closed. He knocked on the door. He has further stated that in the lamp he saw that the accused was sleeping on the body of the victim without wearing a pant. He has stated that he knocked on the door and at that time the accused put on his pant and went out of the house. He has stated that he narrated this incident to his maternal uncle Sunil. He has further stated that he called his grandmother. His grandmother Chunkibai came there and took the victim with her. He has not stated that the victim was unconscious at that time. He has not stated that her mother came there and took her away in an unconscious condition. In his cross-examination, he has stated that the family members of the victim and father-in-law of the accused are not on visiting terms. He has stated that he tried to wake up Sumitra, but she did not wake up. The victim has stated that the Bharat was also present in the house. In my view, the evidence of three witnesses PW-1, 2 and 4 is not sufficient to prove the incident.

20 It is pertinent to note at this stage that no reason was stated by the mother of the victim for not allowing the medical examination of the victim after lodging of the report. The reluctance on the part of the mother of the victim to allow the medical examination of the victim creates a doubt. This doubt is further fortified on the basis of the inconsistent and self-contradictory evidence of the witnesses. The conduct of all the witnesses is not consistent. If the incident as narrated had occurred, then the natural reaction of the mother would have been totally different. Similarly, Bharat and Sumitra, who are of the age of understanding, would have raised hue and cry. The house of the informant is adjacent to the house of her daughter Sundari, where the alleged incident occurred. The informant was present in the house. After noticing such an incident, the children would have run crying for help towards the mother of the victim. The medical evidence, therefore, does not corroborate the oral evidence of the victim and her mother.

The biological samples were sent for analysis to CA. In the biological samples, neither the blood nor the semen was detected. The evidence is, therefore, not sufficient to prove the guilt of the accused beyond reasonable doubt. On the basis of the available evidence sufficient doubt is created in the mind of the Court about the case of the prosecution. The accused is therefore entitled to get benefit of the same.

21 In view of the above, I conclude that the prosecution has failed to prove the charge against the accused. Learned Judge has failed to properly appreciate the evidence. It needs to be stated that presumption under Section 29 of the POCSO Act which has been invoked in this case by the learned Judge was not in accordance with law. As far as Section 29 of the POCSO Act is concerned, the presumption under Section 29 of the POCSO Act is not an absolute presumption. It is a rebuttal 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 prosecution *vis-a-vis* the charge against the accused is shaken. Therefore, in my view, the presumption under Section 29 of the POCSO Act would not automatically get attracted to base the conviction of the accused.

22 In view of the above, I conclude that there is sufficient doubt about the involvement of the accused in this crime. The accused is entitled to the benefit of doubt. Accordingly, the appeal deserves to be allowed.

23 The criminal appeal is allowed.

24 The judgment and order of conviction and sentence of the appellant/accused dated 27.08.2021 passed by

the learned Special Judge and Additional Sessions Judge, Akot, Distt. Akola for the offences punishable under Section 328, 376(2)(i) of the Indian Penal Code and Section 3 read with Section 4 of the Protection of Children From Sexual Offences Act, 2012 is quashed and set aside.

25 The appellant/accused- Kailas Rama Dawar is acquitted of the offences punishable under Sections 328 and 376(2)(i) of the Indian Penal Code and Section 3 read with Section 4 of the Protection of Children From Sexual Offences Act, 2012.

26 The appellant, who is in jail, shall be released forthwith, if not required in any other case.

27 The criminal appeal stands disposed of accordingly. Pending applications, if any, also stand disposed of.

(G. A. SANAP, J.)