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

CRIMINAL APPEAL NO. 185 OF 2021

Vijay s/o Manoharrao Jawanjal
Age about 59 years,
Occ. Labor,
R/o Rawalgaon, Tah. Achalpur .... APPELLANT
Dist. Amravati (In Jail)

// V E R S U S //

State of Maharashtra,
Through P.S.O., Asegaon,
District- Amravati

... RESPONDENTS

Mr A.M. Jaltare, Advocate alongwith Mr. N.D. Dawada, Advocate for appellant.
Ms R.V. Sharma, APP for respondent/State.

CORAM : G. A. SANAP, J.
DATE : 14.08.2024

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

1. In this appeal, challenge is to the judgment and order dated 22.01.2021, passed by the learned Additional Sessions Judge-1, Achalpur, whereby the learned Additional

Sessions Judge held the appellant/accused guilty of the offence punishable under Section 376AB of the Indian Penal Code (for short, "the I.P.C.") and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act") and sentenced him to suffer rigorous imprisonment for twenty years and to pay a fine of Rs.20,000/-, in default of payment of the fine to suffer rigorous imprisonment for six months.

2. Background facts:-

PW-1 is the mother of victim- informant. The report of the crime was lodged on 08.03.2019. It is stated in the report by the informant that the victim, on the date of the commission of the crime was 8 years old. She was studying in the 3rd standard. On 08.03.2019 at about 9.00 a.m. she went to play near the Samaj Mandir of the village. She did not come back and therefore, at about 10.00 a.m. the informant went there and brought her back. The informant gave her a bath and sent her

to school. The victim returned from the school at 5.30 p.m. The informant noticed that she was dull and uncomfortable. On the next day, when the informant asked the victim to get ready for school, she was reluctant and started weeping. On inquiry by the informant, she told the informant that she had pain in her private part. On further inquiry, the victim told the informant that yesterday while she was playing at Samaj Mandir, the accused offered her sweet *(Tilacha Ladu)* and took her inside the Samaj Mandir. The accused removed her knickers and removed his pant as well. It is stated that she told her that the accused forcibly touched his penis to her private part and therefore, she had server pain. The father of victim was not at home on that day. He returned from work at 3.00 p.m. The informant narrated the incident to father of the victim. The informant and the victim went to Asegaon Police Station and lodged the report. On her report, the crime bearing No.56/2019 was registered against the accused.

3. PW-8 conducted the investigation. The victim was referred to the Primary Health Centre, Asegaon for medical examination. She was referred to the District Women Hospital at Amravati. She was examined. The investigating officer drew the spot panchanama. The clothes of the victim and the accused were seized. Investigating officer collected documentary evidence relating to the birth date of the victim. After completion of the investigation, the investigating officer filed the charge-sheet against the accused.

4. Learned Judge framed the charge against the accused. The accused abjured his guilt and claimed to be tried. It is his defence that there was a quarrel between him and father of the victim because the father of the victim had cut the grass from his land, which is adjacent to the village. The accused had slapped the father of the victim and therefore, to take revenge the false report was lodged. The prosecution, in order to prove the charge against the accused, examined eight witnesses.

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

5. I have heard learned Advocates for the appellant and learned APP for the State. Perused the record and proceedings.

6. Learned Advocate for the appellant submitted that evidence of the informant and the victim is not reliable and trustworthy. Learned Advocate took me through the evidence of the informant and pointed out the important facts, which, according to the submission of the learned Advocate, reflect upon the credibility and trustworthiness of the informant. The conduct of the informant as well as the conduct of the victim on the date of the incident is unbelievable and therefore, it creates a doubt about the occurrence of the incident. Learned

Advocate took me through the evidence of the victim and pointed out that the evidence of the victim is nothing but outcome of tutoring by her mother. Learned Advocate further submitted that the accused on the date of the incident, was 60 years old and therefore, the medical officer was required to record the result of the examination of the accused for arriving at the conclusion that he was capable to perform sex. Learned Advocate submitted that the evidence of Dr. Rashmi Tikhe, a medical officer (PW-7), is not sufficient to corroborate the version of the informant and the victim as to the occurrence of the incident. Learned Advocate submitted that in the cross-examination, PW-7 has given vital admissions as to the age of the inflammation noticed by the doctor on the private part of the victim. The history of assault narrated by the mother of the victim and recorded by the medical officer would show that even at the time of the medical examination of the victim, the name of the accused was not stated by the mother of the victim.

Learned Advocate submitted that learned Additional Sessions Judge has failed to properly appreciate the evidence. Learned Advocate took me through the judgment and order passed by the learned Additional Sessions Judge and submitted that learned Judge has committed an error in holding that to invoke presumption under Section 29 of the POCSO Act, the only requirement is that the accused is prosecuted for any offence enumerated under Section 29 of the POCSO Act. Learned Advocate submitted that evidence of Rohit Khandekar (PW-5), who is nephew of the informant is hardly of any use to take the prosecution forward.

7. Learned APP submitted that learned Additional Sessions Judge has properly interpreted and considered the applicability of Section 29 of the POCSO Act. Learned APP submitted that in the teeth of evidence adduced by the prosecution the presumption was rightly triggered against the accused. Learned APP would further submit that the accused

has not brought on record any material to substantiate his defence. Learned APP would submit that the suggestions given by the accused by itself would not be sufficient to fortify his defence. Learned APP took me through the evidence of the informant and the victim and pointed out that they have not exaggerated the incident in any manner. The evidence of the informant and the victim is natural. Mother of the victim, for the purpose of taking revenge, would not have involved her daughter in such a deplorable incident. Learned APP would submit that evidence of the medical officer has corroborated the evidence of the informant and the victim. Learned APP submitted that the victim is a child witness and therefore, she was not able to understand the questions put to her in cross-examination and as such, much weightage cannot be given to some of the answers relied upon by the learned Advocate for the accused to butress his submission of the possibility of tutoring. Learned APP has submitted that the evidence of the

medical officer is sufficient to prove that the victim was subjected to penetrative sexual assault. In the submission of learned APP the well reasoned judgment and order passed by the learned Additional Sessions Judge does not warrant interference.

8. I have minutely perused the evidence and record. At the out set, it is necessary to mention that prosecution is duty bound to prove the guilt of the accused beyond reasonable doubt. The accused is entitled to the benefit of doubt. The benefit of doubt created on the basis of the evidence led by the prosecution cannot be denied to the accused on the spacious plea advanced by the prosecution by relying upon Section 29 of the POCSO Act. Learned Judge has considered the decisions rendered by the Co-ordinate Benches of this Court in the cases of ***Navin Dhaniram Baraiye Vs. The State of Maharashtra*** reported at ***2018 ALLMR (Cri) 4919, Pandurang Narayan Jadhav Vs. State of Maharashtra*** reported at ***2019 ALLMR***

(Cri) 2384 and Khalil Kureshi Vs. The State of Goa reported at *2019 ALLMR (Cri) 5273* and recorded a finding that in his humble opinion the law laid down in the case of *Pandurang Narayan Jadhav (supra)* is more correct. In my view the learned Judge has committed patent mistake in understanding the decisions (supra). The decision in the case of *Navin Dhaniram Baraiye (supra)* was delivered on 25.06.2018. In this case, the Co-ordinate Bench of this Court has considered number of earlier decisions namely *Babu Vs. State of Kerala* reported at *(2010) 9 SCC 189, Sachin Baliram Kakde Vs. State of Maharashtra* reported at *2016 All Mr. (Cri.) 4049, Amol Dudhram Barsagade vs. State of Maharashtra* Criminal Appeal No.600/2017 decided on 23.04.2018 (Nagpur Bench), *Sahid Hossain Biswas Vs. State of W.B.* CRA No.736 of 2016 and C.R.A.N. No.1035/2017 (Calcutta High Court) and *Ragul Vs. State by Inspector of Police* Criminal Appeal No.391 of 2016 (Madras High Court) and held that presumption under Section

29 of the POCSO Act is not an absolute presumption. The presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. The principle of law on analysis of all the above said decisions has been laid down in paragraph No.23 of the decision. Paragraph No.23 is extracted below:-

> *"The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such*

> *facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability."*

9. The Co-ordinate Bench of this Court in the case of *Khalil Kureshi (supra)* has held that the burden to prove the guilt of the accused rests on the prosecution. The prosecution has to discharge the initial burden. The another decision in the case of *Pandurang Narayan Jadhav (supra)* which has been followed by the learned Judge was rendered on 12.04.2019. Paragraph numbers 16, 17 and 18 of the decision are relevant for addressing the issue. The same are extracted below:-

> "16. *Bare glance of the aforesaid provisions of section 29 of the POCSO Act, manifestly made it clear*

that, if the accused persons is prosecuted for committing or abetting or attempting to commit the offence under Sections 3, 5, 7 and Section 9 of the Act, it is mandatory for the Special Court to presume that such person has committed or abetted or attempted to commit the offence unless contrary is proved. It is to be noted that in order to draw the presumption in favour of prosecution, it is necessary to establish that the accused is prosecuted for the offence enumerated in Section 29 of the POCSO Act.

17. In view of aforesaid provision of Section 29 for presumption under the POCSO Act, it is evident that initial burden is upon the accused to show that he is not involved in the said crime and once he succeeded to raise doubt about genuineness or veracity of the allegations nurtured on behalf of prosecution or he succeeded to show his innocence by preponderance of probabilities, then the burden to prove charges against accused for the allegation of sexual assault, will be shifted upon the prosecution to prove the guilt of the accused.

18. At this juncture, it is imperative to take into consideration the difference in between provisions

of presumption provided under Section 139 of the Negotiable Instruments Act, 1881 or under Section 20 of the Prevention of Corruption Act, 1988 and Section 29 of the POCSO Act. It is to be borne in mind that under Section 139 of the Negotiable Instruments Act or Section 20 of the Prevention of Corruption Act, 1988 presumption can be raised on proof of certain facts which are specified in Section 138 of the Negotiable Instruments Act or Section 20 of the Prevention of Corruption Act, 1988. But, under the POCSO Act, there is no other requirement to be complied with by the prosecution to raise presumption except to show that the accused has been prosecuted for any of the offences as enumerated under section 29 of the POCSO Act."

10. It is to be noted that decision in the case of *Navin Dhaniram Baraiye (supra)* was rendered on 25.06.2018. The Co-ordinate Bench while deciding *Pandurang Narayan Jadhav (supra)* on 12.04.2019 appears to have not noticed this decision in the case of *Navin Dhaniram Baraiye (supra).* The Co-ordinate Bench in the case of *Pandurang Narayan Jadhav*

(supra) was bound to follow the decision in the case of *Navin Dhaniram Baraiye (supra)*. If for some reason the Co-ordinate Bench in case of *Pandurang Narayan Jadhav (supra)* had reservation about the law laid down in Navin *Dhaniram Baraiye (supra)* then the same decision by recording the contrary view and opinion was required to be referred to the Larger Bench. The decision in the case of *Navin Dhaniram Baraiye (supra)* was therefore, required to be followed while deciding the case of *Pandurang Narayan Jadhav (supra).* The decision in the case of *Pandurang Narayan Jadhav (supra)* on the point in question takes a contrary view without considering or noticing the earlier view. Learned Additional Sessions Judge had optioned to follow one of the decisions obviously by recording his reasons. In my view, the decision in the case of *Navin Dhaniram Baraiye (supra)* has considered pros and cons of the issue. Similarly the Co-ordinate Bench in this case has done the survey of earlier decisions on the point. In view of

this, the law laid down in the case of *Navin Dhaniram Baraiye (supra)* is in consonance with the settled legal position. The decision in the case of *Pandurang Narayan Jadhav (supra)* therefore, may trickle on the edge of per-incuriam. Therefore, the negative burden cannot be cast on the accused. In order to trigger the presumption under Section 29 of the POCSO Act the prosecution is duty bound to prove the foundational facts in the context of the charge framed against the accused.

11. This would now take me to the evidence of PW-1, who is the informant. In her evidence, she has reiterated the facts stated in her report at Exh.14. The question is whether the incident narrated by the informant is believable or not?. She has stated that on 08.03.2019 the victim did not disclose to her the occurrence of the incident or involvement of the accused in the incident. The incident, as per the informant occurred in the Samaj Mandir. The victim had gone to play at Samaj Mandir. She has stated that she gave a bath to the victim and sent her to

school. She has stated that on the next day, in the morning, the victim narrated the incident to her. She has stated that the victim told her that yesterday the accused had taken her inside Samaj Mandir on the pretext of giving her sweet and after removing her knickers, touched his penis to her private part. PW-1 informant has stated that when she went to call the victim from Samaj Mandir, she found that the accused was sitting near the Samaj Mandir. She has stated that when she went there, she found that the victim was playing. It is to be noted that if such act was done by the accused with the victim, by applying any standard, it was a serious act. Such an act would have obviously terrified the victim. Such an act would have caused immense pain, suffering and trauma to the victim. The victim, in the ordinary circumstances would have ran away from the spot to the house after such a deplorable act and narrated the incident to her mother. This fact is required to be born in mind. It is also equally important to note that as per the

case of the informant the knickers of the victim was removed and then the accused touched his penis to the private part of the victim. If the knickers was removed as stated, then the victim would have stated as to when and how she put on her knickers. In my view, all these are doubtful circumstances.

12. In this backdrop, it is necessary to consider the location of the Samaj Mandir and the conduct of the victim noticed by the mother of victim on that day. It has come on record that doors of the houses of Sukhdeorao Mohod, Suresh Khandekar and Gulsundare, the house of the informant and Sabhagrah open towards Samaj Mandir. She has stated that from these houses Samaj Mandir is clearly visible. She has stated that Samaj Mandir is not visible from her house. She has stated that the way coming to the village is on the eastern side of the Samaj Mandir. She has however, stated that there are houses of Subhash Khandekar, Bhaskar Pawar and Aditya Pande on the said road. She has stated that doors of their houses

of above persons are facing towards Samaj Mandir. She has stated that opposite Samaj Mandir, there is a ration shop of Subhash Khandekar. She has stated that door of shop of Subhash Khandekar and the door of Samaj Mandir are opposite to each other. She has stated that ration shop opens between 8.00 a.m. and 12.00 p.m. and 6.00 p.m. and 9.00 p.m. She has further stated that there is a bore well and water tap towards the southern side of the Samaj Mandir. There is a watering place for cattle on western side of Samaj Mandir. There are two rooms in Samaj Mandir. There is a library in the southern room of Samaj Mandir and it remains open from 7.00 a.m to 9.00 p.m. She has categorically stated that normally people remain present there. She has made voluntary statement and explained that when she went to the Samaj Mandir nobody was present there. She has stated that Samaj Mandir is at main square of the village. She has further admitted that there are houses on all four sides of Samaj Mandir. There are no doors to the rooms of

Samaj Mandir. This is about the location of the spot. The spot is in the main locality. The people are residing around the spot. It was a day time. The people would obviously be moving around the spot or present at the spot. The victim alone was not the child who used to play near the Samaj Mandir.

13. As far as the behaviour of the victim on that day is concerned, mother has categorically stated that she did not find her frightened and therefore, she did not inquire with her about anything. She has stated that she did not find anything abnormal while giving bath to the victim. She made voluntary statement that she did not remove her knickers while giving her bath. She has admitted that on that day, the victim went to school as usual. She has stated that whenever children are dull and angry parents make inquiry with the children and ascertain the reason. She has stated that when she found the victim dull and nervous, she did not make an inquiry with her. Similarly, she did not disclose anything to her on that day. She has stated

that the accused is 65 years old. She has admitted that the field of the accused is adjacent to village. It was suggested to her that her husband had cut the grass from the field of the accused and therefore, the accused slapped him. She has denied the suggestion. It was further suggested to her that they were not on talking terms with the accused and therefore, false report was lodged against him. She has denied the suggestion. She has stated that Rohit Khandekar is her nephew. She has stated that police made an inquiry with the persons residing near the Samaj Mandir. The perusal of her evidence in totality would show that on material aspects her evidence is conspicuously silent. The location of the Samaj Mandir is such that there is always movement of the people. The library is in the Samaj Mandir. If the accused had committed such an act with the victim girl, then it would not have gone unnoticed by the villagers. Similarly, the victim after facing the ordeal of such an incident, at the hands of the accused, could not have behaved

normally. If she was subjected to penetrative sexual assault, then she would have ran towards her house and narrated the incident to her mother. The victim has nowhere stated that after this gruesome act committed by the accused she was threatened by the accused with dire consequences in case incident was disclosed to anybody. The evidence of informant therefore, is not beyond the pale of doubt. It is true that mother in the ordinary circumstances, would not involve a girl child in such incident. But in my view, in order to satisfy the Court about the actual occurrence of the incident, the evidence on record must be cogent and concrete.

14. The victim is PW-2. In her examination-in-chief she has stated that she would play near Samaj Mandir. She has stated that she knows the accused Vijay. She has identified the accused in the Court. She has stated that the accused removed her knickers and touched his penis to her private part. She has stated that she disclosed this fact to her mother, on the next

day, when she felt pain. Her cross-examination is very relevant. Before proceeding to consider the vital answers given by her in her cross-examination, it is necessary to state that child witness is susceptible to tutoring. In the case of child witness the Court has to be on guard and ensure that child is not in any manner tutored. The court must be satisfied that the account of the incident narrated by the child witness is not the result of tutoring. She has stated that on returning from school, her mother taught her. She has stated that her mother told her as to what types of questions would be asked to her and how to answers those questions. She has stated that on that day, she had not gone to Samaj Mandir to play. She has stated that adjacent to Samaj Mandir there is road and therefore, there is no space for playing. She has categorically admitted that on that day she had gone to the ground of school for playing with her friends. She has stated that since she had gone to the school ground she did not meet the accused. She has stated that on the

day of incident, on return from school, she disclosed to her mother the activities of school. She has stated that she disclosed to her about the events took place in school. She has stated that her mother told her to tell before the Court that the accused had caused harassment to her. She has further admitted that her mother told her to depose, as per her say, otherwise she would punish her. She has further stated that her mother told her the name of the accused. She has further stated that on that day she had played in the open, therefore, there was pain in her private part. On that day she suffered a sun stroke. She has stated that therefore, there was pain and itching in her private part. In my view, perusal of cross-examination would show that she has completely demolished the evidence of her mother as well as her statement in examination-in-chief. The cross examination of the victim would show that she was tutored to depose against the accused. The victim has claimed ignorance about the dispute between her father and the accused on

account of cutting of grass from the field of the accused.

15. Rohit Khandekar (PW-5) is the nephew of the informant. His evidence is not direct evidence about the occurrence of the incident. However, he has stated that at about 9.00 a.m. while returning from the river after attending the nauture's call, he saw the accused, sitting on the platform of Samaj Mandir and the victim was standing near him. He was subjected to cross-examination. He has admitted that latrine was constructed in his house by his father. It is his case that he had gone to attend the nature's call on the river side. He is doing labour work. He has stated that during summer labour work is done from 7.00 am to 12 noon. The evidence of this witness, at the most, would show that the accused was found sitting on the platform of the Samaj Mandir. In my view, this evidence by itself would not be sufficient to establish the complicity of the accused.

16. The next important witness Rashmi Tikhe (PW-7) is the medical officer, who had examined the victim on 09.03.2019. It needs to be stated at this stage that the incident had occurred on 08.03.2019 in the morning. She has stated that the history of assault was narrated to her by the mother of the victim. She has stated that the victim was eight years old. She has further stated that the victim had a delayed milestone, i.e. she was not having the understanding according to her age. She has a low IQ level. She has stated that she was unable to narrate the history of the assault. She has stated that on local examination of her private part, she found inflammation, measuring 2 cm. X 2 cm. Her cross-examination is very relevant. She has stated that police had sought her opinion about the age of injuries. She has stated that age of injuries is not mentioned in the certificates at Exh. 43 and 44. She could not assign any reason for not mentioning the age of injuries. She has made a voluntary statement that the victim was non-

cooperative. She has stated that the injury mentioned in Exh.43 and 44 was a fresh injury. She has categorically stated that any injury caused within 1 to 3 hours is a fresh injury. Learned Judge has also questioned her in this context. She has stated that the age of the injury depends upon nature of injury. Abrasion is termed as fresh injury up to 6 hours, whereas cut wound could be termed as fresh up to 04 days. She has stated that there are several reasons for causing inflammation to the private part, such as, yeast infection, urinary track infection, accidental trauma, allergy, burning maturation and strangury etc. It is pointed out by the learned Advocate that the victim has categorically admitted that on the day of the incident, she played in the open and therefore, had sunstroke. Perusal of the medical examination report would show that doctor has not given categorical opinion that the victim was subjected to sexual assault. The answers given by the doctor in her cross-examination as to the age of the injury would show that this

injury could not be co-related with any incident on 08.03.2019.

17. The accused, on the date of the incident, was 60 years of age. He was examined by Dr. Pravin Alane (PW-6). PW-6 has stated that, on examination he found that he was capable to perform sexual intercourse. However, he did not find any injury on his private part or body. He has admitted in his cross-examination that he did not perform any tests to ascertain the potency of the accused. He has admitted that in order to issue such a certificate, it is necessary to record in the report, the test conducted and the findings of the test. He has stated that he has not mentioned as to which test was performed to arrive at the conclusion that the patient was capable to perform sexual intercourse. He has stated that he has not mentioned any reason in his report to come to the conclusion that he was capable to perform sexual intercourse. In my view, over all perusal of the evidence of PW-6 would show that without

performing the necessary tests this certificate was issued.

18. On re-appreciation of the evidence, I am satisfied that learned Judge has failed to consider the above stated vital facts. The evidence adduced by the prosecution is not cogent, convincing, and trustworthy. The evidence is not sufficient to prove the guilt of the accused beyond reasonable doubt. The attending circumstances are sufficient to doubt the credibility and trustworthiness of the witnesses. The evidence has not been corroborated by the medical evidence. It is true that the conviction in such a crime can be based on the sole testimony of the victim of rape. However, for placing implicit reliance on the sole testimony of the victim the same must be of stellar quality. In this case, the evidence could not be said to be of stellar quality to place implicit reliance on the same. The accused has been sentenced to suffer rigorous imprisonment for twenty years. There is no concrete evidence about the penetrative sexual assault. The CA reports are not lending any

assurance to the case of the prosecution. In my view, therefore, it would not be safe to rely on such doubtful and dented evidence. Learned Judge has failed to consider all these aspects. On re-appreciation of the evidence I conclude that the prosecution has miserably failed to prove the guilt of the accused. The accused is therefore, entitled for acquittal. The appeal deserves to be allowed.

19. Accordingly Criminal Appeal is allowed.

(i) The judgment and order of conviction and sentence passed against the accused by the learned Additional Sessions Judge-1, Achalpur in Special (POCSO) Case No.56/2019 dated 22.01.2021, is quashed and set aside.

(ii) The appellant/accused – Vijay s/o Manoharrao Jawanjal is acquitted of the offences punishable under Section 376AB of the IPC and under Section 6 of the POCSO Act.

(iii) The appellant/accused is in jail. He be released forth-with, if not required in any other case/crime.

20. The Criminal Appeal stands disposed of in the above terms."

(G. A. SANAP, J.)

manisha