ALL INDIA POCSO AND RAPE CASES

2024(2)PRC513

IN THE SUPREME COURT OF INDIA

[From BOMBAY HIGH COURT]

[Before Pamidighantam Sri Narasimha; Pankaj Mithal]

Criminal Appeal No 4003 of 2024 **dated 25/09/2024**

Kailashben Mahendrabhai Patel & Ors

Versus

State of Maharashtra & Anr

QUASHING OF FIR

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 498A, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 482, Sec. 178, Sec. 161, Sec. 179 - Protection of Women from Domestic Violence Act, 2005 Sec. 12 - Quashing of FIR - Appeal challenged FIR and chargesheet under IPC Sec. 498A, 323, 504, 506 read with Sec. 34 - FIR involved allegations of cruelty, dowry demands, and property disputes - High Court refused to quash FIR, holding a prima facie case was made out - Appellants argued FIR lacked specific details and was filed to further a civil property dispute between complainant's husband and his family - Supreme Court noted similar allegations were dismissed in Domestic Violence case and held FIR had predominating civil nature - FIR and chargesheet quashed - Appeal Allowed

Law Point: Criminal proceedings based on vague, general allegations, especially when rooted in civil disputes, amount to abuse of process and may be quashed to prevent injustice.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 34, Sec. 498A, Sec. 323, Sec. 506

Code of Criminal Procedure, 1973 Sec. 482, Sec. 178, Sec. 161, Sec. 179

Protection of Women from Domestic Violence Act, 2005 Sec. 12

Counsel:

Abhishek Manu Singhvi, Sidharth Luthra, Shrirang B Varma, Sanjeev Despande

JUDGEMENT

Pamidighantam Sri Narasimha, J.- [1] Leave granted.

[2] This criminal appeal is against the dismissal of a petition under Section 482 of the CrPC to quash the FIR and the subsequent chargesheet against the appellants herein. By order dated 01.05.2018, this Court issued notice in the Special Leave

Petition and stayed the criminal proceedings. The short and necessary facts for disposal of this criminal appeal are as follows.

[3] Respondent no. 2 is the complainant. She was married to one Niraj Mahendrabhai Patel in 2002, and he is not a party in these proceedings. On 01.03.2013, the complainant filed a complaint, pursuant to which an FIR was registered on 25.03.2013 at P.S. Jalna, Maharashtra under Sections 498A, 323, 504, 506 read with Section 34 IPC against the appellants, who are her step motherin-law (appellant no. 1), step brother-in-law (appellant no. 2), father-in-law (appellant no. 3), and the Munim (appellant no. 4). The chargesheet in this case was filed on 30.07.2013.

[4] A precise but accurate description of the allegations in the FIR are that, i) her husband is the son of the appellant no. 3 and his late first wife. Thereafter, the appellant no. 3 married appellant no. 1 and their son is appellant no. 2. She lived with her husband, son and daughter in Mumbai, from where her husband was managing the family business by giving complete accounts to the family, ii) at the time of marriage her father gave certain articles and cash as dowry, and iii) she also held a joint locker at a bank in Anand, Gujarat with appellant no. 1, keys to which were kept by appellant no. 1 alone. iv) At the time of the birth of her daughter, which was eight years before the complaint, appellant nos. 1 and 3 visited her at the hospital and threatened to deprive her of a share in the property and refused to return the gold and silver ornaments that were kept in the locker. v) About 2-4 months after the delivery, when she returned to her matrimonial house in Mumbai, appellant nos. 1 and 3 initially refused to take her and later deprived her of food and physically assaulted her. vi) Even when her son was born, which was four years before the complaint, appellants no. 1 to 3 visited her at Jalna and threatened to deprive her and her husband any share in the property. vii) She has also alleged that appellant no. 2 hindered her daughter's education by cancelling her school admission. viii) Against appellant no. 4, who is the Munim, she has alleged that he threatened her that the family property only belongs to appellant no. 2 and that the complainant, and her husband will have no share in it. ix) Under these circumstances, being frightened, she left the house of the appellants along with her husband and children and started living in Jalna, her parental home. x) Even at Jalna, the accused persons threatened her and asked her to bring Rs. 50,00,000/- for the future of her son and daughter. There is danger to her life and also to the life of her husband and children and therefore the complaint on 01.03.2013. The FIR was registered on 25.03.2013, and chargesheet came to be filed on 30.07.2013.

[5] The appellants filed a petition under Section 482 of the CrPC, 1973 for quashing the FIR dated 25.03.2013 and the chargesheet dated 30.07.2013. By the order impugned herein, the High Court held that a prima facie case of cruelty is made out under Section 498A. The High Court also observed that the complainant specifically referred to instances of cruelty and attributed overt acts to each appellant. Rejecting the contention of the appellants that neither the Police Station, nor the Courts will have

jurisdiction, the Court held that Jalna would have jurisdiction as per Sections 178 and 179 of the CrPC as some part of the offence was committed there.

[6] The appellants have preferred the present appeal against the High Court's order. While issuing notice on 01.05.2018, this Court also stayed further proceedings.

[7] We have heard Dr Abhishek Manu Singhvi and Mr Sidharth Luthra, learned senior counsels for the appellants and Mr. Shrirang B Varma, learned counsel for the State of Maharashtra and Mr. Sanjeev Despande, learned senior counsel for respondent no. 2.

7.1 The learned senior counsels for the appellants have contended that the allegations in the FIR are general and omnibus in nature and lack material particulars bereft of any details, rendering the complaint vague and obscure. There is an existing civil dispute between the father and the son and as such this FIR is an abuse of the process of criminal law. Further, Section 161 statements of witnesses are identical and are based on information from respondent no. 2. They are vague and do not have material particulars about the date and time of the incident. Our attention is also drawn to the judgment and order dated 16.01.2019, passed by the Judicial Magistrate First Class, Jalna dismissing identical allegations, but under Section 12 of the Domestic Violence Act. On the other hand, the learned counsel for the respondent supported the decision and reasoning adopted by the High Court.

[8] Analysis: After identifying certain allegations in the Complaint/FIR, the High Court came to a quick conclusion that there are specific allegations against each of the accused. After referring to certain precedents on the scope and ambit of the power under Section 482 CrPC, the High Court came to a conclusion that exercise of power under Section 482 for quashing an FIR/Complaint is not warranted in the facts and circumstances of the case. Beyond holding that there are specific allegations, there is no other analysis. The duty of the High Court, when its jurisdiction under Section 482 CrPC or Article 226 of the Constitution is invoked on the ground that the Complaint/FIR is manifestly frivolous, vexatious or instituted with ulterior motive for wreaking vengeance, to examine the allegations with care and caution is highlighted in a recent decision of this Court in Mohammad Wajid and Another v. State of U.P. and Others,2023 SCCOnLineSC 951:

"34. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is

very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRS assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged."

8.1 Keeping in mind the broad principle as enunciated in the above referred precedent, we will now examine the Complaint/FIR challenged by the appellants in the Section 482 proceeding.

[9] The FIR in this case is rather unique, in as much as the complainant has chosen not to involve her husband in the criminal proceedings, particularly when all the allegations relate to demand of dowry. It appears that the complainant and her husband have distributed amongst themselves, the institution of civil and criminal proceedings against the appellants. While the husband institutes the civil suit, his wife, the complainant has chosen to initiate criminal proceedings. Interestingly, there is no reference of one proceeding in the other. On 27.02.2013, the husband filed the Special Civil Suit No. 35 of 2013 in Anand against the three appellants, i.e. his father, stepmother and stepbrother seeking for a declaration that the property is ancestral in nature and that the father has no right to alienate or dispose of the property. In that suit the husband also sought a declaration that he is entitled to use the trademark of the family business. Though the written statement filed by the appellants in the suit is brought on record, we are not inclined to examine the details of the civil dispute, but suffice to note the existence of a highly contentious civil dispute between the complainant's husband at one hand and her fatherin-law and others on the other hand.

9.1 While the husband chose to institute the civil suit on 27.02.2013, the complainant filed the present criminal complaint on 01.03.2013 alleging demand of dowry and threat by appellants that she and her husband will be denied a share in the property. The provocation for the Complaint/FIR is essentially the property dispute between father and son.

9.2 Further, the rights and claims in the suit are the very basis and provocation for filing the criminal cases. The Complaint/FIR is replete with just one theme i.e. that the appellants are threatening them that they will deny share in the property. The Complaint/FIR is intended only to further their interest of the civil dispute. In **G. Sagar Suri v. State of U.P**, 2000 2 SCC 636. this Court cautioned that:

"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence.

Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

9.3 The duty of the court, when FIR has predominating and overwhelming civil flavour is also reflected in the opinion of this Court in Jaswant Singh v. State of Punjab,2021 SCCOnLineSC 1007. this court observed that:

"19. From the above discussion on the settled legal principles, it is clear from the facts of the present case that there was a clear abuse of the process of the Court and further that the Court had a duty to secure the ends of justice. We say so for the following reasons;

a) The allegations made in the FIR had an overwhelmingly and predominatingly a civil flavour inasmuch as the complainant alleged that he had paid money to Gurmeet Singh, the main accused to get employment for his son abroad. If Gurmeet Singh failed the complainant could have filed a suit for recovery of the amount paid for not fulfilling the promise.

...

20. In our considered view, the High Court erred in firstly not considering the entire material on record and further in not appreciating the fact that the dispute, if any, was civil in nature and that the complainant had already settled his score with the main accused Gurmeet Singh against whom the proceedings have been closed as far back as 26.09.2014. In this scenario, there remains no justification to continue with the proceedings against the appellant."

[10] We will now examine the 'specific allegations' in the FIR/complaint. Firstly, the complainant referred to certain items which are said to have been given by her father at the time of marriage. These items are (i) one Scorpio car; (ii) T.V.; (iii) fridge; (iv) DVD Tape; (v) silver utensils; (vi) 100 to 150 tolas gold; (vii) and Rs. 5 lacs. This allegation relates to the year 2002 and the present complaint is of the year

2013. It is important to mention at this very stage that identical allegations in a DV case filed by the complainant were taken up at trial and the Judicial Magistrate, First Class had disbelieved the complainant's version. We will be dealing with the judgment of the Judicial Magistrate, First Class in little more detail in the succeeding paras of the judgment. The second allegation relates to a bare statement that there exists a joint locker and that the keys of the said locker are with her stepmother-in-law, that is the appellant no. 1. Even on this, the Judicial Magistrate, First Class has observed that there are no details whatsoever, about the bank or the locker.

10.1 The tendency to make general, vague, and omnibus allegation is noticed by this Court in many decisions. In Usha Chakraborty v. State of W.B.,2023 SCCOnLineSC 90. this court observed that:

"16... the respondent alleged commission of offences under Sections 323, 384, 406, 423, 467, 468, 420 and 120B, IPC against the appellants. A bare perusal of the said allegation and the ingredients to attract them, as adverted to hereinbefore would reveal that the allegations are vague and they did not carry the essential ingredients to constitute the alleged offences.... The ingredients to attract the alleged offence referred to hereinbefore and the nature of the allegations contained in the application filed by the respondent would undoubtedly make it clear that the respondent had failed to make specific allegation against the appellants herein in respect of the aforesaid offences. The factual position thus would reveal that the genesis as also the purpose of criminal proceedings are nothing but the aforesaid incident and further that the dispute involved is essentially of civil nature. The appellants and the respondents have given a cloak of criminal offence in the issue ..."

10.2 Similarly, dealing with allegations lacking in particulars and details, in **Neelu Chopra v. Bharti**, 2009 10 SCC 184. this court observed that:

"7. ...what strikes us is that there are no particulars given as to the date on which the ornaments were handed over, as to the exact number of ornaments or their description and as to the date when the ornaments were asked back and were refused. Even the weight of the ornaments is not mentioned in the complaint and it is a general and vague complaint that the ornaments were sometime given in the custody of the appellants and they were not returned. What strikes us more is that even in Para 10 of the complaint where the complainant says that she asked for her clothes and ornaments which were given to the accused and they refused to give these back, the date is significantly absent."

[11] The third allegation is against appellant no. 1, the mother-inlaw, who is said to have threatened the complainant when she gave birth to a girl child. The threat is that the complainant will not get her gold and silver ornaments, and her husband will not get any share in the property. The allegations are again vague, lacking in basic details. The essence of the complaint is in the alleged threat to deprive the husband any

share in the property with respect to which the husband has already filed the suit for declaration.

[12] The complaint also refers to a small incident where the complainant's brother accompanied her to the matrimonial house, when the appellants no. 1 and 3 are alleged to have refused to take her back but on persuasion by her brother, she was allowed to stay. There is also a vague allegation that, when the complainant gave birth to a second child, appellants 1 and 2 came and "quarrelled" with the complainant, her brother, parents and threatened them. This Court had occasion to examine the phenomenon of general and omnibus allegations in the cases of matrimonial disputes. In Mamidi Anil Kumar Reddy v. State of A.P.,2024 SCCOnLineSC 127. this Court observed that:

"14. ...A bare perusal of the complaint, statement of witnesses' and the charge-sheet shows that the allegations against the Appellants are wholly general and omnibus in nature; even if they are taken in their entirety, they do not prima facie make out a case against the Appellants. The material on record neither discloses any particulars of the offences alleged nor discloses the specific role/allegations assigned to any of the Appellants in the commission of the offences.

15. The phenomenon of false implication by way of general omnibus allegations in the course of matrimonial disputes is not unknown to this Court. In Kahkashan Kausar alias Sonam v. State of Bihar, this Court dealt with a similar case wherein the allegations made by the complainant-wife against her inlaws u/s. 498A and others were vague and general, lacking any specific role and particulars. The court proceeded to quash the FIR against the accused persons and noted that such a situation, if left unchecked, would result in the abuse of the process of law."

[13] There is also an allegation against the appellant no. 2 about which the complainant passingly mentioned that "my daughter's education disturbed since my brother-in-law Rahul cancelled her school admission by signing fraudulently". The complaint is again silent about when such an act was done, where was it done, which was the school in which the admission was cancelled, what documents were signed for such cancellation, and what is fraud played by him. It is impossible to conceive of any offence on the basis of such vague and unclear allegations. Lastly, there is an allegation against the appellant no. 4, the Munim against whom it is said "Vijay Ranchhodbhai Patel is telling stories to my in-laws against me, my husband and my children and making them to mentally torture us". The Munim is said to have threatened them and ask them to go away as there is nothing left for them as the entire property belongs to Rahul, appellant no. 2.

13.1 In **Kahkashan Kausar v. State of Bihar**, 2022 6 SCC 599. this Court noticed the injustice that may be caused when parties are forced to go through tribulations of a trial based on general and omnibus allegations. The relevant portion of the observation is as under:

"11. ...in recent times, matrimonial litigation in the country has also increased significantly and there is a greater disaffection and friction surrounding the institution of marriage, now, more than ever. This has resulted in an increased tendency to employ provisions such as Section 498-A IPC as instruments to settle personal scores against the husband and his relatives.

18. ... upon a perusal of the contents of the FIR dated 1-4- 2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes... However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution.

21. ...it would be unjust if the appellants are forced to go through the tribulations of a trial i.e. general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must, therefore, be discouraged."

[14] One important event that gives us a clear impression that the criminal proceedings were instituted with a mala fide intention, only to harass the appellants, is the filing of the Domestic Violence case. After the institution of the Civil Case on 27.02.2013 and thereafter the present Criminal Complaint/FIR, respondent no. 2 filed a complaint under Section 12 of the Domestic Violence Act on 06.04.2013, based on similar allegations. The DV complaint refers to the same items, a Scorpio car, T.V., fridge, DVD Tape, silver articles, 100 to 150 tolas gold and cash of Rs. 5 lacs as dowry. Again, there is an allegation that the accused have threatened that she will not get a share in the property as she gave birth to a girl child. There are similar allegations against appellant no. 2 as well as the Munim, the appellant no. 4. The domestic violence complaint went to trial and culminated in a detailed judgment of the Judicial Magistrate, First Class, Jalna dated 16.01.2019. We are informed that the judgment and order has become final as there was no appeal against the said order. While dismissing the domestic violence complaint, the learned judge observed as under:

"19. During cross examination, the applicant admitted that the property dispute is going on in between her and respondents. Again, she voluntarily stated that the property dispute is pending in between her husband and parents in law. Moreover, the applicant appears deposed specifically that where ever Joint Bank Accounts are in the

name of respondents, her and her husband, in such cases, respondents shall be prohibited from operation said accounts and she shall be allowed to operate. It further appears that the applicant family shall be provided same level of accommodation as holding by respondents.

20. The above ocular evidence and admission are clearly suggesting that the applicant has brought the present application at the behest of her husband and with ulterior motive to grab property which the husband of the applicant may be entitled by other provisions of law. The wordings used in the application reveal selfish nature of the applicant. Hence, in the given circumstances, I am of opinion that it would be unsafe to rely on the sole testimony of the applicant without corroboration.

21. It seems that the applicant has not brought any other cogent and reliable evidence in support of her said oral evidence. Moreover, it appears that the case filed U/s 498(A) of IPC bearing RCC No. 376/2014 is not yet concluded. There is no record showing that respondents have been held guilty till today in that matter. It means that said allegations are not yet proved and not available for corroboration purpose. Therefore, I am coming to the conclusion that there is no cogent and reliable evidence as to domestic violence and accordingly I record my finding to Point No. 1 as "No"."

[15] We are not referring to all the findings of the Court dismissing the domestic violence complaint. It is sufficient to note that identical allegations were examined in detail, subjected to strict scrutiny, and rejected as being false and untenable. This case is yet another instance of abuse of criminal process and it would not be fair and just to subject the appellants to the entire criminal law process. In Achin Gupta v. State of Haryana,2024 SCCOnLineSC 759. this court observed that:

"20. It is now well settled that the power under Section 482 of the Cr. P.C. has to be exercised sparingly, carefully and with caution, only where such exercise is justified by the tests laid down in the Section itself. It is also well settled that Section 482 of the Cr. P.C. does not confer any new power on the High Court but only saves the inherent power, which the Court possessed before the enactment of the Criminal Procedure Code. There are three circumstances under which the inherent jurisdiction may be exercised, namely (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and iii) to otherwise secure the ends of justice.

21. ...It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, the court would be justified to quash any proceeding if it finds that the initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

36. For the foregoing reasons, we have reached to the conclusion that if the criminal proceedings are allowed to continue against the Appellant, the same will be nothing short of abuse of process of law & travesty of justice. This is a fit case wherein, the High Court should have exercised its inherent power under Section 482 of the Cr. P.C. for the purpose of quashing the criminal proceedings."

[16] It is submitted on behalf of the respondent that after investigation, charge sheet has already been filed and that this Court should not interfere with the judgment of the High Court. The chargesheet is on record and we have examined it carefully, it simply reproduces all the wordings of the complaint. There is nothing new even after investigation, the allegations made in the FIR/complaint are exactly the allegations in the charge sheet. Even otherwise, the position of law is well entrenched. There is no prohibition against quashing of the criminal proceedings even after the charge sheet has been filed. In **Anand Kumar Mohatta v. State (NCT of Delhi)**, 2019 11 SCC 706.

"14. First, we would like to deal with the submission of the learned Senior Counsel for Respondent 2 that once the chargesheet is filed, petition for quashing of FIR is untenable. We do not see any merit in this submission, keeping in mind the position of this Court in Joseph Salvaraj A. v. State of Gujarat...

15. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 CrPC and that this Court is hearing an appeal from an order under Section 482 CrPC....

16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

Similar view is taken by this Court in **Joseph Salvaraj A. v. State of Gujarat**, 2011 7 SCC 59; A.M. Mohan v. State,2024 SCCOnLineSC 339; Mamta Shailesh Chandra v. State of Uttarakhand,2024 SCCOnLineSC 136.

[17] Having considered the matter in detail, we are of the opinion that none of the ingredients of Sections 498A, 323, 504, 506 read with Section 34 IPC are made out. We have no hesitation in arriving at the conclusion that if the criminal proceedings are allowed to continue against the appellants, the same will be nothing short of abuse of process of law and travesty of justice. Though the appellants have also argued on the ground that Jalna Police Station and the Chief Judicial Magistrate, Jalna did not have

jurisdiction, we are not inclined to examine that position in view of our finding that the Complaint/FIR and the chargesheet cannot be sustained.

[18] For the reasons above mentioned, we allow the present appeal, set aside the impugned judgment and order of the High Court in Criminal Application No. 4015 of 2014 dated 05.05.2017, and quash FIR dated 25.03.2013 bearing Crime No. 81/2013 filed under Sections 498A, 323, 504, 506 read with Section 34 IPC at P.S. Jalna and the chargesheet dated 30.07.2013 bearing Chargesheet No. 123/2013 in the above FIR

2024(2)PRC523

IN THE SUPREME COURT OF INDIA

[From MADHYA PRADESH HIGH COURT]

[Before B R Gavai; Prashant Kumar Mishra; K V Viswanathan]

Criminal Appeal No 449 of 2019, 450 of 2019 **dated 12/09/2024**

Rabbu @ Sarvesh

Versus

State of Madhya Pradesh

DEATH PENALTY COMMUTED

Indian Penal Code, 1860 Sec. 34, Sec. 302, Sec. 376A, Sec. 376D, Sec. 450, Sec. 376 - Code of Criminal Procedure, 1973 Sec. 164 - Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 5 - Death Penalty Commuted - Appellant convicted of rape and murder under IPC and POCSO Act, sentenced to death - Based on psychological reports, socio-economic background, and the appellant's age at the time of the offence, Court held that the death penalty was excessive - Conviction upheld but death sentence commuted to 20 years of rigorous imprisonment without remission. - Appeal Partly Allowed

Law Point: In cases involving death penalty, factors such as socio-economic background, age, and potential for reform must be considered - Death sentence may be commuted if the case does not fall under the 'rarest of rare' category.

Acts Referred:

Indian Penal Code, 1860 Sec. 34, Sec. 302, Sec. 376A, Sec. 376D, Sec. 450, Sec. 376

Code of Criminal Procedure, 1973 Sec. 164

Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 5

JUDGEMENT

B.R. Gavai, J.- [1] Heard Shri N. Hariharan, learned Senior Counsel for the appellant and Shri Bhupendra Pratap Singh, learned Deputy Advocate General appearing on behalf of the State of Madhya Pradesh.

[2] These appeals arise out of the judgment and order dated 17.01.2019 passed by the Division Bench of the High Court of Madhya Pradesh at Jabalpur, dismissing the appeal of the appellant and confirming the judgment and order dated 20.08.2018 passed by the First Additional Sessions Judge, Bina, District Sagar (hereinafter referred to as the "Trial Judge"), thereby convicting the appellant for offences punishable under Sections 450, 376(2)(i), 376D, 376A and 302 read with 34 of the Indian Penal Code, 1860 (for short, 'IPC') and Section 5(g)/6 of the Protection of Children from Sexual Offenses Act, 2012 (for short, 'POCSO') awarding death penalty under Sections 376A and 302 IPC and life imprisonment under Section 376D of the IPC and rigorous imprisonment for 10 years under Section 450 of the IPC.

[3] Shri Hariharan submits that the present case basically rests on the three dying declarations and the DNA report. He submits that the dying declarations are inconsistent. He further submits that as the time progressed there were improvements in the dying declaration. He therefore submits that in the present case the truthfulness of the dying declarations itself is doubtful and therefore the conviction could not be based on the said dying declarations. He further submits that the DNA report also points out towards the presence of a third person. In such an eventuality, the learned Senior Counsel submits that the order of conviction could not be sustained.

[4] Shri Hariharan, in the alternative, submits that the present case is not a 'rarest of the rare' case, which would justify awarding death penalty. He further submits that, in the present case, the order convicting the appellant and imposing death penalty were done simultaneously. He submits that the learned Trial Judge also does not consider the balance between the mitigating circumstances and aggravating circumstances while awarding the death penalty. Learned Senior Counsel therefore submits that in the event this Court is not inclined to interfere with the finding of the conviction, in the facts and circumstances of this case and particularly taking into consideration the fact that the appellant lost his mother and brother at a tender age, the socio-economic background of the appellant and the age of the appellant at the time of commission of crime so also his conduct and behaviour in the prison entitle him for commutation of sentence.

[5] Shri Bhupendra Pratap Singh, learned Deputy Advocate General (DAG), on the contrary, submits that the learned Trial Judge as well as the High Court, upon appreciation of the evidence, have correctly come to a finding that the present appellant is guilty for the offences committed. He therefore submits that no interference is warranted in the present appeals.

[6] Insofar as the prayer made by the learned Senior Counsel for the appellant regarding commutation is concerned, the learned DAG for the respondent-State relies on the following judgments of this Court in the cases of **Shivu and Another v. Registrar General, High Court of Karnataka and Another**, 2007 4 SCC 713: 2007 INSC 136. **Purushottam Dashrath Borate and Another v. State of Maharashtra**, 2015 6 SCC 652: 2015 INSC 392. and **Deepak Rai v. State of Bihar**, 2013 10 SCC

421: 2013 INSC 638. in order to contend that merely the age of the appellant cannot be taken into consideration. He further submits that the appellant taking advantage of the circumstances that the deceased was alone in the house has committed the heinous crime and therefore the present case would squarely fit in the category of 'rarest of the rare' cases. He submits that the psychological report would also show that there is no remorse expressed by the appellant. He therefore submits that taking into consideration all these aspects, the death penalty needs to be confirmed.

[7] We have perused the material on record and find that the dying declaration recorded by the Executive Magistrate (Naib Tehsildar), PW-11, which was endorsed by Dr. Avinash Saxena, PW-9 is reliable and trustworthy. The dying declaration recorded by PW-11 is in question-answer form. In the said dying declaration, the deceased clearly implicates the present appellant. The Medical Officer, PW-9, before the commencement of the dying declaration has given an endorsement regarding fit mental status of the deceased to make a declaration and at the end of the dying declaration again he has endorsed that the deceased was in a fit state of mind. The written dying declaration is corroborated by the oral dying declaration as has come on record in the evidence of her grand-father Sohan Singh (PW-1), her grand-father's brother Mukund Singh (PW-2), her aunt Preeti (PW-13) and her uncle Sandeep Singh Rajpoot (PW-14).

[8] In the said dying declaration, all the witnesses have clearly stated that the deceased after coming out from the room in flames has narrated the incident about the appellant committing the crime. Not only this, but DW-1-Golu Chaubey who was examined on behalf of the defence has also clearly stated that when the deceased came out of the house, she was shouting that the accused person(s) had committed rape on her and set her on fire. The statement of the deceased recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) by Smt. Suchita Srivastava, Judicial Magistrate First Class, Sagar (PW-23) also supports the prosecution case. The Dehat Nalishi (Ex. P/28) recorded by Sub Inspector, Anjana Parmaar (PW-16) also narrates the same factual position.

[9] In that view of the matter, we do not find that there is any error in the concurrent orders of the Trial Judge and the High Court convicting the appellant for the offences punishable under Sections 450, 376(2)(i), 376D, 376A and 302 read with 34 of the IPC and Section 5(g)/6 of the POCSO.

[10] The question that now requires to be considered is as to whether the present case would fall in the category of 'rarest of rare case' so as to confirm the death penalty or the sentence could be commuted.

[11] We have perused the psychological assessment of the present appellant as conducted by the Department of Psychiatry, NSCB Medical College, Jabalpur, Madhya Pradesh so also the report of the Senior Probation and Welfare Officer, Central Jail, Bhopal, Madhya Pradesh dated 12.06.2023 and the report of the

Divisional Officer, Western Division/Assistant Jail Superintendent, Central Jail Jabalpur dated 10.06.2023.

[12] In the said reports, it has been found that there is nothing against the behaviour of the appellant herein in the prison. His conduct in the prison has been found to be satisfactory. The reports further reveal that though not allotted any work, the appellant is engaging himself in plantation of trees, cleaning the temple and surrounding area.

[13] While considering as to whether the death penalty needs to be confirmed or not, we would be required to take into consideration various factors.

[14] It is not in dispute that the appellant lost his mother at the tender age of 8 years and his elder brother at the age of 10 years. The appellant was brought up by his father as a single parent. The appellant has close family ties with his father, his sister, who is married and his grand-mother. Though, Shri Singh is right that the age of the appellant at the time of commission of crime solely cannot be taken into consideration, however the age of the appellant/accused at the time of commission of crime along with other factors can certainly be taken into consideration as to whether the death penalty needs to be commuted or not.

[15] In the present case, it is to be noted that the appellant comes from a socio-economic backward stratum of the society. As already discussed hereinabove, he lost his mother and brother at the tender age. The appellant and his family members do not have any criminal background. The appellant was of a tender age of 22 years when the aforesaid incident occurred.

[16] It cannot be said that the appellant is a hardened criminal, who cannot be reformed. The possibility of the appellant, if given the chance of being reformed, cannot be ruled out.

[17] In that view of the matter, we find that in the present case the confirmation of death penalty would not be justified. However, at the same time we also find that the ordinary sentence of life i.e. 14 years imprisonment with remission would not meet the ends of justice. In our considered view, the present case would fall in the middle path, as laid down by this Court in a catena of judgments, which are as follows:-

i. **Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka**, 2008 13 SCC 767: 2008 INSC 853;

ii. **Shankar Kisanrao Khade v. State of Maharasthra**, 2013 5 SCC 546: 2013 INSC 281;

iii. **Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka**, 2017 5 SCC 415;

iv. **Prakash Dhawal Khairnar (Patil) v. State of Maharashtra**, 2002 2 SCC 35: 2001 INSC 606;

v. **Mohinder Singh v. State of Punjab**, 2013 3 SCC 294: 2013 INSC 61;

vi. Madan v. State of Uttar Pradesh,2023 SCCOnLineSC 1473;

vii. **Navas @ Mulanavas v. State of Kerala**, 2024 INSC 215; 2024 SCC OnLine SC 315.

[18] We, therefore, find that in the facts and circumstances of the present case, the death penalty needs to be commuted to fixed imprisonment without remission for a period of 20 years.

[19] The order of conviction is maintained however the death penalty awarded under Sections 376A and 302 IPC is commuted to rigorous imprisonment for 20 years.

[20] The appeals are allowed to the extent indicated above.

[21] Pending application(s), if any, shall stand disposed of.

2024(2)PRC527

IN THE SUPREME COURT OF INDIA

[From KERALA HIGH COURT]

[Before Sudhanshu Dhulia; Ahsanuddin Amanullah]

Criminal Appeal No 3700 of 2024 **dated 03/09/2024**

Mallan @ Rajan Kani

Versus

State of Kerala

RAPE CONVICTION

Indian Penal Code, 1860 Sec. 376 - Rape Conviction - Appellant convicted under Section 376 IPC for repeatedly raping his stepdaughter in a forest and at their home - Conviction upheld by the High Court, and appellant sentenced to life imprisonment with a fine of Rs. 2 lakhs - Appellant sought sentence reduction, citing financial difficulties and having served over 8 years in prison - Court reduced the sentence to 10 years but retained the fine - Failure to pay fine within one year would result in an additional one-year sentence - Appeal disposed of accordingly. - Appeal Partly Allowed

Law Point: Courts may reduce sentences considering the totality of circumstances, but fines imposed must still be paid within a specified period to avoid further imprisonment.

Acts Referred:

Indian Penal Code, 1860 Sec. 376

Counsel:

D N Goburdhun (Senior Advocate), Nidhi, Harshad V Hameed, Dileep Poolakkot, Ashly Harshad, Farhad Tehmu Marolia

JUDGEMENT

[1] Leave granted.

[2] The appellant has been convicted and sentenced for life imprisonment with fine of Rupees Two lakh in default to pay the fine to undergo RI for two more years for the offences punishable under Section 376 of the Indian Penal Code, which has been upheld in appeal before the High Court vide order dated 14.12.2021. The case of the prosecution against the appellant is that he is the step father of the victim and the he used to insist that the victim accompany him to the nearby forest to collect fire woods where she was raped by the appellant. The victim also states that the appellant had raped her on previous occasions as well, at the very same forest and also at her dwelling house.

[3] Under these circumstances, we see absolutely no reason to interfere with the well-considered finding of the Trial Court as well as the High Court on conviction.

[4] Learned senior counsel for the appellant thereafter argue on the sentence. Presently, the appellant is in his 40s and he had already undergone more than 8 years of the sentence. His financial condition is such that he will never been able to pay the fine of Rupees Two lakh which has been additionally imposed upon him, states his counsel who has been assigned to argue this Court as a legal aid matter.

[5] Having consider the totality of the facts and circumstances of the case, we reduce the sentence to 10 years and retain the fine amount as Rupees Two lakhs. The appellant shall pay the said fine amount within a period of one year from today.

[6] In case the said fine amount is not paid by the appellant within the stipulated time, the appellant shall undergo one year (instead of two years RI) of further sentence.

[7] The appeal stands disposed of in the above terms.

[8] All pending applications stand disposed of

2024(2)PRC528

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[From AURANGABAD BENCH]

[Before R G Avachat; Neeraj P Dhote]

Criminal Appeal No. 889 of 2023 **dated 25/09/2024**

Nivrutti S/o Nagorao Hange

Versus

State of Maharashtra; X Y Z

CONVICTION REVERSED

Indian Penal Code, 1860 Sec. 376 - Code of Criminal Procedure, 1973 Sec. 374, Sec. 299, Sec. 164A, Sec. 293, Sec. 313, Sec. 235 - Evidence Act, 1872 Sec. 8 - Protection of Children from Sexual Offences Act, 2012 Sec. 2, Sec. 6, Sec. 3, Sec. 5, Sec. 4 - Conviction Reversed - Appellant was convicted for sexual assault under POCSO and IPC based on DNA evidence linking him to the pregnancy of a minor - Prosecution's case was supported by medical and DNA reports, but several inconsistencies were found in the handling and chain of custody of DNA samples, including unexplained delays - DNA results were contradictory and sample integrity was questioned - High Court ruled that the chain of custody was compromised, leading to contamination or tampering possibilities - Conviction and sentence quashed - Appellant acquitted - Appeal Allowed

Law Point: DNA evidence must adhere strictly to protocols for collection, preservation, and chain of custody to ensure its admissibility; failure to follow these protocols can lead to acquittal even in serious offences.

Acts Referred:

Indian Penal Code, 1860 Sec. 376

Code of Criminal Procedure, 1973 Sec. 374, Sec. 299, Sec. 164A, Sec. 293, Sec. 313, Sec. 235

Evidence Act, 1872 Sec. 8

Protection of Children from Sexual Offences Act, 2012 Sec. 2, Sec. 6, Sec. 3, Sec. 5, Sec. 4

Counsel:

Deoda Mohit Lalit, Pavan M Salunke, Govind A Kulkarni, Vinaya Dharurkar

JUDGEMENT

Neeraj P. Dhote, J.- [1] This Criminal Appeal, fled under Section 374**[2]** of the Criminal Procedure Code, 1973 [hereinafter referred to as 'Cr.PC'] challenges the Appellant's conviction and sentence awarded by the learned Additional Sessions Judge, Aurangabad, vide Judgment and Order dated 03/03/2022, in Special [POCSO] Case No.43/2016, as under:-

"(i) The accused - Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the commission of offence under Section 3(a) punishable under section 4, and the offences under Sections 5(j) (ii), 5(l), 5(n), 5(p) punishable under Section 6 of the POCSO Act.

(ii) The accused - Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the charge of commission of offence punishable under Section 376 (2)(i) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life, which shall mean imprisonment for the remainder of his natural life and to pay fne Rs.3000/-;

in default of payment of fne the accused to undergo simple imprisonment for six months.

(iii) The accused - Nivrutti Nagorao Hange is convicted under Section 235 of Cr.PC for the charge of commission of offence punishable under Section 376(2) of the Indian Penal Code and sentenced to suffer an imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fne Rs.3000/-; in default of payment of fne the accused to undergo simple imprisonment for six months.

(iv) All the substantive sentences shall run concurrently."

[2] The Prosecution's case as revealed from the Police Report is as under:-

[I] The Prosecutrix, hail from Village Martandwadi, Taluka Palam, District Parbhani. For education purpose she had come to reside at Aurangabad with her eldest married sister, from the year 2009. The Appellant was her brother-in-law [husband of sister]. At the relevant time, she was taking education in 8th standard. Her sister was a working woman and her sister had school going children. The Appellant, taking disadvantage of the situation, committed sexual intercourse with the Prosecutrix. The Appellant threatened the Prosecutrix with the consequence that, he will discontinue her education and kill her sister. Due to the threat, the Prosecutrix did not disclose the repeated sexual intercourse by the Appellant on her. After some months, the Prosecutrix had stomach ache and vomiting, therefore, her sister took her for medical examination. Sonography was advised by the Doctor. The medical examination revealed that the Prosecutrix was pregnant. On inquiry by the sister, the Prosecutrix disclosed her the sexual act by the Appellant on her. The Prosecutrix was admitted to the Hospital. She aborted naturally a non-viable foetus. On the statement of the Prosecutrix, the criminal law was set in motion and Crime bearing No.275/2013 came to be registered against the Appellant for the offences punishable under Sections 3(a), 4, 5(j)(2), 5(l), 5(n), 5(p), 5(q) and 6 of the Protection of Children From Sexual Offences Act, 2012 [hereinafter referred to as 'the POCSO Act']

[II] The Investigating Machinery recorded supplementary statement of the Prosecutrix, statements of the witnesses, conducted the Spot Panchnama, collected the medical papers, referred the Prosecutrix for radio-logical test, collected the documents relating to her age from the school, got the blood samples of Prosecutrix and samples of foetus collected and referred for Chemical Analysis. Since the Appellant was not traceable, Charge-sheet came to be submitted on 18/02/2016 under Section 299 of Cr.PC. Subsequently, the Appellant came to be arrested on 11/04/2017. The Appellant was medically examined. His blood samples were collected and the same were referred for Chemical Analysis. Supplementary Charge-sheet came to be fled against the Appellant. The reports from the Chemical Analyser were received which were submitted before the trial Court.

[3] After committal, the learned Additional Sessions Judge framed the Charge against the Appellant at Exhibit - 178, to which, the Appellant did not plead guilty and

claimed to be tried. To prove the Charge, the Prosecution examined in all seventeen **[17]** witnesses and brought on record the relevant documents. On completion of the Prosecution's evidence, the learned Trial Court recorded the statement of Appellant under Section 313[1][b] of Cr.PC. The Appellant denied the case and evidence of Prosecution. After hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

[4] Heard the learned Advocates Mr. Deoda Mohit Lalit and Mr. Pavan M. Salunke for the Appellant, learned APP Mr. Kulkarni for Respondent No.1 - State, assisted by learned Advocate Ms. Vinaya Dharurkar for Respondent No.2. Scrutinized the evidence.

[5] It is submitted by the learned Advocate for the Appellant that the Prosecutrix did not support the case of Prosecution. There is ambiguity regarding the date of birth of Prosecutrix. There was delay in registering the FIR. The requirement of Section 164-A of Cr.PC was not complied. The Prosecution failed to establish the chain of custody of samples of foetus and blood samples. There was delay in result of DNA analysis. Therefore, the evidence in the nature of DNA report cannot form the basis to convict the Appellant. There are discrepancies in the reports of DNA analysis. The learned Trial Court recorded the conviction only on the basis of DNA report, which is unsustainable in the eye of law and the Appeal be allowed. The Judgments cited are considered in later part of this Judgment.

[6] It is submitted by the learned APP that though the Prosecutrix did not support the Prosecution, the medical evidence supports the Charge. The Prosecutrix was minor and her age was proved. Since the Prosecutrix was minor, there was no question of her consent. The sister of Prosecutrix supported the Prosecution. The Appellant was absconding. There was proper handling of the DNA in sealed condition. The DNA report concluded that the Appellant and Prosecutrix were the biological parents of the baby [foetus]. The learned Trial Court has properly appreciated the evidence on record and passed the impugned Judgment and Order. Hence, the Appeal be dismissed. The Judgments cited are considered in later part of this Judgment.

[7] The learned Advocate for the Prosecutrix [assisting the Prosecution] adopted the submissions made by the learned APP and additionally submitted that the conduct of the Appellant becomes relevant by virtue of Section 8 of the Indian Evidence Act, 1872 [hereinafter referred to as 'the Evidence Act']. The sister of Prosecutrix deposed in respect of the age of Prosecutrix and the school record was brought in evidence to establish her date of birth. The DNA report was conclusive in nature. Hence, the Appeal be dismissed.

[8] From the evidence available on record, following aspects are not in dispute;

[i] The Prosecutrix was the younger sister of PW - 2 [Meena Nivrutti Hange];

[ii] The Appellant / Accused is the husband of PW - 2 [Meena Nivrutti Hange];

[iii] The Prosecutrix was residing in the house of Appellant and PW - 2 [Meena Nivrutti Hange] for her education;

[iv] The Prosecutrix got pregnant for which she was hospitalized and she aborted;

[9] The Charge and the conviction is for sexual offences against a child. The term child as defned under Section 2(1)(d) of the POCSO Act means any person below the age of eighteen **[18]** years. Thus, it becomes necessary for the Prosecution to prove that, the Prosecutrix was a child. The learned Trial Court has dealt with the evidence on record and held the Prosecutrix to be a child at the relevant time. The learned Trial Court considered and accepted the medical record of Radiologist for determination of age, which is brought on record in the evidence of PW-15 (Asha Pandurang Bhange). The Radiologist is not examined, thus, the said record is kept out of consideration.

[10] Though the Prosecutrix, who is examined as PW - 1, deposed her date of birth as 25/05/1999, it would be hearsay in nature. The Prosecution examined the Teacher of Zilla Parishad Primary School, Martandwadi, District Parbhani as PW - 9 [Dilip Motiram Bhingole], where the Prosecutrix was studying. He appeared before the learned Trial Court pursuant to the witness summons in respect of the date of birth of Prosecutrix. The original register was brought by him. The Prosecutrix had taken admission in the said school in frst [1st] standard on 16/06/2005 and as per the school record, her date of birth was 25/05/1999. The said register contained the information in respect of the date of birth, date of admission and date of issuing school leaving certifcate. The relevant extract from the said register was brought on record at Exhibit - 86. Though he was working in the said school since one and half years [1] 1/2 from his date of evidence and he had no personal knowledge about the entries made in the said register, the said document was the school record and had come from proper custody. His further evidence shows that the Prosecutrix was given admission in the school on the basis of extract of register of the Anganwadi which was received from the Anganwadi Sevika. There is nothing in the cross-examination to doubt the testimony of this witness. The extract brought on record corroborate his testimony. By examining this witness, the Prosecution has successfully proved the date of birth of the Prosecutrix as 25/05/1999 from the school record where she was studying from standard 1st .

[11] The evidence of PW - 1 Prosecutrix, shows that the report dated 17/07/2013, which was treated as FIR, was confronted to her and she only identifed her signature on the same, which was marked as Exhibit - 31 [signature]. The evidence of PW - 2 [Meena Nivrutti Hange], who was the elder sister of PW - 1 Prosecutrix, shows that on 04/07/2013, when she along with PW - 1 Prosecutrix, her daughter and friends had gone to the Temple in the morning, PW - 1 Prosecutrix, was not feeling well and she was feeling giddiness and vomited. She took PW - 1 Prosecutrix to the Doctor, who advised a Sonography. The result of Sonography was that PW - 1 Prosecutrix was pregnant for four **[4]** months. On 13/07/2013, PW - 1 Prosecutrix was admitted to the

Ghati Hospital and during the medical examination, it was found that the foetus was dead and abortion was carried. This evidence remained undiluted in cross-examination. The evidence of PW - 10 [Dr. Anjali Suresh Darekar] shows that on 13/07/2013, she was working as Lecturer in Gynaecology Department in Ghati Hospital. On that day, PW - 1 Prosecutrix was admitted to the Ghati Hospital and her Sonography showed that she was pregnant for twenty **[20]** to twenty one **[21]** weeks. On 16/07/2013, PW - 1 Prosecutrix aborted naturally. Her evidence remained unchallenged.

[12] The above evidence in respect of date of birth of PW - 1 Prosecutrix and her admission to the Hospital and her abortion, which led to the non-viable foetus, establishes that at the relevant time, PW - 1 Prosecutrix was a child. Her date of birth, her admission to the Hospital and her date of abortion clearly shows that at the relevant time, she was aged fourteen **[14]** years, one **[1]** month, twenty one **[21]** days. The learned Trial Court has rightly held that PW - 1 Prosecutrix was below sixteen **[16]** years in age and a child.

[13] For proving the Charge, the star witness of Prosecution was the Prosecutrix herself, who is examined as PW - 1. She did not support the case of Prosecution. She denied the contents of the report, which was treated as FIR. She further denied giving of supplementary statement to the Police. The Prosecution cross-examined her, however, nothing came in her evidence towards establishing the Charge, even remotely. Her evidence that at the relevant time, she told her sister PW - 2 [Meena Nivrutti Hange] that the Appellant had sexual intercourse with her, cannot take the place of substantive evidence. It was a previous oral statement made to her sister. According to her, she was unable to say as to how she conceived. Though in her re-examination done by the Prosecution, she admitted of recording her statement in the Ghati Hospital, Aurangabad, which was recorded in presence of two - three ladies, which was narrated by her without any pressure, that cannot take the place of substantive evidence. All in all, the evidence of PW - 1 Prosecutrix is of no assistance to the Prosecution in establishing the Charge.

[14] The learned APP relied on two Judgments. In **Selvamani Vs. The State Rep. By the Inspector of Police, in Criminal Appeal No.906/2023**, delivered on May 08, 2024, wherein, the Prosecutrix as well as her mother and her aunt had fully supported the Prosecution, which is not so in the case in hand. In Imran Shamim Khan Vs. State of Maharashtra,2019 DGLS(Bom) 366, wherein, the conviction recorded by the learned Trial Court was upheld, as the Prosecution examined the Magistrate, who recorded the statement of the Prosecutrix under Section 164 of Cr.PC. In catena of Judgments of the Hon'ble Supreme Court of India, it is well settled position in law that the statement recorded under Section 164 of Cr.PC is not the substantive evidence.

[15] PW -2 [Meena Nivrutti Hange] was admittedly not the eye witness to any of the incidents, for which, the Crime was registered. Her evidence that, on detection of

pregnancy, PW - 1 Prosecutrix told her that, it was because of the Appellant, is hearsay in nature and not substantive evidence. Her evidence shows that her marriage with the Appellant was at the instance of her parents and she was not happy with the marriage. Her evidence shows that once she was hospitalized for consuming poison. Of course, this is not the issue in question, it shows that the relations between PW - 2 and the Appellant were not harmonious. It is, thus, clear that the evidence of PW - 2 [Meena Nivrutti Hange] do not take the case of Prosecution any further to prove the Charge.

[16] The evidence of PW - 3 [Dnyaneshwar Ramkrushna Sonar], shows that he video-graphed the statement of Prosecutrix. The evidence of PW - 4 [Durga Mangilal Bhati] shows that the statement of Prosecutrix was recorded in her presence. Her evidence as to what the Prosecutrix stated, is hearsay in nature. The evidence of PW - 5 [Sandhya Ramchandra Jadhav] shows that the DVD was seized in her presence. The evidence of PW - 6 [Girish Chidambarmurti Ringe] shows that he was the panch for the Spot Panchnama i.e. the room, which was on the frst foor of the house. His evidence do not show that anything was seized from the said spot. Evidence of these witnesses have no potency to prove the Charge.

[17] Another evidence, upon which, the Prosecution laid emphasis and which weighed heavily with the learned Trial Court to convict the Appellant, is the scientifc evidence in the nature of DNA reports. Following Judgments are relied upon by the learned Advocates for the Appellant on this aspect.

[I] In Pattu Rajan Vs. The State of Tamil Nadu,MANU/SC/0439/2019, it is observed as follows:-

"31. Shri Sushil Kumar also argued that a DNA test should have been conducted in order to identify the dead body, and identification merely on the basis of a superimposition test, which is not a tangible piece of evidence, may not be proper.

One cannot lose sight of the fact that DNA evidence is also in the nature of opinion evidence as envisaged in Section 45 of the Indian Evidence Act. Undoubtedly, an expert giving evidence before the Court plays a crucial role, especially since the entire purpose and object of opinion evidence is to aid the Court in forming its opinion on questions concerning foreign law, science, art, etc., on which the Court might not have the technical expertise to form an opinion on its own. In criminal cases, such questions may pertain to aspects such as ballistics, fingerprint matching, handwriting comparison, and even DNA testing or superimposition techniques, as seen in the instant case.

32. The role of an expert witness rendering opinion evidence before the Court may be explained by referring to the following observations of this Court in **Ramesh Chandra Agrawal v. Regency Hospital Limited and Ors.**, 2009 9 SCC 709: MANU/SC/1641/2009:

16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed....

Undoubtedly, it is the duty of an expert witness to assist the Court effectively by furnishing it with the relevant report based on his expertise along with his reasons, so that the Court may form its independent judgment by assessing such materials and reasons furnished by the expert for coming to an appropriate conclusion. Be that as it may, it cannot be forgotten that opinion evidence is advisory in nature, and the Court is not bound by the evidence of the experts. (See **The State (Delhi Administration) v. Pali Ram**, 1979 2 SCC 158; MANU/SC/0189/1978: **State of H.P. v. Jai Lal and Ors.**, 1999 7 SCC 280; MANU/SC/0557/1999: **Baso Prasad and Ors. v. State of Bihar**, 2006 13 SCC 65; MANU/SC/8723/2006: Ramesh Chandra Agrawal v. Regency Hospital Ltd. and Ors. (supra); **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.**, 2010 2 SCC(Cri) 299 MANU/SC/1416/2009:).

33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party".

[II] In Manoj and Others Vs. State of Madhya Pradesh,MANU/SC/0711/2022, it is observed as follows:-

"134. During the hearing, an Article published by the Central Forensic Science Laboratory, Kolkata was relied upon. The relevant extracts of the Article are reproduced below:

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Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling.

....

....

136. The Law Commission of India in its report, observed as follows:

DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000. This is described as the 'random occurrence ratio' (Phipson 1999).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law.

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141. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an Accused was sought to be established. Notably, the reliance, was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case".

[III] In Naveen Vs. The State of Madhya Pradesh,MANU/SC/1167/2023, it is observed as follows:

"18. The issue concerning evidentiary value of DNA report has been considered by this Court in a recent judgment reported in the case of **Rahul v. State of Delhi, Ministry of Home Affairs and Anr.**, 2023 1 SCC 83 MANU/SC/1455/2022: wherein the following has been held in Paragraphs 36 and 38 as under:

36. The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the Appellant-Accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged Under Section 45 and like any other opinion evidence, its probative value varies from case to case.

38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the Accused and relating to the deceased were seized by the investigating officer on 14-2- 2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.

(Emphasis supplied)

19. In the case of **Manoj and Ors. v. State of M.P.**, 2023 2 SCC 353 MANU/SC/0711/2022:, it was held that if DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence as it can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen even when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches the area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link

among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed, and sent for DNA Profiling.

20. In the case of **Anil @ Anthony Arikswamy Joseph v. State of Maharashtra**, 2014 4 SCC 69 MANU/SC/0124/2014: , the following has been held in paragraph 18 as under:

18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with the DNA profile of the suspect, it can generally be concluded that both the samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory". (Emphasis supplied)

[IV] In Prakash Nishad Vs. State of Maharashtra,MANU/SC/0613/2023, one of the issue for consideration was whether DNA evidence can form the solitary basis in determining the guilt of the Appellant therein and it observed as follows:-

"60. We may observe that the Maharashtra Police Manual1, when speaking of the integrity of scientific evidence in Appendix XXIV states -

The integrity of exhibits and control samples must be safeguarded from the moment of seizure upto the completion of examination in the laboratory. This is best done by immediately packing, sealing and labeling and to prove the continuity of the integrity of the samples, the messenger or bearer will have to testify in Court that what he had received was sealed and delivered in the same condition in the laboratory. The laboratory must certify that they have compared the seals and found them to be correct. Articles should always be kept apart from one another after packing them separately and contact be scrupulously avoided in transport also.

61. In the present case, the delay in sending the samples is unexplained and therefore, the possibility of contamination and the concomitant prospect of diminishment in value cannot be reasonably ruled out. On the need for expedition in ensuring that samples when collected are sent to the concerned laboratory as soon as possible, we may refer to "Guidelines for collection, storage and transportation of Crime Scene DNA samples For Investigating Officers - Central Forensic Science Laboratory Directorate Of Forensic Sciences Services Ministry Of Home Affairs, Govt. of India"2 which in particular reference to blood and semen, irrespective of its form, i.e. liquid or dry (crust/stain or spatter) records the sample so taken "Must be submitted in the laboratory without any delay."

62. The document also lays emphasis on the 'chain of custody' being maintained. Chain of custody implies that right from the time of taking of the sample, to the time

its role in the investigation and processes subsequent, is complete, each person handling said piece of evidence must duly be acknowledged in the documentation, so as to ensure that the integrity is uncompromised. It is recommended that a document be duly maintained cataloguing the custody. A chain of custody document in other words is a document, "which should include name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim's or suspect's name and the brief description of the item."

[V] In Mukesh and Others Vs. State of NCT of Delhi and Ors.,MANU/SC/0575/2017, it is observed as follows:-

"216 In **Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh**, 2009 14 SCC 607 MANU/SC/1306/2009: , a two-Judge Bench had explained as to what is DNA in the following manner:

41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken".

[VI] In Ananda Vs. The State of Maharashtra,MANU/MH/3781/2024, one of the evidence was in the nature of DNA reports and it is observed as under:

"39. The question is, based on the DNA reports, whether the conviction and/or sentence passed by the trial court would be sustainable. We have gone through the impugned judgment. The trial court has relied on the evidence of each and every witness. It also relied on the evidence of the medical officer who collected blood of the appellant for DNA analysis, even in breach of protocol in that regard. The reason assigned for relying on the said evidence is that the said witness is uninterested and independent one. Before appreciating the evidence relating to DNA, we must have a look at the guidelines for collection, storage and transportation of the crime-scene DNA samples. Those have been placed on record by learned counsel for the appellant.

Item No.10 therein speaks of maintaining the chain of custody. It describes what chain of custody means. Same reads as under:-

10. Maintaining the chain of custody:

• Chain of custody is a process used to maintain and document the chronological history of the evidence.

• A 'chain of custody' document should be maintained which should include name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim's or suspect's name and the brief description of the item.

Those were the guidelines issued by The Central Forensic Science Laboratory, Chandigarh. PW 18 - Vaishali admitted in cross-examination that the C.F.S.L., Chandigarh and Hyderabad are best in India."

[18] From the above observations, it is clear that, there is protocol for selecting and preserving the samples for DNA analysis. Necessary precautions are necessary, right from taking samples for DNA till the fnal results of its analysis. Even, the chain of custody of samples is required to be established so as to rule out the possibility of contamination or tampering. Further, the said exercise is required to be taken up and completed without any delay. What can be gathered from the above observations made by the Hon'ble Supreme Court is that the evidence in the nature of DNA report can only be relied or accepted provided the Prosecution establishes that integrity of the samples remain uncompromised right from the beginning till end and the chain of handling the samples is established and all the possibility of contamination or tampering of the samples is completely ruled out. Further, it leads that DNA could not be said to be infallible, as after all it is an opinion evidence.

[19] Coming to the case in hand, the evidence of PW - 8 [Dr. Sushilkumar Narayanrao Pundge] shows that he was the Medical Offcer at G.M.C.H, Aurangabad and Prosecutrix had come along with her sister on 13/07/2011. He recorded her MLC and informed the Police and referred her to the OBGY Department for further expert opinion, investigation and management. The evidence of PW - 10 [Dr. Anjali Suresh Darekar], who was attached to the Gynaecology Department in Ghati Hospital, Aurangabad, shows that the Prosecutrix was pregnant for twenty **[20]** weeks and complained of abdomen ache and was hospitalized on 13/07/2013. On 16/04/2013, at about 6.15 a.m., she aborted naturally. Her evidence shows that the aborted foetus was preserved by on duty Doctor for DNA test. However, who was the said Doctor is not known. The said on duty Doctor to whom this witness had handed over the foetus is not examined. The evidence of PW - 10 [Dr. Anjali Suresh Darekar] is completely silent as to how the foetus was preserved.

[20] The evidence of PW - 7 [Dr. Nitin Subhash Ninal] shows that on 17/07/2013, he was attached as the resident Doctor at Government Medical College, Aurangabad

and on that day, PSI - V. A. Tandale, [PW - 16] brought the foetus [dead] for postmortem and on postmortem, he opined that the foetus was 'non-viable fetus of gestational age 5 - 6 months' and accordingly, he prepared the postmortem report at Exhibit - 64. The samples femur and sternum were packed, sealed, labeled and handed over to the Police on duty for DNA analysis. Who was that Policemen to whom the said samples were handed over is not known.

[21] The evidence of PW - 16 [Vishnu Arjun Tandale], the PSI of Mukundwadi Police Station, shows that, he conducted the inquiry of ADR, which was registered for the dead foetus. His evidence nowhere show that he had carried the foetus with him to PW - 7 [Dr. Nitin Subhash Ninal] for postmortem and thereafter the samples were handed over to him. His evidence only shows that he issued letter to the C.M.O with request to conduct the postmortem and collection of DNA vide Exhibit - 150. There is no inter-se corroboration in the evidence of PW - 7 [Dr. Nitin Subhash Ninal] and PW - 16 [Vishnu Arjun Tandale].

[22] The evidence of PW - 16 [Vishnu Arjun Tandale] nowhere shows as to from where and from whose custody the foetus was taken in his custody for sending it to the postmortem. He further deposed of handling over the medical muddemal to PHC Ahire on 17/07/2013. It is not clear from his evidence as to what the said medical muddemal contained. Even if, it is taken that it was the sample of foetus, the said PHC Ahire is not examined.

[23] The evidence of PW - 13 [Dr. Kanarjuman Mohammad Ibrahim] shows that on 15/08/2013, he was working as Casualty Medical Offcer in Ghati Hospital, Aurangabad and Prosecutrix was brought by Lady Police Constable [LPC] Batch No.156, H. A. Chincholkar for drawing her blood samples along with the communication at Exhibit - 124. He accordingly took the blood samples of the Prosecutrix after flling up the identifcation form and handed over the blood samples to the Police for taking it to the Forensic Science Laboratory. The cross-examination shows that the blood samples of Prosecutrix were not collected in presence of third party. The column, 'The blood is collected, labeled and sealed in presence of following witnesses' in Exhibit - 125, which is the identifcation form referred by this witness in her evidence, is blank. There are no names of witnesses and their signatures in the said Exhibit-125. It is worth to note that, at the bottom of the said identifcation form at Exhibit - 125, there is a Note as 'No column should be left empty'. This evidence on record establishes that the protocol required for collecting the blood samples was not followed. Admittedly, this witness had not given the name of Police to whom the blood samples were handed over for taking it to Forensic Laboratory. Even for the sake of argument, it is taken that the said blood samples were handed over to the said LPC - H. A. Chincholkar, she is not examined.

[24] The evidence of PW - 15 [Asha Pandurang Bhange], the Police Offcer, who investigated the Crime, shows that the blood samples were sent for DNA examination

to Laboratory Kalina, Mumbai vide Exhibit - 94. However, her cross-examination shows that the Doctor handed over the blood samples for sending to Chemical Analysis and she did not remember the period for which the samples were lying with her. Her evidence nowhere shows as to where the blood samples were kept during that intervening period.

[25] The evidence of PW - 11 [Vaijinath Eknath Phalke] shows that on 15/08/2013 when he was present at Mukunwadi Police Station, PSI - Bhange [PW - 15] handed over the blood samples of Prosecutrix for being taken to Mumbai and handed over a letter with sealed thermacol box and sealed envelop. Accordingly, he deposited the same at Mumbai. His cross-examination shows that the box and envelop were not sealed in his presence.

[26] The evidence of PW - 12 [Madhuri Haibati Narwane] shows that she was attached to the Mukundwadi Police Station as Police Constable and on direction by PW - 17 [Dipali Bhagwat Nikam], she carried and deposited the DNA sample kit with one sealed envelop to the Forensic Laboratory, Kalina, Mumbai and took the acknowledgment in that regard. She had no reason to know the articles in the kit.

[27] The evidence of PW - 14 [Dr. Archana Nivrutti Parsewar], who was the CMO at Ghati Hospital, Aurangabad, shows that on 16/04/2017, the Accused was brought for drawing his blood samples and accordingly, she took his blood samples for DNA after flling the identifcation form and the blood samples were taken in presence of the witnesses, whereas, as seen earlier, the blood samples of Prosecutrix were not drawn in the presence of witnesses. There is no explanation as to why the blood samples of Prosecutrix were not collected in the presence of witnesses, as is done while collecting the blood samples of the Appellant.

[28] The above discussed evidence clearly shows that, the chain of custody of the non-viable foetus, which was aborted by the Prosecutrix, is not at all established. There is complete absence of evidence to show as to in what condition the said non-viable foetus was preserved. There is complete absence of evidence to show that the foetus was handled as required by the medical protocol so as to maintain its integrity. This defciency in the Prosecution's case, examined in the light of the above legal position, is fatal for the Prosecution. As the chain of custody of the samples of foetus and blood is not established, the possibility of contamination or tampering or diminishment of its value cannot be ruled out.

[29] The CA report at Exhibit - 161 is in respect of results of analysis of DNA extracted from blood samples of the Prosecutrix and samples of the foetus. The opinion after the analysis was that, the Prosecutrix was concluded to be the biological mother of the foetus. For clear understanding, chart given in the said report is re-produced below:

STR LOCUS	GENOTYPE	
	DNA ex1 femur bone of F.S.L. ML. Case No. DNA-817/13	DNA Nikita Suryakant Gutte
D8S1179	10, 12	12, 13
D21S11	27, 32, 2	27, 30
D7S820	11, 12	9, 12
CSF1PO	10, 11	11, 12
D3S1358	17, 17	17, 17
THO1	6, 9	8, 9
D13S317	11, 13	10, 11
D16S539	11, 11	9, 11
D2S1338	18, 19	19, 23
D19S433	**14, 14.2**	**14.2, 14.2**
8VWA	16, 17	16, 17
TPOX	8, 11	8, 11
D18S51	13, 16	15, 16
AMEROGENIN	**X,X**	**X,X**
D5S818	14, 14	13, 14
FGA	23, 24	23, 26

[30] The CA report at Exhibit - 162 shows that the Appellant and Prosecutrix were concluded to be the biological parents of the baby [foetus] of the Prosecutrix. A chart shown in the said report is re-produced below for better understanding:

STR Loci	**GENOTYPE**		
	DNA-992/13	**DNA-817/13**	**DNA-553/17**
	Ex. Nikita Suryakant Gutte	Ex. 1 femur bone of baby of Nikita Suryakant Gutte	Ex. 1 Nivrutti Nagorao Hange
D8S1179	12, 13	10, 12	10, 14
D21S11	27, 30	27, 32, 2	31.2, 32.2
D7S820	9, 12	11, 12	11, 11
CSF1PO	11, 12	10, 11	10, 11
D3S1358	17, 17	17, 17	16, 17

TH01	8, 9	6, 9	6, 8
D13S317	10, 11	11, 13	12, 13
D16S539	9, 11	11, 11	9, 11
D2S1338	19, 23	18, 19	18, 23
D19S433	**14.2, 14.2**	**14.2, 15**	**13, 15**
vWA	16, 17	16, 17	15, 16
TPOX	8, 11	8, 11	8, 11
D18S51	15, 16	13, 16	13, 14
AMELOGENIN	**XX**	**XX**	**X, Y**
D5S818	13, 14	14, 14	11, 14
FGA	23, 26	23, 24	24, 26

[31] On close scrutiny of the above charts, we fnd merit in the contention of the learned Advocate for the Appellant that the reading in the vertical column styled as 'STR locus / Loci' for D19S433, in both the reports, in respect of femur bone of baby [foetus] is different. No doubt, the CA reports are admissible by virtue of Section 293 of Cr.PC. However, the said ambiguity is not cleared by the Prosecution. The CA report at Exhibit - 162 opining that the Appellant, Prosecutrix were the biological parents of baby [foetus], is dated 26/10/2018. True it is that the blood samples of the Appellants were taken on 16/04/2017 after his arrest, the said CA report shows that the analysis was started on 16/05/2018. Admittedly, there is no evidence to show as to in what condition the samples received by the Laboratory were preserved. This long delay in respect of result of analysis of DNA is not explained. The possibility of the samples getting contaminated cannot be ruled out. Under such circumstances, we do not fnd it safe to accept and rely on the said CA reports.

[32] There is one more aspect to the matter. The evidence of PW - 7 [Dr. Nitin Subhash Ninal], who performed the postmortem on the foetus shows that the sex of foetus was Male, whereas, AMELOGENIN, in the CA report at Exhibits- 161 and 162 shows the DNA of foetus as X, X, which is indicative of Female foetus. This inconsistency in the evidence of the Doctor and the CA reports is signifcant and gives severe dent to the Prosecution's case.

[33] PW - 17 [Dipali Bhagwat Nikam] was the Police Offcer, who investigated the Crime, after initial investigation was done by PSI Asha Pandurang Bhange [PW - 15]. She fled Charge-sheet against the Accused under Section 299 of Cr.PC as the Appellant was at large. Thereafter, she arrested the Appellant, got blood sample of the Appellant, which was forwarded to the Forensic Laboratory, Kalina, Mumbai and fled supplementary Charge-sheet against the Appellant. The abscondance of the Appellant,

though may be relevant, cannot form the sole basis to hold him guilty, in absence of substantive evidence to prove the Charge.

[34] The above discussed evidence leads us to hold that the report of Chemical Analysis in respect of DNA cannot form the basis to affrm the conviction recorded by the learned Trial Court. The evidence as discussed above shows number of shortcomings. There is no evidence to show that the samples were collected and preserved as prescribed by the medical protocol. The delay in respect of the analysis of the samples is also signifcant. This gives rise to reasonable possibility of the samples getting contaminated or tampered. Thus, the medical / scientifc evidence in respect of DNA reports is liable to be discarded. This being so, there is no evidence to prove the Charge. The other evidence, as discussed above, takes the case of Prosecution no further in proving the Charge. In the backdrop of the above discussion, it is not possible to uphold the conviction and sentence awarded by the learned Trial Court against the Appellant. Hence, the following order:

ORDER

[a] Criminal Appeal is allowed.

[b] The Judgment and Order dated 03/03/2022, passed by the learned Additional Sessions Judge, Aurangabad, in Special [POCSO] Case No.43/2016, convicting the Appellant for the offences punishable under Sections 3(a), 4, 5(j) (ii), 5(l), 5(n), 5(p) and Section 6 of the POCSO Act and for the offences punishable under Sections 376(2) (i) and 376 (2)(n) of IPC, is quashed and set aside.

[c] The Appellant stands acquitted for the offences punishable under Sections 3 (a), 4, 5(j) (ii), 5(l), 5(n), 5(p) and Section 6 of the POCSO Act and for the offences punishable under Sections 376(2)(i) and 376(2)(n) of IPC.

[d] The fne amount, if paid by the Appellant, be refunded to him.

[e] The Appellant be released, if not required in any other case.

[f] The Record and Proceedings be sent back to the learned Trial Court.

[g] Criminal Appeal stands disposed of accordingly.

[35] The fees of appointed Advocate Ms. Vinaya Dharurkar for Respondent No.2 is quantifed at Rs.10,000/- [Rupees Ten Thousand Only], to be paid by the High Court Legal Services Sub - Committee, Aurangabad

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2024(2)PRC546

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Divyesh A Joshi]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 21237 of 2019 **dated 19/09/2024**

Marshall Amubhai Vadariya

Versus

State of Gujarat & Anr

FALSE PROMISE ALLEGATION

Indian Penal Code, 1860 Sec. 376, Sec. 498A, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 482 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3 - False Promise Allegation - Applicant sought quashing of FIR alleging rape under IPC Sec. 376, based on a promise to marry - Complainant claimed she was impregnated by the accused, but DNA testing disproved the allegation - Complainant also married another person and showed no interest in pursuing the case - Court found the relationship consensual and observed that failure to marry due to unforeseen circumstances does not amount to rape unless a false promise was made with intent to deceive - FIR quashed due to lack of evidence and misuse of legal process - FIR Quashed

Law Point: A consensual relationship cannot be classified as rape under IPC Sec. 376, especially when there is no false promise to marry and no evidence of intent to deceive.

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 498A, Sec. 506

Code of Criminal Procedure, 1973 Sec. 482

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3

Counsel:

R V Acharya, Jay Mehta

JUDGEMENT

Divyesh A. Joshi, J.- [1] Rule returnable forthwith. Learned APP waives service of notice of rule for and on behalf of the respondent-State.

[2] The respondent No.2, although served with the notice issued by this Court, has chosen not to remain present before this Court either in person or through an advocate and oppose the present application.

[3] By this application under section 482 of the Code of Criminal Procedure,1973, the applicant seeks to invoke the inherent powers of this Court praying for quashing of

the First information report being C.R. No.I-35 of 2019 registered before the Keshod Police Station, Junagadh for the offence punishable under Sections 376, 506(2) of IPC and Sections 3(1), W(i)(ii), 3(2)(5), 3(2)(5A)of the Atrocities Act.

[4] According to the complaint Filed on 21.02.2019, the complainant- and the applicant-accused came into contact with each other about one and a half year ago, and before Five months, the applicant-accused entered into a physical relationship with the complainant by giving her a promise to marry. Thereafter, they continued to meet each other. After some time the applicant-accused called the complainant at his Vadi and again made a physical relationship with her. It is alleged that after some period of time, on the complainant realizing her of being pregnant, she informed the applicant about the same, however, the applicant-accused declined to accept the same and backed from his promise. With this sort of allegations, the impugned FIR has been registered.

[5] Learned advocate Ms. R.V. Acharya appearing for the applicant submits that even assuming that the entire allegations of love affair and the promise made by the applicant to marry the complainant are true, still, the same would not make out an offence of rape at all, as it is projected by the prosecution. She submits that the applicant-accused is an innocent person against whom a false and frivolous complaint is Filed by the complainant, a consensual party, which is nothing but a sheer abuse of process of law. She further submits that from the FIR itself, it appears that there was a love affair between the applicant-accused and the complainant which continued for about one and half year. Learned advocate Ms. Acharya also submits that the complainant voluntarily entered into a physical relationship with the applicant-accused. Even the impugned FIR has also been Filed after a period of six months. She submits that it is the specific case of the prosecution that the applicant-accused impregnated her and after came to know about the same, the applicant-accused deserted her. In this regard, she would like to submit that after registration of the complaint, she delivered a baby boy claiming to be through the relationship with the applicant-accused. However, during the course of investigation, the concerned investigator collected the DNA samples of both, the applicant-accused and the son of the complainant and sent it to the FSL for analysis, a report of which, was received on 10.07.2019, and as per the said report, the applicant-accused is not a biological father of the son of the complainant. Moreover, during the pendency of the present proceedings, the complainant has got married with another person and, therefore, despite service of notice, the complainant has chosen not to appear and oppose the present application, which clearly shows that she may not be interested in pursuing further with the matter. Thus, According to her, allowing the case to be proceeded with further would be a wastage of valuable time of the trial Court.

5.1 In such circumstances, referred to above, learned advocate Ms. Acharya prays that there being merit in this application, the same be allowed and the impugned FIR be quashed.

[6] But the learned APP Mr. Jay Mehta appearing for the respondent-State has stoutly opposed this application. According to him, in the present case, charge-sheet has already been Filed and the same has also been culminated in Sessions Case No.11 of 2019.. The learned APP further submits that at the First time, when the applicant expressed his love to the complainant and promised to marry her, whether he had any intention to deceive her or not, is a matter to be appreciated on the basis of evidence to be let in only at the time of trial. However, looking to the evidence available on record, more particularly, the DNA report of the FSL and the non-appearance of the original complainant, rest is left for the Hon'ble Court whether to exercise the inherent powers or not.

[7] I have considered the above submissions.

[8] Before delve into the rival submissions made by the respective parties, let us have a look into Section 376 of the IPC, which reads as follows;

"376. Punishment for rape.-

(1)Whoever, except in the cases provided for in sub- section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to ne](Subs. by Act 22 of 2018, s. 4, for "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to ne" (w.e.f. 21-4-2018)

(2)Whoever,-

(a)being a police o+cer, commits rape-

(i)within the limits of the police station to which such police o+cer is appointed; or

(ii)in the premises of any station house; or

(iii)on a woman in such police o+cer's custody or in the custody of a police o+cer subordinate to such police o+cer; or

(b)being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c)being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d)being on the management or on the sta0 of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e)being on the management or on the sta0 of a hospital, commits rape on a woman in that hospital; or

(f)being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g)commits rape during communal or sectarian violence; or

(h)commits rape on a woman knowing her to be pregnant; or

(i)commits rape on a woman when she is under sixteen years of age; or

(j)commits rape, on a woman incapable of giving consent; or

(k)being in a position of control or dominance over a woman, commits rape on such woman; or

(l)commits rape on a woman su0ering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or dis gures or endangers the life of a woman; or

(n)commits rape repeatedly on the same woman,shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to ne.

Explanation.- For the purposes of this sub-section, -

(a)"armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b)"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c)"police o+cer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d)"women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

(3)Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to ne:

Provided that such ne shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any ne imposed under this subsection shall be paid to the victim."

[9] A cursory perusal of the above provision makes it clear that in the entire provision, there is not a whisper about a person committing rape on a woman being her love interest. Because the word love in itself carries 'consent'. Clause (j) of sub-section (2) of Section 376 talks about a woman incapable of giving consent, which means either a girl of a tender age who is not so matured enough to understand the things and the consequences of the consent being given by her for the proposed act, or a mentally disabled girl or a woman. Here, in the instant case, at the time of the alleged offence, as per the say of the applicants' counsel, the girl was 19 years old and had already attained the age of majority and was matured enough to understand what is right and what is wrong and what would be the consequences of a particular act being allowed to be done upon her. That apart, looking to the allegations as stated in the complaint, the same do not make out a case under any of the other categories as mentioned in Section 376, requiring the applicant-accused to undergo the ordeal of trial.

[10] The word "rape" is derived from the Latin term "rapio" which means to "seize". In other words, rape can be defined as the ravishment of a woman without her consent, by force, fear against her will. To further define a rape, it can be once and there must be a resistance from the victim upon which such an sexual assault is attempted to be committed. But if such a sexual act was allowed to be continued for some time by a woman, for which FIR is being lodged at a later stage upon disputes having been cropped up, then the element of consent would come into play, and when consent comes, that too of a major girl, then the case no longer remains to be of a rape.

[11] Like the cases under the provisions of the Domestic Violence Act and under Section 498(A), the cases of consensual sexual relationship being later converted into allegations of rape are rapidly increasing. In the case at hand, the applicant-accused and the complainant was in relationship past one and a half year. She knew the applicant-accused since quite a long time. It is alleged that before Five months from the date of the Filing of the complaint, applicant-accused established a sexual relationship with her on the promise of marriage. Now the question arises that mere say of a woman of being promised to marry by the accused, can be so believable so as to held the accused guilty of the offence of rape. The answer is 'No'. In every case where a man fails to marry a woman despite a promise made to her, cannot be held guilty for committing the offence of rape. He can only be held guilty if it is proved that the promise to marry was given with no intention to honour it and also that was the only reason due to which the woman agreed to have a sexual relationship. Let us assume that instead of asking her to share the bed, if a woman is asked to provide anything else by the accused like any assets or some other valuable things of her ownership on a promise to marry her later, then whether would she fulfill such a demand; if 'No', then why her precious corpus before marriage?, and if still it has been done, then she can be presumed to be the consensual party fully aware about the consequences of the proposed act and action, and deliberately avoiding or ignoring any foresee danger, would result into the present situation. Further, a girl who is fully

aware of the nature and consequences of the sexual act, gives consent for the same based on a promise to marry and continue her relationship for a long period, then in such cases it becomes really diHcult to determine whether the reason behind the giving of consent was only the promise made by the boy and not a mutual desire to be together.

[12] Further, there is a distinction between a false promise and a breach of promise. False promise relates to a promise which the accused had no intention to fulfill from the beginning, whereas a breach of promise may happen due to many factors. Such as if a boy fell in love with someone, he might get involved with another partner, he might be compelled by his family to marry someone else, etc. this doesn't mean that the promise was false from the beginning. So, the determining factor is only the intention of the accused. However, the determining factor of the consent, whether it was obtained voluntarily or involuntarily, will depend on the facts of each case. The court must consider the evidence and the circumstances in every case before reaching a conclusion, but if the court Finds that the prosecutrix was also equally keen, then, in that case, the offence would be condoned.

[13] With regard to the controversy on hand, the Hon'ble Apex Court in a decision in the case of Pramod Suryabhan Pawar v State of Maharashtra, AIR 2019 SC 4010, penned by Justice Dr. D.Y. Chandrachud has observed as under;

"The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfill his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no o0ence under Section 375 of the IPC has occurred."

[14] In another decision in the case of **Prashant Bharti v. Delhi**, 2013 AIR(SC) 2753 the Supreme Court observed that the age of the victim should be taken into consideration to evaluate the issue of consent and to know an indication of how wordly-wise she is, and to what degree she is judged to given her consent based on the belief that the accused will execute his promise of marriage. It has been observed as under;

"16. The factual position narrated above would enable us to draw some positive inferences on the assertion made by the complainant/prosecuterix - against the appellant-accused (in the supplementary statement dated 21.2.2007). It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecuterix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under Section 13B of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/prosecuterix accused Prashant Bhati of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecuterix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/prosecuterix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecuterix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satis ed that the assertion made by the complainant/prosecuterix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsi ed.

17. Would it be possible for the prosecution to establish a sexual relationship between Priya, the complainant/prosecuterix and Prashant Bharti, the appellant-accused, is the next question which we shall attempt to answer. Insofar as the instant aspect of the matter is concerned, medical evidence discussed above reveals, that the complaint made by the complainant/prosecuterix alleging a sexual relationship with her by Prashant Bharti, the appellant-accused, was made more than one month after the alleged occurrences. It was, therefore, that during the course of her medical examination at the AIIMS, a vaginal smear was not taken. Her clothes were also not sent for forensic examination by the AIIMS, because she had allegedly changed the clothes which she had worn at the time of occurrence. In the absence of any such scientic evidence, the proof of sexual intercourse between the complainant/ prosecuterix and the appellant-accused would be based on an assertion made by the

complainant/prosecuterix. And an unequivocal denial thereof, by the appellant-accused. One's word against the other. Based on the falsity of the statement made by the complainant/prosecuterix noticed above (and other such like falsities, to be narrated hereafter), it is unlikely, that a - factual assertion made by the complainant/ prosecuterix, would be acceptable over that of the appellant-accused. For the sake of argument, even if it is assumed, that Prashant Bharti, the appellant- accused and Priya, the complainant/prosecuterix, actually had a physical relationship, as alleged, the same would necessarily have to be consensual, since it is the case of the complainant/ prosecuterix herself, that the said physical relationship was with her consent consequent upon the assurance of marriage. But then, the discussion above, clearly negates such an assurance. A consensual relationship without any assurance, obviously will not substantiate the o0ence under Section 376 of the Indian Penal Code, alleged against Prashant Bharti."

[15] In **Deepak Gulati v. State of Haryana**, 2013 AIR(SC) 2071, the Supreme Court held that an accused can be convicted for the offence of rape under the penal provisions only if there is evidence to show that 'the intention of the accused was mala Fide and that he has clandestine motives.' The Court further observed that the defendant should have adequate evidence to show that he had no intention to marry the victim in the First place. Section 90 of the IPC cannot be invoked in such a situation, to fasten the criminal liability on the accused and to pardon the act of the victim in entirety unless the court is assured of the fact that the accused never intended to marry the victim from the very beginning. I may quote some of the relevant observations of the said decision as under;

"8. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala de motives, and had made a false promise to this e0ect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not ful lling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated di0erently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala de, and that he had clandestine motives.

21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

22. The instant case is factually very similar to the case of Uday (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the signi cance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was di+cult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her.

IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre- decided by them. She also waited for him for a long time, and when he nally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police."

[16] In **Uday v. State of Karnataka**, 2003 AIR(SC) 1639 the Supreme Court observed that the consent given by the victim to sexual intercourse with a person whom she is deeply in love on a promise to marry her in future, cannot be said to be a misconception of fact under Section 90 of IPC and hence, the accused will not be convicted for rape within the meaning of Section 375.

"There is yet another diHculty which faces the prosecution in this case. In a case of this nature two conditions must be fulFilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was diHcult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and Find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very diHcult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

In view of our Findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

In the result, this appeal must succeed, and is accordingly allowed. The impugned judgment and order convicting and sentencing the appellant for the offence punishable under Section 376 IPC is set aside, and the appellant stands acquitted of the charge. Since the appellant was granted exemption from surrendering when the special leave was granted, no further order for his release is necessary."

[17] The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In **Jayanti Rani Panda vs. State of West Bengal and another**, 1984 CrLJ 1535 the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded:-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

[18] Before I conclude, it is to be worth noting that after the registration of the complaint, the complainant gave birth to a baby boy claiming to be through the relationship with the applicant-accused. Therefore, the DNA samples of both, the son of the complainant and the applicant-accused was taken and sent to the FSL for analysis, and a report thereof on record suggests that both the DNA samples are not matching to each other and the applicant-accused is not a biological father of the son of the complainant. After that nothing more remains to be said. Because specific allegation has been made in the complaint that the complainant became pregnant through the relationship with the applicant-accused, however, as per the DNA report of the FSL, the applicant-accused is not a biological father of the son of the complainant, which completely falsifies the case of the prosecution.

[19] So far as the allegations under the provisions of the Atrocities Act are concerned, looking to the allegations made in the complaint, the same do not constitute an offence under the Atrocities Act.

[20] Based on the holistic consideration of the facts and circumstances summarized in the foregoing paragraphs as well as the tenets of law enunciated in the above referred decisions, I am of the view that the present application deserves consideration.

[21] In the result, the present application succeeds and is hereby allowed. The First Information Report being C.R. No.I-35 of 2019 registered before the Keshod Police Station, Junagadh is hereby ordered to be quashed. All consequential proceedings arising from the same also stands terminated. Rule is made absolute to the aforesaid extent.

Direct service is permitted

2024(2)PRC557

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Revision Application (For Regular Bail) No 1360 of 2024 **dated 18/09/2024**

Manish Harishbhai Chauhan Thro Harishbhai Chhanabhai Chauhan

Versus

State of Gujarat

BAIL FOR JUVENILE

Indian Penal Code, 1860 Sec. 302, Sec. 354, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 439 - Protection of Children from Sexual Offences Act, 2012 Sec. 9, Sec. 10 - Juvenile Justice (Care and Protection of Children) Act, 2015 Sec. 102, Sec. 101, Sec. 12 - Gujarat Police Act, 1951 Sec. 135 - Bail for Juvenile - Child in conflict with law (CCL) sought bail under Section 12 of the Juvenile Justice Act after being charged

with murder under IPC Sec. 302 - Children's Court denied the bail citing the severity of the offense - CCL's advocate argued that the court failed to consider the criteria outlined in the Juvenile Justice Act, such as moral or psychological danger, and lacked the necessary probation report - Based on the assessment report, CCL's helpful nature, and the absence of criminal history, the High Court granted bail, instructing monitoring by a probation officer - Bail Granted

Law Point: Section 12 of the Juvenile Justice Act mandates that bail must be granted to juveniles unless it is proven that release would expose them to danger or defeat the ends of justice; probation reports are essential for such determinations.

Acts Referred:

Indian Penal Code, 1860 Sec. 302, Sec. 354, Sec. 506

Code of Criminal Procedure, 1973 Sec. 439

Protection of Children from Sexual Offences Act, 2012 Sec. 9, Sec. 10

Juvenile Justice (Care and Protection of Children) Act, 2015 Sec. 102, Sec. 101, Sec. 12

Gujarat Police Act, 1951 Sec. 135

Counsel:

Apurva K Jani, Monali Bhatt

JUDGEMENT

Gita Gopi, J.

[1] RULE returnable forthwith. Learned Additional Public Prosecutor waives service of notice of Rule on behalf of respondent - State.

[2] This Revision Application has been filed by the child in conflict with law (hereinafter referred to in short as 'CCL'), through his father as Guardian, under Section 102 of the Juvenile Justice (Care & Protection of Children) Act, 2015 (hereinafter referred to in short as the 'JJ Act') challenging the order dated 18.06.2024 passed by the learned Incharge Judge, Children Court and learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad in Criminal Appeal No.4414 of 2024 whereby the bail application of the CCL came to be rejected.

[3] The First Information Report (FIR) being C.R. No.11191032240020 of 2024 was registered on 10.01.2024 with Maninagar Police Station, Ahmedabad City for the offence punishable under Section 302 of the Indian Penal Code and under Section 135(1) of the G.P. Act. The CCL is aged about 17 years and four months.

[4] Learned Advocate for the applicant Mr. Apurva K. Jani submitted that the learned Children's Court was required to sit as an Appellate Court and not the Court of the first instance by entertaining the application under Section 439 of Cr.P.C. It is further submitted that the learned Children's Court was required to consider the

application of the CCL in accordance with the provisions of Section 12 of the JJ Act and not as per Section 439 of the Cr.P.C. It is also submitted that the learned Children's Court was required to verify the matter of the Juvenile Justice Board (hereinafter referred to in short as 'JJB') since it is only on that order, the learned Children's Court can entertain the application for grant of bail under Section 101 of the JJ Act.

[5] Learned Advocate Mr. Apurva K. Jani further submitted that under revisional jurisdiction, the Revisional Court on its own motion can also entertain an application against the order passed by the JJB or the learned Children's Court to examine the legality and propriety of the said order. It is also submitted that the order passed by the learned Children's Court is not in accordance to the law and the Court was required to consider the application in accordance with Section 12 of the JJ Act whereby the said Section does not make any distinction between bailable and non-bailable offences. It is submitted that the learned Children's Court was required to consider the criteria as laid down under Section 12 of the JJ Act where it was incumbent on the Court to find out whether release of CCL would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. It is also stated that the learned Children's Court as the learned Appellate Court was required to record the reason to deny the bail and circumstances that led to such a decision.

[6] Learned Advocate Mr. Apurva K. Jani has relied on the decision dated 14.08.2024 of the Hon'ble Apex Court in the case of Juvenile in Conflict with Law v. The State of Rajasthan and Another in Special Leave Petition (Crl.) No.9566 of 2024 to submit that the Hon'ble Apex Court has dealt with the matter of a juvenile against whom offences under Sections 354 and 506 of the Indian Penal Code and Sections 9 and 10 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO') were registered. The Hon'ble Apex Court on observing the one year custody of CCL and referring to Section 12 of the JJ Act, has observed about the proceedings. Learned Advocate for the applicant has referred to Paragraphs 6, 7 and 9 of the above decision which reads as under:-

"6. From the phraseology used in sub-section 1 of Section 12, a juvenile in conflict with law has to be necessarily released on bail with or without surety or placed under supervision of a probation officer or under the care of any fit person unless proviso is applicable.

7. We have perused all the orders passed earlier by the JJ Board, Special Court and High Court and specially the order dated 11th December, 2023 passed by the JJ Board. There is no finding recorded that the proviso to sub-Section 1 of Section 12 is applicable to the facts of the case. Without recording the said finding, bail could not have been denied to juvenile in conflict with law.

9. Though none of the courts at no stage have recorded a finding that in the facts of the case, the proviso to sub-Section 1 of Section 12 was applicable, the juvenile in conflict with law has been denied bail for last one year."

[7] Learned Advocate Mr. Apurva K. Jani has referred to the preliminary assessment of the CCL by the Department of Psychiatry, General Hospital, Mehsana (Gujarat). The assessment reveals that the CCL has never been involved in any other matter, he is living in a joint family and has a normal behaviour. The CCL has been living in the institution since the last one and half months and is a Standard IX dropout. The Report further states that the CCL has not taken alcohol or any other drugs. It is also found that the CCL was co-operative and has average level of intelligence and his psycho-motor activities were found to be normal. The Report further reveals that the CCL is able to understand the nature, severity and consequences of his act, is mentally fit and no physical illnesses were found to be present.

[8] A reference is made to the statement of Ritesh Bhupendrabhai Patel, who is a handicapped person. The statement of this witness reveals that the CCL has a helpful nature and he not only assists his father but also helps others in arranging the carts. The CCL also assists the said witness. It is further that the CCL has confided before this witness and has repented for his act. It was therefore, urged that considering the facts and circumstances of the case, discretion be exercised by this Court in favour of the CCL.

[9] On the other hand, learned Additional Public Prosecutor submitted that it is a case of CCL who has murdered his father's friend as the deceased has found the CCL to have fallen into bad company and therefore, the deceased had complained to the father of the CCL. It is further submitted that considering the nature of the grievous offence, bail ought not to be granted to the CCL.

[10] This Court had called for the Probation Officer's Report. As per the Report, prior to four days of his death, the deceased had informed the father of the CCL that the CCL is consuming liquor and ganja and till late night, the CCL is sitting with girls and talking with them. The CCL's father thus rebuked CCL. Hence, the CCL went to the deceased and asked as to why he is telling false facts to his father. The Report further states that the deceased had verbally abused the CCL and hence, the CCL went away from the place. The Report also states that on the date of incident, when the CCL and his sister were eating dumplings ('pakodi'), the deceased went there and started a quarrel with the CCL. Again the father of the CCL scolded him because of which the CCL went away crying at the father's cart. The Report further states that the CCL's sister took away the mobile phone of the CCL and in anger, CCL left the place and after some time, he returned to arrange the carts. The CCL reached the ware house and saw a rusted knife. At about 11.30 pm, the CCL confronted the deceased asking him as to why he was telling false things to his father, the deceased got enraged and it is noted

on the deceased's provocation, the CCL gave knife blows on the chest and stomach of the deceased. The Probation Officer has further noted that the CCL has repented for his action and he requires counselling.

[11] Heard the submissions canvassed and perused the records of the case. The allegations are to the effect that the deceased was complaining about the CCL to his father stating that the CCL is consuming liquor and ganja. The assessment report of the Department of Psychiatry reveals that the CCL is not taking alcohol or any other drugs. The statement of Ritesh Bhupendrabhai Patel shows that the CCL is also assisting the said witness in parking his cart. The said witness had stated that at about 12.30 pm when the CCL was helping this witness, he told him about his act and since he was afraid seeing the deceased in a pool of blood, he had come to the witness. After taking the CCL to the place where the deceased was lying, the witness through the CCL had called for 108 Ambulance and thereafter, the witness had informed the Maninagar Police Station.

[12] In an application filed for bail by a CCL, Section 12 of the JJ Act is required to be taken into consideration. Section 12 of the JJ Act mandates that the juvenile, in a bailable or non-bailable offence, is arrested or detained or appears or brought before the Court, has to be released on bail with or without surety or place under the supervision of the Probation Officer or under the care of any fit institution of fit person but shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. The Court below has not examined the aspect by calling upon the Report of the Probation Officer. Further, the Court has also have failed to note as to whether the CCL would be exposed to moral, physical or psychological danger and to examine these aspects, the Report was required to be called upon. It was also required to be considered whether the CCL's release would defeat the ends of justice.

[13] Taking into consideration the Assessment Report of the Department of Psychiatry, the Probation Officer's Report and the First Information Report, it appears that the deceased was 57 years of age. The deceased was required to discipline the CCL, being a friend of the CCL's father. The Report states that the deceased was unmarried. The CCL was often complaining to the deceased that he was telling false things about him to his father. The Probation Officer's Report shows that the CCL was being rebuked often by the deceased and the CCL was disturbed by this act of the deceased and even at the time of incident, the deceased appears to have provoked the CCL, which led to the incident. The CCL is staying in a joint family, the deceased was rather required to discipline the CCL if at all, it was found that the CCL was falling into bad company. Nothing has come on record to suggest that the CCL had fallen into bad company. Rather, the statement of Ritesh Bhupendrabhai Patel suggests that the

CCL was of helpful nature and he was assisting his father and others in arranging the carts.

[14] Considering the above role of the CCL, discretion is exercised in favour of the child to enlarge him on bail.

[15] In view of the observations and discussion made herein above, the present application succeeds and is accordingly, allowed. The order impugned in this revision of the learned Children's Court, referred herein above is set aside, i.e. the order dated 18.06.2024 passed by the learned Incharge Judge, Children Court and learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad in Criminal Appeal No.4414 of 2024.

[16] The CCL is ordered to be released on bail in connection with the aforesaid FIR, by his father, executing a personal bond in sum of Rs.10,000/- (Rupees Ten Thousand only) before the JJ Board.

[17] It is directed that the Probation Officer shall monitor the conduct of the CCL and shall quarterly submit the report before the Trial Court. Moreover, if the Probation Officer considers any necessity of sending the CCL for any behavior modification then necessary therapy and psychiatric support be provided to the CCL.

[18] The father of the CCL to ensure that the CCL will not fall into bad company.

[19] Rule is made absolute to the aforesaid extent. Direct service is permitted. Registry to communicate this order to the concerned Court/authority by Fax or Email forthwith

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2024(2)PRC562

IN THE HIGH COURT AT CALCUTTA

[Before Soumen Sen; Uday Kumar]

Criminal Miscellaneous Case (A) No 2030 of 2024 **dated 18/09/2024**

Md Mainul Hoque

Versus

State of West Bengal

ANTICIPATORY BAIL REJECTION

Indian Penal Code, 1860 Sec. 341, Sec. 376, Sec. 417, Sec. 304, Sec. 509, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 438, Sec. 156, Sec. 154, Sec. 164, Sec. 437 - Anticipatory Bail Rejection - Petitioner applied for anticipatory bail after cancellation of previously granted bail upon addition of a non-bailable Section 376 IPC - State raised an objection citing that once a petitioner appears in a cancellation hearing and the bail is revoked, anticipatory bail is not maintainable - The petitioner argued that the addition of new charges does not nullify the right to anticipatory bail - Court reviewed

decisions including Pradeep Ram and dismissed the application, stating that anticipatory bail cannot be sought after a contested cancellation order. - Application Dismissed

Law Point: Once bail is cancelled after contested hearings, a petitioner cannot apply for anticipatory bail; the appropriate remedy is a revision under Section 401 CrPC.

Acts Referred:

Indian Penal Code, 1860 Sec. 341, Sec. 376, Sec. 417, Sec. 304, Sec. 509, Sec. 506

Code of Criminal Procedure, 1973 Sec. 438, Sec. 156, Sec. 154, Sec. 164, Sec. 437

Counsel:

Md Wasim Akram, Suman De, Sudeshna Das, Arnab Saha, Abhimanyu Banerjee, Anirban Basak, Sekhar Basu (Senior Advocate)

JUDGEMENT

Soumen Sen, J.- [1] This is an application for anticipatory bail.

[2] At the threshold Mr. Suman De, the learned Counsel for the State has raised an objection with regard to the maintainability of the application in view of the fact that the prayer for cancellation of bail was heard in presence of the petitioner accused and dismissed on merits. It is submitted that the said order is revisable under Section 401 Cr.P.C. 1973 corresponding to Section 442 of Bharatiya Nyaya Sanhita (in short, 'BNS, 2023') and not maintainable in view of the judgment of the Hon'ble Supreme Court in the case of **Pradeep Ram v. The State of Jharkhand & Ors.**, 2019 17 SCC 326] Mr. De has referred to paragraph 31 of the said judgment and submitted that the said judgment has clearly stated that in such a situation the petitioner can either surrender and seek bail under Section 437 Cr.P.C or challenged the said order of cancellation in revision.

[3] The learned Counsel for the de facto complainant appears and supports the said submission.

[4] Mr. Wasim Akram the learned Counsel appearing on behalf of the petitioner has submitted that the said issue is no more res integra in view of two co-ordinate bench decisions of this court in **CRM 8216 of 2017** (In the matter of Siraj Roy) decided on 22nd September, 2017 and **CRM 11409 of 2015** (in the matter of Sayantan Chatterjee) decided on 13th January, 2017 in which it has been categorically stated that addition of a new charge and consequent cancellation of bail granted earlier in view of such addition would not affect the court to decide an application for anticipatory bail under Section 438 Cr.P.C.

[5] In view of the aforesaid two coordinate bench decisions and the submissions that **Pradeep Ram** (supra) has not addressed such issues we appointed Mr. Sekhar

Basu, Senior Advocate as amicus curiae, on 15th July, 2014, to assist the court in arriving at a decision on this issue.

[6] Mr. Sekhar Basu, learned senior counsel, has submitted that he has read the petition under Section 156(3) Cr.P.C carefully and found that the learned Magistrate did not follow the proper procedure in directing investigation in its order dated 2nd March, 2024. It is submitted that if it appears to the Court in deciding an application for anticipatory bail that the procedure adopted by the Magistrate is not in conformity with the law irrespective of the fact that the order cancelling the bail is revisable, the court can decide the said applications as the paramount consideration for the Court would be to ensure that the liberty enshrined under Article 21 of the Constitution of India is not affected or jeopardized. Mr. Basu has submitted that the said application was not supported by an affidavit of compliance of Section 154(1) read with Section 154(3) Cr.P.C. This is a mandatory requirement in view of the judgment of the Hon'ble Supreme Court in the case **Priyanka Srivastava & Anr. v. State of U.P & Ors.**, 2015 6 SCC 287]. It is further submitted that in the event the accused is heard before cancellation of bail, ordinarily the said order becomes revisable. However, if the Court is of the view that proper procedure has not been followed by the Magistrate then the High Court in exercise of its power and under Section 438 of Cr.P.C corresponding to Section 482 of BNNS 2023 can receive, try and decide an application for anticipatory bail. In appropriate cases the court can exercise such discretion in favour of the petitioner in order to do complete justice.

[7] It is submitted in the aforesaid judgment in paragraph 27 it has clearly stated that an application under Section 156(3) Cr.P.C should be filed following the procedure prescribed under Sections 154(1) and 154(3) Cr.P.C. An application under Section 156(3) must be supported by an affidavit giving details of the incidents as required under Section 154(1) and in case of refusal to register the request of 154(3) has to be fulfilled. The Magistrate should verify the veracity of the affidavit filed under Section 156(3). The said paragraph reads as follows:

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction Under Section 156(3) Code of Criminal Procedure and also there is a separate procedure

under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to."

[8] Mr. Basu has pointed out that in the said decision the Hon'ble Supreme Court has relied upon its earlier decision in **Lalita Kumari v. Govt. of U.P. & Ors**, 2014 2 SCC 1] in paragraphs 111 and 112 of the report. The said decision unequivocally has stated that in appropriate cases the police officer can hold a preliminary enquiry and he can foreclose an FIR before an investigation under Section 157 of the Code if it appears to him that there is no sufficient ground to investigate the same. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not required to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

[9] Mr. Basu has submitted that an application for anticipatory bail cannot be denied to an accused where a grave offence is added during investigation. Mr. Basu submits that merely because the application for cancellation of bail was rejected the right and liberty of an accused for anticipatory bail under Section 438 is not lost in view of the judgment of the Hon'ble Supreme Court in **Bhadresh Bipinbhai Sheth v. State of Gujarat & Anr.**, 2016 1 SCC 152: 2015 7 Sup641:]

[10] Mr. Basu has relied upon paragraph 21 of the said report to demonstrate that the provision of Section 438 calls for a liberal interpretation in the light of Article 21 of the Constitution. The said paragraph is stated below:

"21. Before we proceed further, we would like to discuss the law relating to grant of anticipatory bail as has been developed through judicial interpretative process. A judgment which needs to be pointed out is a Constitution Bench Judgment of this Court in the case of **Gurbaksh Singh Sibbia and Ors. v. State of Punjab**, 1980 2 SCC 565. The Constitution Bench in this case emphasized that provision of anticipatory bail enshrined in Section 438 of the Code is conceptualised Under Article 21 of the Constitution which relates to personal liberty. Therefore, such a provision calls for liberal interpretation of Section 438 of the Code in light of Article 21 of the Constitution. The Code explains that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction Under Section 438 is therefore intended to confer conditional immunity from the 'touch' or confinement contemplated by Section 46 of the Code. The essence of this provision is brought out in the following manner (**Gurbaksh Singh case**, 1980 2 SCC 565], SCC P.586, paragraph 26):

"26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in **Maneka Gandhi v. Union of India**, 1978 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

(emphasis supplied)

[11] Mr. Basu has also referred to Co-ordinate Bench decisions in **CRM 11409 of 2015** (in the matter of Sayantan Chatterjee) decided on 13th January, 2017) and **CRM 8216 of 2017** (in the matter of Siraj Roy) decided on 22nd September, 2017 respectively. It is submitted that in both the matters the Co-ordinate Benches entertained an application for anticipatory bail notwithstanding the addition of a new section and cancellation of bail by the Trial Court.

[12] Mr. Basu is of the opinion that addition of a grave offence does not fetter the power and jurisdiction of the court under Section 438 Cr.P.C. to consider an application for anticipatory bail irrespective of cancellation of bail by the trial court on merits.

[13] In the instant case, we find that the victim lodged a written complaint to the O.C of Golapganj I.C on 3rd February, 2024 making certain allegations against the present petitioner. After lodging of the said complaint, Kaliachak Police Station registered it as P.S Case No. 115 of 2024 dated 04.02.2024 under Sections 341/417/506/509 I.P.C. However, Section 376 I.P.C was not included. Subsequently on 7th March, 2024 the statement of the victim was recorded under Section 164 Cr.P.C. The grievance of the complainant was that in spite of disclosing ingredients of the offence under Section 376 IPC, the Investigating Officer did not incorporate the said Section and proceeded with the matter ignoring her statement recorded on 7th March, 2024. The allegation of the petitioner was that the concerned Kaliachak P.S

after registration of the case never made an application for adding Section 376 of I.P.C or under any section of Information Technology Act regarding the complaint of sending obscene photographs to her husband by the accused person. The police officer under political pressure did not include such section and secreting vital evidence for which the petitioner complained to the higher official of the police authority including the Inspector-in-Charge of Kaliachk P.S for necessary direction upon the concerned IO so that the IO may be directed to add appropriate section of penal law and investigate the case in an unbiased manner.

[14] Due to inaction on the part of the Investigating agency and the superior authority of the police, the de facto complainant filed an application before the Jurisdictional Magistrate relying upon the decision of the Hon'ble Supreme Court in the case of **Sakiri Vasu v. State of Uttar Pradesh & Ors.**, 2008 1 SCC(Cri) 440] in which it is stated that if the complainant is not satisfied with the investigation and feels that appropriate provisions have not been added in the charge-sheet such aggrieved person can approach the Magistrate under Section 156(3) Cr.P.C and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. Learned Magistrate here issued a direction to the police to do investigation properly and monitor the same.

[15] In the instant case, the said petition was not, however, supported by an affidavit showing compliance of Section 154(1) read with 154(3) Cr.P.C, however, the investigating agency did not raise any objection nor the present petitioner at any stage where such objection could have been raised thereby giving an impression that such complaints have been made to such authorities. The IO has never contended non-compliance of Section 154(1) and 154(3) Cr.P.C. At this stage the decision of the magistrate directing investigation and filing of report resulting in addition of nonbailable Section cannot be challenged. This was not even raised by the petitioner when the cancellation of bail was heard and disposed of on merits.

[16] In **Bhadresh Bipinbhai Sheth** (supra) the prosecutirx on 29th May, 2001 lodged a complaint alleging harassment by the appellant over a period of time. The allegations of rape, emotional blackmail and threats were leveled against the appellant. However, in her statement made on May 31, 2001 to the police, allegations of rape were conspicuously missing, the FIR was registered and the charge under Section 506 Part II of the Penal Code, 1860 (IPC) was framed in the year 2001 based on such statement. The appellant was admitted to bail in the said case. In the year 2010 the prosecutrix made an application for addition of charge under Section 376 IPC as well. On 31st March, 2012 the Metropolitan Magistrate directed the police to carry out a special investigation under Section 173 (8) of the Code of Criminal Procedure 1973 (Cr.P.C). The police filed a revised charge-sheet stating that a prima facie case under Section 376 IPC was made out. In view of addition of the charge under Section 376

IPC the Magistrate passed an order on 25th April, 2013 for committal of proceedings to the Session Court and taking the appellant into custody. However, execution of this order was stayed till 7th May, 2013. During this period the appellant moved the City Sessions Court for grant of anticipatory bail which was ultimately granted on 18th May, 2013. On an application of the prosecutrix the High Court cancelled the anticipatory bail granted to the appellant.

[17] It appears that in the aforesaid matter an allegation of rape was made almost after 7 years after framing of the charge and an application was filed in the year 2010 for addition of the charge under Section 376 IPC as well on the ground that her complaint to the ACP given on 29th May 2001 where she alleged rape be treated as FIR. The prosecutrix did not take any steps for almost 9 years and the charge under Section 376 was added in the year 2014. The Hon'ble Supreme Court in paragraph 17 of the report clearly mentioned the scope of the enquiry and issues to be decided in the said criminal appeal. It reads as follows:

"In the first place, it is necessary to remind ourselves that in the present proceedings, this Court is concerned not about the feasibility of framing of the charge Under Section 376 Indian Penal Code or merit thereof but to the grant of anticipatory bail to the Appellant. Therefore, the arguments of the prosecutrix that such a charge is rightly framed and the submissions on behalf of the Appellant attempting to find the loopholes and the weakness in the prosecution case, would not be of much relevance to the issue involved. At this stage, it cannot be said as to whether there was any physical relationship between the Appellant and the prosecutrix and, if so, whether it was consensual and, therefore, no charge of rape was made out. The fact remains that a charge of rape has been framed. It would ultimately be for the trial court to arrive at the findings as to whether such a charge stands proved or not, on the basis of evidence that would be produced by the prosecution in support of this charge. With these preliminary remarks, we advert to the core issue, namely, whether in the circumstances of this case, Appellant was entitled to anticipatory bail or not and whether the High Court was justified in cancelling the anticipatory bail." (emphasis supplied)

[18] Then in paragraph 19 of the Apex Court noted the long inexplicable delay in applying for addition of new section. The paragraph is reproduced below:

"In a matter like this where allegations of rape pertain to the period which is almost 17 years ago and when no charge was framed Under Section 376 Indian Penal Code in the year 2001, and even the prosecutrix did not take any steps for almost 9 years and the charge Under Section 376 Indian Penal Code is added only in the year 2014, we see no reason why the Appellant should not be given the benefit of anticipatory bail. Merely because the charge Under Section 376 Indian Penal Code, which is a serious charge, is now added, the benefit of anticipatory bail cannot be denied when such a charge is added after a long period of time and inaction of the prosecutrix is also a contributory factor." (emphasis supplied)

[19] It thus would appear that the scope of enquiry was to find out if the High Court was justified in cancelling the anticipatory bail and not the maintainability of an application for anticipatory bail after cancellation of bail on addition of a graver offence on merits after hearing the accused.

[20] Factually in the instant matter, the prosecutrix in her complaint disclosed ingredients of Section 376 IPC and approached the learned CJM within a short span of time

[21] In **Siraj Roy** (supra) during investigation the investigating officer submitted a prayer for addition of Section 376 of the IPC against Siraj. Pursuant thereto, the said Section was added and his bail was cancelled. The said order of the learned Magistrate was challenged in a criminal revision. A learned Single Judge of this Court was pleased to reject the said application holding inter alia that the learned Magistrate was perfectly justified in cancelling the bail of the petitioner and as a follow up action issued a warrant of arrest against him. While passing such order the learned Judge granted liberty to the petitioner to surrender before the court of the learned Magistrate and pray for regular bail in accordance with law if so advised. Before the Co-ordinate Bench it was contended that Siraj cannot pray for anticipatory bail since the learned Single Judge had specifically directed the petitioner to surrender before the court of the learned Magistrate. However, on behalf of Siraj it was contended that despite direction by the Single Judge to surrender the prayer for anticipatory bail is maintainable in view of the decision of a Co-ordinate Bench of this court in CRM 11409 of 2015 (**Sayantan Chatterjee** (supra)) and several other decisions of the Hon'ble Supreme Court including **Shri Gurbaksh Singh Sibbia & Ors. v. State of Punjab.**, 1980 AIR(SC) 1632] The decision in **Bhadresh Bipinbhai Sheth** (supra) was placed for the proposition that anticipatory bail can be granted even if a revisional court does not interfere with the order of the learned Magistrate as anticipatory bail is a device to secure liberty of an individual and it is to be liberally construed. In **Siraj** (supra) warrant of arrest was issued and the petitioner had reasonably apprehended arrest. The Co-ordinate Bench applied the ratio in **Shri Gurbaksh Singh Sibbia** (supra) and held that the said application for anticipatory bail is maintainable.

[22] In **Sayantan Chatterjee** (supra) during investigation the investigating agency made a prayer for adding Section 304 IPC and also for cancellation of bail. The said prayer was allowed by the learned Magistrate on 4th December, 2015 and the petitioner was directed to appear before the court and pray for fresh bail under Section 437 of the Code. The accused petitioner challenged the said order in criminal revision no.4035 of 2015 before the learned Single Judge of this Hon'ble Court. The said revisional application was disposed of with a modification of the impugned order to the effect that the petitioner is disentitled to bail granted by the learned Magistrate for the bailable offence as the Investigating Officer has already intimated the Court of the learned Magistrate of the involvement of the petitioner in, aggravated non-bailable

offence under Section 304 Part II of the IPC, however, in paragraph 8 of the said order the following observation was made:

"The petitioner is at liberty to pray for bail for the offence under Section 304 of the Indian Penal Code "

[23] The de facto complainant preferred criminal revision against the order whereby the learned Magistrate granted permission to the Investigating Officer to add Section 304 of the Indian Penal Code and the said revisional application was disposed of on 29th February, 2016 by a learned Single Judge of this Hon'ble Court with the following observation:

"I would like to make it clear that I have not gone into the merit to decide whether the petitioner can be indicted for the offence under Section 304 Part II of the Indian Penal Code in the instant case. The trial Court will ultimately decide on conclusion of investigation whether the petitioner will be prosecuted for the offence under Section 304 Part II of the Indian Penal Code. I refrain myself from making any observation whether the petitioner is liable to be prosecuted for the offence under Section 304 Part II of the Indian Penal Code at this stage of further investigation of the case."

[24] On the basis of the aforesaid observation it was submitted that the present petition under Section 438 Cr.P.C. is not maintainable and the accused petitioner, is not entitled to an order of anticipatory bail. It was argued that after the specific observation of the revisional court that the petitioner was disentitled to bail by reason of adding of the aggravated offence the only recourse upon to him was to surrender either before the Investigating Officer or the Court pray for bail under Section 437 CrPC.

[25] The Hon'ble Division Bench accepted the submission on behalf of the accused that the observation of the learned Single Judge in CRR No 4035 of 2015 that the petitioner would be at liberty to pray for bail for the offence under Section 304 of the IPC and since bail also includes anticipatory bail, which argument appears to have been conceded by the learned Public Prosecutor, the application for anticipatory bail was held to be maintainable.

[26] In a later decision in **Pradeep Ram** (supra) four issues have been raised and considered out of which issue no. (i) & (ii) may be relevant in view of the submission on behalf of the State:

(i) Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody?

(ii) Whether re-registration of FIR by the investigating agency in the present case was a second FIR and was not permissible there being already FIR no.2 of 2016 registered at the police station concerned arising out of the same incident?

[27] The relevant facts for the present purpose have been summarized in paragraph 30 which reads:

"30.Coming back to the present case, the appellant was already into jail custody with regard to another case and the investigating agency applied before the Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the accused was produced before the Court on 26th June, 2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather the accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. We, thus do not find any error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of the appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10th March, 2016 granted to the appellant before permitting the appellant-accused to be produced before it or remanding him to the judicial custody."

[28] The said issues have been answered in paragraph 31 which reads:

"31. In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an Accused, further cognizable and non-bailable offences are added:

31.1. The Accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the Accused can certainly be arrested.

31.2. The investigating agency can seek order from the court Under Section 437(5) or 439(2) Code of Criminal Procedure for arrest of the Accused and his custody.

31.3 The court, in exercise of power Under Section 437(5) or 439(2) Code of Criminal Procedure, can direct for taking into custody the Accused who has already been granted bail after cancellation of his bail. The court in exercise of power Under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4. In a case where an Accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the Accused, but for arresting the Accused on such addition of offence or offences it needs to obtain an order to arrest the Accused from the court which had granted the bail." (emphasis supplied)

[29] The said decision has clearly stated that the recourse available to an accused in a situation where after grant of bail further cognizable and non-bailable offences are added to the FIR it is for him to surrender and apply afresh for bail in respect of newly added offences. The Investigating Agency is also entitled to move the court for seeking the custody of the accused by invoking the provisions of Section 437 (5) and 439 (2) Cr.P.C. The said decision was followed subsequently in X v. State of Maharashtra & Anr.,2023 SCCOnlineSC 279] In the later decision it appears that the ACMM on an application filed by the State based on the statement of the prosecution disclosing an offence under Section 376 alleged the application for cancellation subsequent whereof the accused approached the court of the learned Additional Sessions Judge seeking anticipatory bail. The said application was rejected. However, the High Court granted anticipatory bail in favour of the accused. Mr. Basu has not disputed that the order cancelling the bail if decided in presence of the accused and on merits the said order is revisable, however, he has submitted it would by itself not fetter the power of the High Court to consider an application for anticipatory bail under Section 438 of the Cr.P.C. as a constitutional Court in exercise of power under Section 438 Cr.P.C. as the court is required to zealously protect the liberty of an accused under Article 21 of the Constitution of India.

[30] As the expression "anticipatory bail" suggests a person in apprehension of an arrest approaches the court for protection against arrest. Once the accused appears in a proceeding for cancellation upon addition of a non-bailable section then the question of his apprehension of arrest becomes irrelevant and inconsequential. He is then contesting the said proceeding with his eyes wide open as has happened in the instant case. The petitioner after being aware of addition of a graver and nonbailable offence appeared before the learned Jurisdictional Court upon notice and contested the prayer for cancellation of bail. It was only after contested hearing the jurisdictional court has cancelled the bail granted earlier to the petitioner. This order under Code is revisable. In the instant case, the petitioner could have approached the court for anticipatory bail on receiving notice of addition of graver non-bailable section and prior to the cancellation of the bail by the learned Magistrate. After he has participated and suffered an order he cannot file an application for anticipatory bail. Mr. Shekhar Basu learned Senior Counsel has also not disputed the fact that this order is revisable. In **Pradeep Ram** (Supra) the Supreme Court has considered the effect of addition of further cognizable and non-cognizable offences on the remedies available to the accused.

[31] Under such circumstances, we dismiss the application for anticipatory bail as not maintainable. The original case diary is returned to the learned Advocate for the State.

[32] This order however, shall not prevent the petitioner to seek appropriate remedies in accordance with law

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2024(2)PRC573

IN THE HIGH COURT AT CALCUTTA

[Before Tirthankar Ghosh]

Cr A (Criminal Appeal); C R A N No 200 of 2023; 3 of 2024 **dated 13/09/2024**

Newton Mondal @ Niwetan Mondal

Versus

State of West Bengal

ABDUCTION AND RAPE ALLEGATIONS

Indian Penal Code, 1860 Sec. 341, Sec. 376, Sec. 363, Sec. 366, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 164 - Abduction and Rape Allegations - Appellant was convicted under IPC Sec. 376, Sec. 366, and Sec. 341 for abducting and raping the victim - The victim alleged that she was abducted in a Tata Sumo and confined for over a month - Prosecution relied heavily on her testimony, which had inconsistencies in her statement under Sec. 164 CrPC and deposition in court - No corroborative witnesses from the busy marketplace were presented, and there was unexplained delay in filing the complaint - Court observed discrepancies in the evidence, raising doubts about the conviction, leading to the acquittal of the appellant. - Conviction Set Aside

Law Point: In cases of abduction and rape, sole testimony of the prosecutrix must be consistent and credible; unexplained delays and lack of corroboration weaken prosecution's case.

Acts Referred:

Indian Penal Code, 1860 Sec. 341, Sec. 376, Sec. 363, Sec. 366, Sec. 506

Code of Criminal Procedure, 1973 Sec. 164

Counsel:

Surajit Basu, Jasika Alam, Pritam Chakraborty Rana Mukherjee, Mujibar Ali Naskar, Subhasish Datta

JUDGEMENT

Tirthankar Ghosh, J.- [1] The present appeal has been preferred against the judgment and order of conviction and sentence dated 04.10.2023 and 05.10.2023 passed by the learned Additional Sessions Judge, Rampurhat, Birbhum in Sessions Trial No. 04/February/2016 arising out of Sessions Case No. 156 of 2015, thereby convicting the appellant under Sections 341/366/376 of the Indian Penal Code and sentencing him as follows:

(i) For the offence punishable under Section 341 of IPC Simple Imprisonment for one month;

(ii) For the offence punishable under Section 366 of IPC Rigorous Imprisonment for 7 (seven) years and a fine of Rs.5,000/-, i.d. to suffer further R.I. for 3 (three) months;

(iii) For the offence punishable under Section 376 of IPC Rigorous Imprisonment for 7 (seven) years and fine of Rs.5,000/-, i.d. to suffer further R.I. for 3 (three) months.

[2] Nalhati Police Station case no. 92/10 dated 17.04.2010 was registered for investigation on the basis of a written complaint filed by 'Y' (brother of the victim 'X'). The allegations made in the written complaint addressed to the Officer-in-charge, Nalhati Police Station were to the effect that the accused promised to marry his sister 'X' but she used to avoid him. However, the accused used to visit her during day and night and even when his sister used to come to market then the accused would go around the road and threaten to beat her. The incident was informed to villagers, the villagers called the accused for settlement/meeting however, the accused did not attend the settlement/meeting and disobeyed the villagers. On 28.03.2010 at about 10.00 am when the victim had been to Nalhati market from then onwards she did not return home. The complainant alleges that his sister is a widow having two minor sons and the accused kidnapped her and confined her at a secret place.

[3] On the basis of the aforesaid complaint Nalhati Police Station registered the case under Section 341/363/366/506 of the Indian Penal Code and the Officer-in-charge was pleased to endorse the case to Sub-inspector Sunil Kr. Dey (PW14) for investigation. The investigation of the case was thereafter handed over to Sub-inspector Samir Kr. Dutta (PW15) who submitted a report in final form and prayed for discharging the accused. A further investigation was held by Mojammel Mondal (PW16), Sub-Inspector of police and after conclusion of investigation he submitted charge-sheet against the accused under Section 341/363/366/376/506 of the Indian Penal Code.

[4] Learned A.C.J.M., Rampurhat after complying with the relevant provisions of law was pleased to commit the case to the learned Additional Sessions Judge, Rampurhat, Birbhum. The learned Trial Court thereafter by its order dated 17th February, 2016 was pleased to frame charges under Sections 341/363/366/376/506 of the Indian Penal Code. The contents of the charge was read over to the accused person to which he pleaded not guilty and claimed to be tried.

[5] The prosecution in order to prove its case relied upon 16 witnesses which included PW1, Kartick Let, co-villager; PW2, Santana Let, co-villager; PW3, 'Y', complainant, brother of the victim; PW4, Sunil Let, co-villager; PW5 Kalpana Let, co-villager; PW6, Tuktuki Let, co-villager; PW7, Santosh Maharaj, scribe; PW8, Binoy Kumar Nonia, Judicial Magistrate who recorded the statement of the victim under Section 164 of Cr.P.C.; PW9, Dr. Sricharan Halder, doctor who examined the accused; PW10, 'Z', sister of the victim; PW11, Jakir Sk., owner of the land where the

complainant was engaged as a cultivator; PW10, Narayan Dhar, brother-in-law of the victim; PW13, 'X', victim; PW14, Sunil Kr. Dey, first investigating officer of the case; PW15, Samir Kr. Dutta, S.I. of police and second investigating officer of the case who submitted the final report; PW16, Mojammel Mondal, Sub-inspector of police who carried out further investigation and submitted charge-sheet.

[6] Pw1, Kartick Let is a co-villager who deposed that he knew the complainant 'Y', as also the accused Newton Mondal and identified him in Court. He deposed that he knew that the victim 'X' was the elder sister of the complainant, however, he denied of having heard any incident relating to the victim 'X' and the accused Newton Mondal. He was declared hostile by the prosecution.

[7] Pw2, Santana Let is a co-villager who identified the accused in Court and deposed that she knew both the complainant 'Y' as well as the accused Newton Mondal and also had knowledge that the victim was the elder sister of the complainant who was a widow and had two sons. However, she denied of any knowledge in respect of the incident relating to the accused and the victim. She was also declared hostile by the prosecution.

[8] Pw3 is 'Y', complainant of the case who deposed that the accused is a resident of Akalipur village. He identified the accused in Court and deposed that the victim 'X' is his elder sister who is a widow having two minor sons. He stated that the incident took place on 28.03.2010 at about 10.00 am when his elder sister went to Nalhati Market and did not return. He alleged that the accused Newton Mondal kidnapped his elder sister that is why she did not return. According to him the accused confined his elder sister in a hilly area within a forest where she was raped and threatened of being killed. He further deposed that his elder sister was confined for two days and he came to know regarding the incident after the same was disclosed by his elder sister when she returned home. As such after having knowledge regarding the incident he lodged a written complaint at Nalhati Police Station which was drafted by one Santosh Maharaj as per his instruction. He identified the complaint along with his signature which was admitted in evidence. In his cross-examination he replied that his elder sister's house is situated after five houses away from his house and denied also the suggestion relating to kidnap and rape of not having taken place.

[9] Pw4, Sunil Let, identified the accused in Court and deposed that he knew the accused as well as the complainant. He was aware regarding the victim being the elder sister of the complainant. However, he denied of any knowledge in respect of any incident between the accused and the victim. His cross-examination was declined on behalf of the accused.

[10] Pw5, Kalpana Let, identified the accused in Court and deposed that she knew the accused as well as the complainant and was aware regarding the fact that the victim was the elder sister of complainant. However, she denied of any knowledge relating to any incident between the victim and the accused. She was declared hostile by the

prosecution. In cross-examination on behalf of the accused she replied that she had no bitter relationship with the complainant or his elder sister.

[11] Pw6, Tuktuki Let, identified the accused in Court and deposed that she knew the accused as well as the complainant who are her co-villagers. She was also acquainted regarding the fact that the victim is the elder sister of the complainant. However, she denied of any knowledge relating to any incident between the victim and the accused.

[12] Pw7, Santosh Maharaj is scribe of the FIR who deposed that he wrote the complaint as per instruction of the complainant 'Y', read over the same to the complainant and after being satisfied the complainant signed it. He also signed on the complaint as a scribe. He identified his signature, accordingly the same was admitted in evidence.

[13] Pw8, Binoy Kumar Nonia is the Judicial Magistrate who at the relevant point of time was the Judicial Magistrate, 2nd Court, Rampurhat. He deposed that on 05.05.2010 as per order of learned A.C.J.M., Ramurhat he recorded the statement of the victim in his chamber under Section 164 of Cr.P.C. after observing all legal procedures. The victim was identified and produced before him by a lady Home Guard namely, Jahanara Bibi of Nalhati Police Station and after identification she left his chamber. After observing all formalities the statement of victim was recorded under Section 164 of Cr.P.C. and she signed all the pages. After conclusion of the statement he certified the same. He identified the statement along with his signature and seal. The statement of the victim as such was admitted in evidence.

[14] Pw9, Dr. Sricharan Haldar is Medical Officer of Rampurhat Government Medical College and Hospital, who deposed that on 25.09.2015 he examined Newton Mondal aged about 37 years for his potency test. On examination he arrived at his conclusion and accordingly prepared the report with opinion that there was nothing to suggest that the male examined is not capable of performing sexual act. The medical report was admitted in evidence.

[15] Pw10, 'Z' is the sister of the victim who deposed that the accused Newton Mondal used to offer ill proposal to her sister for residing with him, and once the victim was found missing from Nalhati Market. She was searched but could not be traced. After one month she came back to their paternal house at Monigram, Bhadrapur and on being asked about her absence for a month, she disclosed that she was kidnapped by Newton Mondal and confined in an unknown place by him. According to the witness the victim also alleged regarding torture being inflicted by the accused Newton Mondal and she being ravished by him. The witness stated that the incident took place on 28th of March few years ago. The witness also stated that she was illiterate and so she could not tell exact year when her sister was kidnapped. She identified the accused in Court and stated that police interrogated her five years after the date of the incident. In cross-examination she answered that she was a

resident of Dankuni for about 25 years and further stated that she heard that the accused Newton had a family consisting of his wife and children. Further she stated that the victim was kidnapped forcefully with her mouth being tied with a cloth. She was taken by a vehicle. According to her a General Diary was lodged with the police officer of Nalhati Police Station after few days of the victim being not traceable.

[16] Pw11 is Jakir Sk. who deposed that he knew the complainant as well as the accused Newton Mondal and identified the accused in Court. He further stated that the complainant is cultivating his land and the victim happens to be the sister of the complainant who was a widow and had two sons. He was informed relating to the incident in the year 2010 by the complainant that his sister was missing from Nalhati Bazaar. According to him the complainant stated that his sister was kidnapped and was raped. In cross-examination, however, he stated that he has deposed on the basis of what he heard from the complainant.

[17] Pw12, Narayan Dhar is the brother-in-law of the victim, who deposed that the victim was a widow having two minor sons and the accused used to send ill proposal of marrying her. The victim felt irritated as he teased and assaulted her. On 28.03.2010 at about 10.00 am when the victim had been to Nalhati Market she was kidnapped by the accused and confined at a secret place. He also stated that the victim was confined for one month and 20 days, when she was raped continuously but somehow she fled away from the unknown place. He heard the incident as narrated by the victim after she returned. He identified the accused in Court and further deposed that as the mental condition of the victim deteriorated because of bad experiences she felt ashamed of the incident. In cross-examination he replied that on 28.03.2010 he came to know about disappearance of his sister-in-law and the same was informed by his brother-in-law. He deposed in Court as per the version what was stated to him by his brother-in-law at the relevant point of time. He also narrated the same facts to the police authorities which he heard from his brother-in-law.

[18] Pw13, 'X' is the victim who identified the accused in Court and deposed that the complainant was her younger brother. She narrated the incident by stating that initially she did not know the accused but subsequently she knew when he inflicted torture upon her. On 28.03.2010 at about 9.00 am she went to the market. The accused earlier also irritated her in different way on the road and also assaulted her. Over this issue she complained to Nalhati Police Station, earlier ventilating her grievances to the police. Prior to the incident she had been to the police station when police officer asked her to come with paper. Accordingly she went there and when she was returning from police station the accused along with three persons restrained her on the road and dragged her in a Tata Sumo vehicle to an unknown place and confined her. At the said place the accused raped her and confined her for about a month. She narrated to the Court that she could not go out from the said place as she was guarded all along by the accused and sometime by others. The accused left her and she thereafter boarded a

train from Loharpur railway station under Nalhati Police Station from where she returned to her home and went to the police station subsequently. She divulged the incident to the police officer. Being an illiterate lady she did not know where she was confined. According to her as she protested against the torture by the accused she was abducted and ravished by the accused. Additionally she deposed that initially she went to the police station for ventilating her grievances and there a document was prepared by Bhomor Vakil but the accused did not abide by the terms of settlement and continued his torture upon her in different ways. She stated in Court that she was abducted from Nalhati Market and she was a widow having two minor children. She repeated that the accused Newton Mondal along with others raped her, however, she did not know the name of the other persons. She was medically treated at Rampurhat Hospital where she signed on the medical paper. She identified her signature in the medical paper. Her signature was admitted in evidence. She was also produced before the Magistrate and her statement was recorded. She identified her signature in the statement under Section 164 of Cr.P.C. which was also admitted in evidence. Lastly she stated in her examination-in-chief the facts which she deposed in Court was also narrated to the police authorities. In cross-examination she stated that except her signature she is unable to read or write. Further when she was confronted on behalf of the accused she replied that for responding to natures call she came out from the room and used field for defecation and used water from a small pond nearby. She described that there was no bedding and spent one month in a dark place. Four persons used to ravish/rape her for about four/five times a day regularly. She reiterated that the accused and others committed such mischief forcibly. She sustained injuries on different parts of her body. After one month she came back from there when she got an opportunity. The day when she left nobody raped her, but the day before all the four persons rapped her for four to five times. On the very day when she returned she went to Nalhati Police and narrated all the facts to Darogababu. However, she did not sign the same but her brother/complainant signed it. She was sent to hospital where she narrated the incident to the doctor. She also replied that she showed all the injuries which were inflicted upon her, including her private parts. She was unable to state the registration number of the vehicle and on a suggestion being advanced on behalf of the accused she denied the fact that she and her husband worked under the accused Newton and as there was misunderstanding she went to the house of Newton and complained to his wife that she would get money. She denied of any such incident not having taken place.

[19] Pw14, SI Sunil Kumar Dey, is the first investigating officer of the case who deposed that on a missing complaint the Officer-in-charge started Nalhati Police Station case no. 92/2010 dated 17.04.2010 and entrusted the case to him. After getting charge of the investigation he perused the FIR, visited the place of occurrence, drew rough sketch map with index, examined available witnesses and recorded their statement, the victim girl was sent for recording her statement under Section 164

Cr.P.C. and the statement was also collected by him. As he was under transfer he handed over the Case Diary to the Officerin-charge, Nalhati Police Station on or about 17.06.2010.

[20] Pw15, SI Samir Kumar Dutta deposed that he was handed over the charge of investigation of Nalhati Police Station case no. 92/2010 dated 17.04.2010 and on receipt of the documents he initiated the investigation and according to him as he did not find anything he submitted a final report vide FRT no. 12/2012 dated 31.01.2012 and discharged the FIR named accused.

[21] Pw16, Mojammel Mondal, Sub-inspector of police was entrusted on and from 18.09.2015 for carrying out further investigation of Nalhati Police Station case no. 92/2010 dated 17.04.2010. He arrested the accused Newton Mondal on 21.09.2015. The accused was remanded to police custody for five days and his statement was recorded, further he was sent for medical examination. The medical report of the accused was collected. He also collected the medical report of the victim. He examined the witnesses Jayanti Dhar, Narayan Dhar and Jakir Sk. recorded their statement and on conclusion of investigation submitted charge-sheet no. 280/15 dated 21.10.2015 against the accused under Section 341/363/366/376/506 of IPC.

[22] Mr. Surajit Basu, Learned advocate appearing on behalf of the appellant submitted that there was inconsistency in the version of the victim both in her statement under Section 164 of the Code of Criminal Procedure before the Learned Magistrate as well as her deposition before the Court. Her narratives were scripted and exaggerated in such a manner that the same strikes at the root of the prosecution case thereby making her an unreliable witness. According to the learned advocate if the FIR is taken to be true then the victim was missing since 28.03.2010 and there were no complaints regarding her whereabouts as the complaint was lodged on 17.04.2010. The victim in her statement under Section 164 of the Code of Criminal Procedure before the learned Magistrate stated that for 1 month and 20 days prior to recording of her statement she was abducted by the appellant along with others in a Tata Sumo vehicle. She was thereafter taken to a hilly area where she was confined in a dark room and ravished, however, she managed to flee away after boarding a train. Although, she in her deposition stated that she had narrated the incident to the doctor but in the medical report the incident is not reflected. Learned advocate also stated that in response to the question relating to her being confined for more than one month, in cross-examination improbable circumstances were narrated by her and the same crumbles the fact of her abduction as also probabilize the defence case that there were some enmity in respect of the victim having grievance of receipt of some money for which she has falsely implicated the present appellant in connection with the instant case which would be evident from the cross-examination of PW13 as well as the answer of the accused under Section 313 of the Code of Criminal Procedure wherein the accused stated that "I went to her house for demanding money lend to her and she

filed this false case. She started to work under Jakir". The conduct of the complainant being the brother of the victim and other relations are also not above suspicion as they did not lodge any complaint relating to her whereabouts for a considerable period of time when she was missing and almost after 20 days lodged the complaint with the Nalhati Police Station. It was submitted that having regard to the aforesaid circumstances the evidence of the victim who is the sole individual for narrating the incident cannot be relied upon. To that effect learned advocate referred to the judgments of Nirmal Premkumar & Anr. -Vs. State represented by Inspector of Police,2024 SCCOnLine 260; **Juwar Singh & Ors. Vs. State of Madhya Pradesh**, 1980 Supp1 SCC 417; **Santosh Vs. State of Bihar**, 2020 3 SCC 443. Lastly, it was submitted that having regard to the factual circumstances of the present case and the proposition of law as laid down in the aforesaid judgments, interference is called for in respect of the judgment and order of conviction and sentenced so passed by the learned trial Court and the same as such should be set aside.

[23] Mr. Rana Mukherjee, learned advocate appearing for the State on the other hand opposed such contention and submitted that in cases of sexual assault/offences the sole testimony of the prosecutrix assumes significance, as such offences are committed in seclusion. To search for corroborative materials in such type of offences are practically impossible as hardly there will be witnesses available in front of whom the offences have been committed. Additionally it was submitted that considering the background from where the lady belongs, who is illiterate, it cannot be expected that she would have the courage to forthwith taken action, although in evidence it has surfaced that she had been to the police station on several occasions but the police authorities on one pretext or the other delayed and/or did not cooperate with her so far as her harassment which was inflicted by the accused upon the victim. According to the learned advocate for the State the judgment and order of conviction and sentence so passed by the learned trial Court do not call for any interference and as such the same should be affirmed.

[24] I have considered the arguments advanced on behalf of the appellant as well as that of the State and I find that the lady was missing from 17.03.2010 and not even a missing diary was lodged or any information communicated to the police authorities. There were no witnesses relied upon by the prosecution relating to the place of occurrence which is a market place, as such the question of abduction from a market place and taking her away by a Tata Sumo vehicle do not inspire any confidence. Majority of the prosecution witnesses do not support the prosecution case or their deposition before the Court is on the basis of hearsay evidence. As such the prosecution case is based upon the evidence of PW3, complainant 'Y'; PW10, 'Z' (sister); PW12 (brother-in-law) and PW13, 'X' (victim). So far as PW10 and PW12 are concerned they heard the incident that on 28.03.2010 the victim was abducted and she was missing and they deposed that a General Diary was lodged with the Police Station regarding the victim which is not traceable, however, no such General Diary was

produced before the Court so the other witnesses whose deposition are of significance are the complainant and the victim. The complainant was residing in the same locality as that of the victim and is her brother. In spite of the same there is nothing in evidence to suggest that any information was available to the local police station in respect of the victim who was missing. Thus there is no corroborative evidence which lend support to the version of abduction as such the sole testimony of the prosecutrix in this case assumes importance. So far as her version is concerned in her statement under Section 164 of Cr.P.C. before the learned Judicial Magistrate she narrated that when she was returning after complaining against the appellant from Nalhati Police Station, she was abducted by few persons who made her unconscious and took her to an unknown destination in a hilly area. She further stated that the accused were four in number and all the four persons raped her. She, however, managed to escape from them and she apprehends that such act was done at the behest of the accused Newton Mondal. Thus in the statement under Section 164 of Cr.P.C. she did not allege that the accused/appellant ravished her rather she stated that she was sexually abused by four unknown persons. In her deposition before the Court she stated that the accused along with three other persons restrained her on the road and dragged her in a Tata Sumo vehicle to an unknown place and kept her there and at the said place the accused committed rape upon her and confined her there for one month. Additionally, she also stated that the accused Newton Mondal along with others committed rape upon her and she do not know the other persons. The victim also before the doctor who examined her did not narrate any fact of sexual abuse committed at the instance of all the persons or the appellant.

[25] Having considered the aforesaid facts which surfaced in the present case it would be pertinent to consider the settled proposition of law so far as the appreciation principles relating to the sole testimony of the prosecutrix is concerned. In **State of Rajasthan Vs. Babu Meena**, 2013 4 SCC 206, it has been held in paragraphs 8 and 9 which are as follows:

"8. Mr Jain assails the acquittal of the respondent under Section 376 of the Penal Code and contends that the trial court ought to have accepted the evidence of Kirti (PW 3). He submits that conviction can be based on the sole testimony of the prosecutrix and the trial court erred in rejecting her evidence and acquitting the respondent. In support of the submission he has placed reliance on the judgment of this Court in **Vijay v. State of M.P.**, 2010 8 SCC 191: (2010) 3 SCC (Cri) 639] Relevant para of the judgment reads as under: (SCC p. 198, para 14)

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

9. We do not have the slightest hesitation in accepting the broad submission of Mr Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused."

[26] Further in **Dinesh Jaiswal -Vs. State of M.P.**, 2010 3 SCC 232, in paragraph 10 of the Hon'ble Supreme Court was pleased to held:

"10. Mr C.D. Singh has however placed reliance on Moti Lal case [(2008) 11 SCC 20: (2008) 3 SCC (Cri) 950] to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

[27] In **Rai Sandeep Vs. State (NCT of Delhi)**, 2012 8 SCC 21 while reversing the order of conviction and holding that the prosecutrix was not a witness to be held as a 'sterling witness', it was opined by the Hon'ble Supreme Court in paragraph 22 which is as follows:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version

should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

[28] Additionally in **Krishan Kumar Malik Vs. State of Haryana**, 2011 7 SCC 130 while dealing with solitary evidence of the victim in matters relating to sexual offences the Hon'ble Supreme Court in paragraph 31 and 32 was pleased to hold as follows:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant."

[29] Very recently in Nirmal Premkumar & Anr. Vs. State represented by Inspector of Police,2024 SCCOnLineSC 260, relied upon by the appellant in paragraph 15, it has been held by the Hon'ble Supreme Court as follows:

"15. in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a "sterling witness" without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistences excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded."

[30] Thus, on an appreciation of the materials available in this case, firstly non-explanation relating to the delay of absence of the victim for a long period and no information being made available to the police authorities or any authorities for that purpose without any explanation being furnished raises a serious concern. Secondly, the variance in the version of the statement under Section 164 of the Code of Criminal Procedure of the victim and her deposition before the Court along with no witnesses being examined by the prosecution at a busy market place from where the victim was allegedly abducted in a Tata Sumo vehicle raises a doubt regarding the factual foundation of the prosecution case and do not inspire this Court to arrive at a conclusion of guilt so far as the present appellant is concerned in respect of the charges which he was called upon to answer.

[31] Accordingly, the judgment and order of conviction and sentence dated 04.10.2023 and 05.10.2023 passed by the learned Additional Sessions Judge, Rampurhat, Birbhum in Sessions Trial No. 04/February/2016 corresponding to Sessions Case No. 156 of 2015 arising out of Nalhati Police Station Case no. 92/10 dated 17.04.2010 is hereby set aside.

[32] The appellant is acquitted of all the charges.

[33] Thus, CRA (SB) 200 of 2023 is allowed.

[34] The appellant is on bail and as such he is discharged from the bail bonds.

[35] Pending connected applications, if any, are also disposed of.

[36] Department is directed to send back the Lower Court Records immediately. A copy of the judgment be forwarded to the learned Trial court immediately for compliance regarding the directions given above.

[37] All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

[38] Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities

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2024(2)PRC584

DELHI HIGH COURT

[Before Prathiba M Singh; Amit Sharma]

Crl L P (Criminal Leave Petition); Crl M A (Criminal Miscellaneous Application) No 182 of 2023; 9276 of 2023 **dated 13/09/2024**

State of NCT of Delhi

Versus

Shyam Kishore Alias Putan

ACQUITTAL IN SEXUAL ASSAULT

Indian Penal Code, 1860 Sec. 354 - Code of Criminal Procedure, 1973 Sec. 161, Sec. 164, Sec. 378 - Protection of Children from Sexual Offences Act, 2012 Sec. 29, Sec. 8, Sec. 12 - Acquittal in Sexual Assault - Respondent was accused of sexually assaulting a minor under IPC Sec. 354 and POCSO Sec. 8 and 12 - Victim's mother alleged finding bite marks on the victim's body, but medical examination conducted the same day found no injuries - Victim failed to recognize the respondent in court and inconsistencies were noted between the victim's and the mother's testimonies - Court ruled that tutoring had likely occurred, and the case was weakened by lack of physical evidence or reliable testimony - Acquittal upheld due to insufficient evidence and delay in appeal - Petition Dismissed

Law Point: Inconsistent testimonies, lack of corroborative medical evidence, and possible tutoring undermine the reliability of the victim's account, leading to acquittal in sexual assault cases

Acts Referred:

Indian Penal Code, 1860 Sec. 354

Code of Criminal Procedure, 1973 Sec. 161, Sec. 164, Sec. 378

Protection of Children from Sexual Offences Act, 2012 Sec. 29, Sec. 8, Sec. 12

Counsel:

S K Sharma, Ritesh Kumar Bahri, Lalit Luthra

JUDGEMENT

Prathiba M. Singh, J.- [1] This hearing has been done through hybrid mode.

[2] The present petition has been filed by the Petitioner-State under Section 378 of Cr.P.C. seeking grant of leave to appeal challenging the judgment dated 31st August, 2021 passed by the ld. ASJ-01,Special Court, POCSO, East District by which the Respondent-Accused has been acquitted.

[3] The alleged incident in the present case dates back to 9th July, 2015 pursuant to which a FIR No. 418/2015 dated 10th July, 2015 was registered by PS Geeta Colony (East) under Sections 354/354(A) of the IPC and Sections 8/12 of the POCSO Act. The allegation against the Respondent-Accused was that he had committed penetrative sexual assault on the victim child. The complainant was the victim's mother who was examined as PW-3.

[4] The Trial Court has acquitted the Respondent on three broad grounds:

i) That the medical record i.e., the MLC dated 10th July 2015 (Ex. PW7/A) did not reveal any injury on the survivor despite the fact that the medical examination was conducted on the same day i.e., 10th July 2015, when the mother of the survivor alleged that she found injury marks and bite marks on the survivor;

ii) The second ground on which the Trial Court has acquitted the accused is that the survivor failed to recognize the RespondentAccused in her testimony before the Trial Court. The Trial Court has made a noting that in the examination-in-chief of the survivor when the Accused shown to the survivor through video conferencing he was having beard and mustache. However, the survivor had claimed that the person who committed the alleged act on her, was a clean shaved man;

iii) The Trial Court also records that there appears to have been tutoring of the survivor by the mother, and that the survivor's 'chachi', to whom the victim had claimed to have first narrated the incident, was also not examined. The relevant portions of the impugned judgment are set out below:

"38. Ld. counsel for the accused argued that the PW3/mother of the victim deposed that she noticed some bite marks on the chest and near the private part of the victim on 10.07.2015 at about 9/10 am and If it is correct, then it is not possible that the said alleged bite marks which were caused in evening of 09.07.2015 were not noticed by the doctor concerned during medical examination of the victim in the evening of 10/07/2015. Ld. Addl. P.P submitted that the bite marks on the human body depends upon the force used by the person giving the bite. So merely because the bite marks were not noticed by the doctor concerned does not mean that the victim deposed falsely. In support of his arguments, he relied upon the case 'Inspector of Police vs. Dinesh' Crl.Appeal No.41/2021 Madras High Court decided on 12.03.2021.

39. It is pertinent to note that the victim in her complaint Ex.PW1/A and in her statement u/s 164 Cr.P.C. Ex.PW1/B dated 16.07.2015 clearly stated that the accused had given a teeth bite on her chest and private part. The victim was medically examined on 10.07.2015 at about 6 pm vide MLC Ex.PW7/A, the doctor concerned observed in MLC that L/E - no fresh external injury seen and O/E - no sign of external injury noted. It is also recorded on the MLC that the mother of the victim refused for her internal medical examination. So IO again recorded the statement of victim u/s 161 Cr.P.C on 24/07/2015 wherein victim stated that the uncle started sucking her nipples and for this reason, no bite mark was on her chest and this very statement of her, She earlier stated bitten. It is clear from the MLC of the victim and her statement u/s 161 Cr.P. dated 24.07.2015 that there was no bite mark on the chest and private part of the victim. Hence, the testimony of the victim that the accused had bitten on her chest and private part and further the testimony of PW3 that she had seen the said bite marks has no force and therefore can not be relied upon. xxx xxx xxx

43. Further, according to PW1, she went to the house of her grandmother on the alleged day of the incident and she was playing with her sister namely 'S' when the accused came there and asked her to accompany to his room. PW4 is the grandfather of PW1, he deposed that on the day of incident he and his wife went to Irwin Hospital so they were not present at the time of incident. According to PW3, there are two rooms on the first floor of the building, in one room the accused was the tenant and in

another room, her mother & father in law were residing but on that day they were not residing. It is clear from the testimony of PW3 & PW4 that on the alleged day of the incident the grandparents of the victim were not present in their room. Further, it is pertinent to note that there is no witness of prosecution who deposed that he/ she had seen the victim child who came on first floor to play or was playing there on the alleged day of incident. xxx xxx xxx

45. In view of the above said discussion, I am of the considered view that the prosecution has failed to establish the foundational facts which are necessary to attract the presumption as defined in section 29 of the POCSO Act against the accused. Hence, the case of prosecution fails. Accordingly, the accused is hereby acquitted for the offences charged i.e u/s 4 of the POCSO Act"

[5] The Trial Court also notes that there is no consistency between the survior's testimony and her mother's testimony as the narration of events by the victim and the mother do not match.

[6] Mr. Bahri, ld. APP appearing for the State, submits firstly, on the ground of delay of 372 days in filing the present leave to appeal, that the delay happened due to changes in the ld. APP's office and due to delay in marking of the file.

[7] Ld. APP further submits on merits that the victim has completely supported the case of the prosecution and the mere fact that she was a 12 years old child who may not have been able to decipher the fact that the accused had grown a beard during the period between the incident and the examination-in-chief, could not have led to his acquittal.

[8] On the other hand, on behalf of the Accused-Respondent, it is submitted that in the testimony of the victim child, she fails to even recognize the Accused. Secondly, no injury has been observed on her in the medical examination. Further, Mr. Sharma, ld. counsel submits that the victim has not been able to identify the accused and that the victim child was tutored before the examination-in-chief took place.

[9] Heard and perused the record. The Court has perused the MLC dated 10th July 2015 (Ex. PW7/A). The examination of the victim was done at 6:00 p.m. on 10th July, 2015 which is the same day, on which the mother claims to have found injuries on the victim's body. However, the MLC records that there is no fresh external injury to be noted. The MLC completely contradicts the mother's testimony. Further, in the victim's testimony, she has clearly stated that she does not identify the accused. The relevant portion of the testimony is set out below:

" At this stage, accused is taken out from the screened room and shown to the witness through video camera. After seeing the accused, witness states that she has had no occasion of seeing the accused prior to this day."

[10] In the cross-examination also, the victim states that she was told by her mother as to what to say before the Judge. More than anything, the family has also refused to get an internal examination of the victim done as is recorded in the MLC.

[11] Mr. Sharma, ld. counsel has alleged that the entire case was fabricated against the Accused as he was the tenant in the complainant's father-in-law's property. He was staying in one room along with his wife and daughter and the incident could not have gone unnoticed by them, considering that the victim child was 12 years old at the time of alleged incident.

[12] In the overall facts and circumstances of this case, the Trial Court's conclusion seems perfectly plausible and does not warrant any interference.

[13] The petition for leave to appeal is rejected both on the ground of delay as also on merits.

[14] All pending applications are also disposed of

2024(2)PRC588

IN THE HIGH COURT AT CALCUTTA

[Before Tirthankar Ghosh]

Cr A (Criminal Appeal) No. 333 of 2019 **dated 12/09/2024**

Bikash Das

Versus

State of West Bengal

ASSAULT ON DEAF VICTIM

Indian Penal Code, 1860 Sec. 376, Sec. 511, Sec. 354 - Assault on Deaf Victim - Appellant convicted under IPC Sec. 376/511 for attempting to rape a deaf and mute girl - Incident occurred when the victim's mother was absent, and the accused entered the house, forcibly undressed and molested the victim - Trial court convicted him under Sec. 376/511 and sentenced him to three years - On appeal, the High Court found inconsistencies in the mother's testimony and no medical evidence of injury - Court reduced the charge to Sec. 354 for outraging modesty and sentenced the appellant to the time already served in custody, around eleven and a half months - Appeal Partly Allowed

Law Point: In sexual assault cases involving disabled victims, credibility of the testimony and corroborating medical evidence are critical for upholding higher charges.

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 511, Sec. 354

Counsel:

Sourav Chatterjee, Prasun Kumar Datta, Subrato Roy

JUDGEMENT

Tirthankar Ghosh, J.- [1] The present appeal has been preferred against the judgement and order of conviction and sentence dated 30.04.2019 and 28.05.2019 passed by learned Additional District and Sessions Judge, Fast Track Court, Kalna in Sessions Trial No. 46 of 2015 arising out of G.R. Case No. 288 of 2011 wherein the learned trial court was pleased to convict the appellant under Sections 376/511 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three years and pay fine of Rs.5000/-, in default, to suffer further simple imprisonment for six months.

[2] The genesis of the present case relates to Purbasthali Police Station Case No. 139 of 2011 dated 09.05.2011 under Sections 376/511 of the Indian Penal Code wherein the complainant "Y" being mother of the victim reported to the Inspector-in-Charge, Purbasthali Police Station to the effect that her daughter "X" aged about 18 years is an inborn deaf and dumb girl. It was alleged that on 08.05.2011 which was Sunday at about 4 p.m. when she went for bath and her daughter was at the house being alone, one Bikash Das entered the house and attempted to rape her daughter forcibly. Her daughter was outraged of her female modesty as extreme physical force was applied to her daughter at the instance of the accused. When she returned home, the accused Bikash Das having heard the sound went in a corner of the room thereby hiding himself. The victim was there in the room and when the complainant entered, she found the accused was standing in a corner of the room and when she raised her voice, at that time, the accused pushed her and fled away. The victim thereafter started weeping and trembling in fear and became senseless. When her husband returned, she informed the entire incident to her husband and thereafter both of them went to the house of father of Bikash Das viz. Jogesh Das to inform the incident, but they were threatened not to inform the matter to the police station. As such, under such circumstances, the complainant requested the police authorities to take action against the accused.

[3] On the basis of the aforesaid complaint, the criminal case was registered under Sections 376/511 of the Indian Penal Code and the Investigating Officer on conclusion of investigation, submitted chargesheet under the same Sections being Sections 376/511 of the Indian Penal Code. The case was thereafter committed to the court of sessions and the proceedings were thereafter transferred to the court of the learned Additional District and Sessions Judge, Fast Track Court, Kalna. The learned trial court on or about 17.11.2015 was pleased to frame charge under Section 376 of the Indian Penal Code read with Section 511 of the Indian Penal Code against the accused/appellant. The contents of the charge were read over to the accused to which he pleaded not guilty and claimed to be tried.

[4] The prosecution in order to prove its case relied upon eight witnesses which included PW-1, "X" the victim girl; PW-2, "Y" mother of the victim girl; PW-3, Kartick Das, scribe of the FIR; PW-4, Tapan Das, a resident of the locality; PW-5, Motilal Das, a resident of the locality; PW6, Sanjit Das, a resident of the locality; PW-7, Kanchan Das, a resident of the locality; PW-8, Dr. Anup Kumar Bhole, doctor who examined the victim.

[5] Pw-1, "X", the victim girl as she was deaf and dumb, the court sought the assistance of an interpreter named Stuti Debi. It was apprised to the court by the interpreter that the witness was 100% hearing impaired and at the time of inserting the requirements so far as the introduction of the witness/victim is concerned, it was stated by the mother of the victim that she was aged about 24 years. It was recorded that the victim stated that she was alone in her house when her mother was absent. At that time, the accused entered their house, came to her room, pushed her on a bed, embraced her and pressed her breast and thereafter put off her undergarment. The accused thereafter climbed over her body and removed his trouser. However, the accused did not commit the offence of rape. She thereafter deposed that her mother went for a bath and after returning when she saw the incident, the accused concealed himself. The accused was identified by the witness. In crossexamination, she deposed that her mother understood her gesture and posture and therefore, she was able to explain her mother as to what the accused committed to her. At this stage, it is reflected in the crossexamination that the learned trial court has recorded the witness/victim could not hear the word '"mother' and also could not express as to how many brothers or sister she had. She also replied that the accused was working in the nearby field as there was a vacant land beside their house.

[6] Pw-2, "Y", is the mother of the victim and de facto complainant of the case who deposed that the victim "X" is her daughter who is deaf and dumb and she is acquainted with her gesture and posture as well as the manner in which she communicates. She stated that she lodged the complaint with the police station against the accused whom she identified in court. Additionally, she stated that the incident occurred almost six years ago at about 4 p.m. when she went for a bath and while returning, she heard that her daughter was crying and a sound was heard from the room which was closed, but unlocked. When she opened the room, she saw the accused tried to conceal himself in the corner of the room and on questioning her daughter, she by her gesture communicated that the accused tried to rape her. When she tried to question the accused, the accused pushed her and fled away. As a result of such act, her daughter was traumatized, so when her husband returned at about 5 p.m., she narrated the incident and they went to the house of the accused and narrated the incident to his father. However, Jogesh Das, the father of the accused, threatened them by stating that they are trying to falsely implicate his son. The couple thereafter narrated the incident to the local people and her husband went to the house of Kartick Das who happens to be a teacher in the locality. The said Kartick Das wrote a

complaint which was signed by her. She identified the complaint which was admitted in evidence. She also stated that she handed over the dress which her daughter was wearing at the relevant period of time. The same was identified and admitted in evidence. In cross-examination, on a specific query on behalf of the accused that whether the couple had taken a sum of Rs.50,000/- on an allegation of an affair in between Tapas Das and her daughter which was by way of a village salish, she replied to the same as correct. It was also suggested on behalf of the defence that for the purpose of squeezing money from the parents of the accused, a false narrative has been created as a counterblast as the appellant raised objection for installation of electricity at their house.

[7] Pw-3 is Kartick Das who is a resident of the locality to whom the PW-2 and her husband went for writing the complaint. The witness identified the complaint which was written by him and the same was admitted in evidence. In cross-examination, the witness categorically stated that he did not have any personal knowledge in respect of the allegations.

[8] Pw-4 is Tapan Das, a resident of the locality who stated that his house is situated at a distance of half k.m. away from the house of the victim. However, he on hearing a hue and cry, rushed to the house of the de facto complainant and heard from the de facto complainant/PW-2 that the accused fled away from her room by tearing the wearing apparels of her daughter. He identified the accused in court. However, in cross-examination, the witness replied that he did not state to the Investigating Officer that he heard from PW-2 that accused Bikash Das tore the wearing apparels of the victim.

[9] Pw-5 is Motilal Das who is a resident of the locality who deposed that on hearing a hue and cry, he rushed to the house of PW-2 and found that PW-2/the de facto complainant was shouting to the effect that the accused entered the room of her daughter when she was alone and she found that her daughter was crying. In cross-examination, the witness stated that the victim happens to be her niece.

[10] Pw-6 is Sanjit Das who deposed that when he went out from his house to a nearby tea stall, he heard an incident involving the accused and a deaf and dumb girl. In cross-examination, he stated that his residence is half k.m. away from the house of the de facto complainant.

[11] Pw-7 is Kanchan Das who denied of any knowledge regarding the incident.

[12] Pw-8 is Dr. Anup Kumar Bhole who was attached with Kalna S.D. Hospital as gynaecologist and deposed that the victim was identified to him by a lady constable. He found her to be deaf and dumb and the history was recorded as per the version of her mother. The history as recorded in the medical report is as follows:

"On 8.05.11 at about 4 p.m. after taking a bath when Tumpa's mother was returning back to her room, she found that her daughter was crying inside of the room.

She found one Bikash Das being the neighbour was tearing her dresses (Tumpa's dress). On seeing her mother Bikash rushed away."

[13] The doctor did not find any injury in the medical report. He identified the medical report which was marked in evidence. In crossexamination, the doctor replied that he did not ask the mother as to whether she was acquainted with the gesture or communication made by the deaf and dumb girl. However, he volunteered that he noted down the reaction of the mother as reported to him.

[14] Mr. Chatterjee, learned advocate appearing for the appellant submitted that the de facto complainant had a history of squeezing money which would be evident from the cross-examination. To that effect learned advocate drew the attention of the Court to the relevant part of the cross-examination of PW-2 wherein she admitted that she accepted a sum of Rs.50,000/- from a person named Tapas Das with whom at the relevant point of time, she alleged that her deaf and dumb daughter had a relationship. It was also contended on behalf of the appellant that because of supply of electricity, a dispute arose between the de facto complainant and the accused. As such, having regard to the previous conduct of the de facto complainant, the factum of falsely implicating the present appellant cannot be ruled out. The learned advocate also drew the attention of the Court to the medical evidence and submitted that in the medical report, there is nothing to suggest that there was any attempt committed for ravishing the victim as has been alleged. Attention was drawn to the relevant part of the statement of the mother of the victim which was recorded in the form of history in the medical report wherein it was stated that the accused was tearing the dress of the victim. Lastly, it was submitted on behalf of the appellant that having regard to the vindictive attitude of the mother of the victim, there is every possibility of the appellant being falsely implicated and as there is not even any injury as is reflected in the medical report, the appellant should be acquitted of the charges.

[15] On the other hand, Mr. Datta, learned advocate appearing for the State resisted such submission of the appellant and submitted that in cases of such nature, the offences are committed in seclusion and as such, there is hardly any witness who can narrate the incident in detail, more so in a case where the victim happens to be a deaf and dumb girl. It was also submitted on behalf of the State that there is corroboration in the statement of the victim and her mother and having regard to the manner in which the victim has narrated the incident, the principles on which the sole testimony of the prosecutrix is to be relied upon for convicting an appellant in cases of sexual assault should be applied in the present case. The learned advocate for the State emphasised that the reasons so assigned by the learned trial court are cogent and acceptable and as such, no interference should be made in the judgement and order of conviction and sentence so passed.

[16] I have considered the evidence of the witnesses and having considered the plea taken by the State that the sole testimony of the prosecutrix can be relied upon in

a case of sexual offence, I would express my dissatisfaction particularly with regard to the manner in which the cross-examination has been recorded in this case. The learned trial court while recording the cross-examination, has categorically stated that the witness could not hear the word "'mother' and the witness could not express how many brothers or sister she has. As such, it was incumbent upon the learned trial court to test the capacity of the interpreter who was brought in to interpret the gesture/ communication of a deaf and dumb witness who happens to be a victim.

[17] In this case, I find that the victim is a deaf and dumb girl and so far as the mother, PW-2, is concerned, she has exaggerated the version particularly by introducing facts of tearing the wearing apparels which is not reflected from the seizure list and she having accepted the fact that there was a dispute with the accused with regard to installation of electricity and she has already taken a sum of Rs.50,000/- from another person who she claimed had an affair with her daughter.

[18] Having considered the aforesaid facts and the medical evidence which do not reflect that any form of injury was committed on the girl, I am of the view that so far as the version of the victim is concerned, the same can be extended to the fact that the accused tried to outrage the modesty of the victim and not beyond the same. Having regard to the said factum, I am of the view that the order of finding of guilt, conviction and sentence so passed by the learned trial court under Sections 376/511 of the Indian Penal Code be converted to Section 354 of the Indian Penal Code.

[19] The accused, therefore, is convicted under Section 354 of the Indian Penal Code.

[20] Records reflect that the accused/appellant was in custody from 21.06.2011 to 03.09.2011 during the stage of investigation and/or at the pre-trial stage and was again taken into custody on 25.04.2019. The accused continued in custody till 04.02.2020 when the appellate court was pleased to release the appellant on bail on certain terms and conditions during the pendency of the appeal. I find, therefore, the appellant has already served out a sentence of more than eleven and a half months. Having considered the period of sentence so undergone by the appellant, I am of the view that the offence so committed at the instance of the appellant be reduced to the period of detention already undergone by the accused.

[21] With the aforesaid observations, the appeal being CRA 333 of 2019 is partly allowed.

[22] Pending connected application, if any, is consequently disposed of.

[23] Department is directed to send back the lower court records along with a copy of this judgment immediately to the learned trial court.

[24] All concerned parties shall act on the server copy of this judgement duly downloaded from the official website of this Court.

[25] Urgent photostat certified copy of this judgement, if applied for, be given to the parties upon compliance with all requisite formalities

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2024(2)PRC594

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Revati Mohite Dere; Prithviraj K Chavan]

Criminal Appeal No 595 of 2014 **dated 11/09/2024**

Ramesh Krishna Gopnur

Versus

State of Maharashtra

SEXUAL ASSAULT ON MINORS

Indian Penal Code, 1860 Sec. 354, Sec. 323, Sec. 506, Sec. 376 - Protection of Children from Sexual Offences Act, 2012 Sec. 29, Sec. 8, Sec. 4 - Sexual Assault on Minors - Appellant convicted for sexually assaulting five minors aged between 8 to 13 years - The incidents occurred over two years, and victims initially did not disclose the assaults due to fear - Case came to light when a witness saw one of the assaults - Medical examinations corroborated the victims' testimonies - Trial court convicted the appellant under IPC Sec. 376(f), 354, 323, 506, and POCSO Sec. 8 and 4 - Appellant argued false implication due to a land dispute, but Court found no merit in this defense. Conviction and life sentence upheld, with directions for compensation to the survivors - Appeal Dismissed

Law Point: Under POCSO Act Sec. 29, presumption of guilt applies unless rebutted. Medical evidence and consistent victim testimony validated conviction.

Acts Referred:

Indian Penal Code, 1860 Sec. 354, Sec. 323, Sec. 506, Sec. 376

Protection of Children from Sexual Offences Act, 2012 Sec. 29, Sec. 8, Sec. 4

Counsel:

Laxmi Raman, Gauri S Rao, A R Kapadnis

JUDGEMENT

Revati Mohite Dere, J.- [1] By this appeal, the appellant has impugned the judgment and order of conviction and sentence dated 29th March 2014 passed by the learned Additional Sessions Judge, Vasai, Thane in Session Case No. 33/2013 as under:

- for the offence punishable under Section 376(f) of the Indian Penal Code ('IPC'), to suffer life imprisonment and to pay a fine of Rs.50,000/-, in default, to suffer rigorous imprisonment for 2 years;

- for the offence punishable under Section 8 of the Prevention of Children from Sexual Offences Act ('POCSO Act'), to suffer rigorous imprisonment for 3 years and to pay a fine of Rs. 15,000/-, in default, to suffer rigorous imprisonment for 6 months;

- for the offence punishable under Section 506 of the IPC, to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for 6 months;

- All the substantive sentences were directed to run concurrently.

- The appellant, in addition to the fine amount, was directed to pay compensation of Rs.1,00,000/- each to the survivers A, B, C and E.

- The appellant was directed to pay compensation of Rs.10,000/- to surviver D.

- On deposit, the compensation amount was directed to be kept in Fixed Deposit in any Nationalised Bank in the joint names of survivers and their respective mothers and on attaining the age of majority, the amount along with interest was directed to be paid to the survivers.

Since, it is a POCSO case, the identity of the victim girls is concealed.

[2] The prosecution case in brief is as under:

The appellant and the complainant (PW7) are close relatives, inasmuch as, PW7 is the wife of the brother-in-law of the appellant. It is the prosecution case that the appellant sexually assaulted five girls. All the victim girls were between the age group 8 years to 13 years and living in the same village as the appellant. The said incident of sexual assault by the appellant on the victim girls went on for about 2 years. It is only when PW6 saw the appellant sexually assaulting one of the victim girls, the complainant (PW7) was informed of the same, pursuant to which, PW7 lodged an FIR against the appellant alleging offences punishable under Sections 376(f), 354, 323 and 506 of the Indian Penal Code and Sections 4 and 8 of the Prevention of Children from Sexual Offences Act. The victim girls were sent for medical examination and after investigation, charge-sheet was filed in the said case in the Court of the Judicial Magistrate First Class, Vasai. Since the offences were triable by the Court of Sessions, the case came to be committed to the Court of Sessions, for trial.

The trial Court framed charge against the appellant, to which, the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of its case, examined 12 witnesses i.e the victim girls PW1 (Survivor A); PW2 (Survivor B); PW3 (Survivor C); PW4 (Survivor D); PW5 (Survivor E); PW7, the complainant (mother of one of the survivor-PW2); PW6, (eye-witness), who witnessed sexual assault by the appellant on one of the victim girls; two medical officers i.e. PW8-Dr. Sheela Chakre and PW 10-Dr. Ravindra Deokar; PW9-Nancy Pareira, panch to the spot panchnama; PW11-Amol Ghag (photographer) and PW 12-Mrs. Muthe (the Investigating Officer).

Thereafter, the 313 statement of the appellant was recorded. His defence was of denial and false implication. The appellant did not examine any witness in support of his case.

The learned Judge, after hearing the parties, was pleased to convict the appellant as stated aforesaid, in paragraph 1.

[3] At the outset, we may note that as soon as the appeal was called out for hearing, Advocate Mr. Aniket Vagal stated that he has given his no objection to the appellant and as such stated that he has no instructions to appear in the aforesaid appeal. Hence, we appointed Ms. Laxmi Raman, who is on the Legal Aid Panel to espouse the cause of the appellant. We also appointed Mr. A. R. Kapadnis as amicus curiae to espouse the cause of the original complainant.

[4] Mrs. Raman, learned appointed advocate submitted that the evidence of the victim girls does not inspire confidence, inasmuch as, they have not disclosed the sexual assault on them by the appellant, for almost 2 years. She submitted that the appellant has been implicated because of the dispute between the appellant and his brother-in-law on account of agricultural land situated at Vasai, Thane. She submitted that having regard to the evidence on record, the conviction of the appellant cannot be sustained and as such, the appellant be acquitted of the offences, for which he is convicted.

[5] Mrs. Rao, learned A.P.P submitted that no interference was warranted in the impugned judgment and order of conviction and sentence. She submitted that the evidence of the victims, is corroborated by medical evidence and that mere delay would not render the evidence of the prosecutrix, suspicious. She further submitted that the evidence of each of the victim girls inspires confidence and as such, will show the manner in which the appellant sexually assaulted them. She further submitted that PW6, an eye-witness has also duly corroborated the evidence of the victim girls.

[6] Mr. Kapadnis learned appointed advocate for the original complainant supported the submissions advanced by the learned A.P.P. Mr. Kapadnis further submitted that the appellant has not even rebutted the presumption under Section 29 of POCSO Act. Mr. Kapadnis relied on the judgment of the Apex Court in the case of **Nawabuddin vs. State of Uttarakhand**, 2022 5 SCC 419 , to show how crimes against women and children, in particular, under the POCSO Act are to be dealt with.

[7] Heard learned counsel for the parties and perused the evidence. We will first deal with the evidence of the victim girls i.e. PW1 (Survivor A); PW2 (Survivor B); PW3 (Survivor C); PW4 (Survivor D) and PW5 (Survivor E).

[8] PW1-Survivor A, at the time of the incident, was aged 11 years. Her date of birth being 25th May 2000. According to PW1, she knew the appellant, as he was the husband of her paternal aunt and hence, would call him Mama. She has stated that the appellant was living behind their house and that he would call her for cleaning utensils.

PW1 has further stated that the appellant would hold her hand, remove her underwear, gag her mouth and thereafter, would sexually assault her after applying oil to her private part; that the appellant would threaten her not to disclose the same or else he would beat her, and that after the sexual assault, the appellant used to tell her to go home. According to PW1, the first incident took place about 2 years prior (to recording of her evidence) and although, she had pain, she did not disclose the said incident to anyone. She has stated that the said incident took place at the appellant's house at 'R'. She has stated that again when she had gone to her paternal aunt's place at 'P, when her aunt had gone to the agricultural field, the appellant sexually assaulted her. PW1 has further deposed that the appellant had called PW5 to perform dance and that he had done the same thing with her, as he had done with her and that the said incident was witnessed by PW6 and one 'J' and that PW6 and 'J' disclosed the same to PW2's mother, after which, she too disclosed the incident to her mother. PW1 has identified the appellant in Court.

A perusal of the cross-examination would show that there is no cross to the date of birth of PW1 and as such, the same has gone unchallenged. Thus, the prosecution has proved that PW1 was 11 years old when the said incident of sexual assault started. It is pertinent to note that there is absolutely no cross also on the actual incident as deposed to by PW1 with respect to sexual assault on her, as stated hereinabove. The only cross conducted is on the activities of PW1 in school i.e. playing Kho-Kho, Kabaddi, etc. and with respect to the house. There is also no suggestion with respect to any dispute over any agricultural land. Thus, the evidence of PW1 vis-à-vis the actual incident of sexual assault as well as her date of birth, has gone unchallenged.

[9] PW2-Survivor B was also a minor, studying in standard V at the relevant time. She has stated that after coming from school, she would clean utensils in the house, do sweeping and also study. She has stated that the appellant was called, Mama and would live at a short distance from their house; that, whereas Mama lived at 'R', his wife and children would live at 'P'. PW2 has deposed that Mama used to call her and send her to a shop to bring bidi for him and thereafter, he would close the door and sexually assault her; and that he did the same with her, about four times. PW2 has further stated that she disclosed the sexual assault to her mother, by the appellant, only in March 2013; as the appellant had extended threats to her that he would assault her. She has further stated that PW6 and 'J' had seen the appellant doing the said act with PW5 in the appellant's house at 'R', pursuant to which she also disclosed the incident to her mother.

Again, there is no challenge to the evidence of this witness with respect to PW2-Survivor B's age. Although, certain omissions have come on record, the said omissions are not material omissions and as such, do not in anyway discredit PW2's testimony, vis-a-vis sexual assault on her. Infact, some of the omissions are not omissions.

[10] PW3-Survivor C, was also studying in standard V. She too was studying in the same school as PW2, PW4 and PW5. She has stated that the appellant was known as Mama and would stay near their house, alone. PW3 has stated that the appellant used to call her to get bidi and matchstick from a shop; that after bringing the same, he would close the door and sexually assault her by gagging her mouth. She has stated that the incident occurred only once. She has stated that she did not disclose the said incident to any one, as the appellant had threatened her that if she disclosed the same, he would burry her. She has further deposed that the appellant would take her, PW4, PW2 and PW5 to a plot for eating cucumber and thereafter, he used to take them to a hut and thereafter, the appellant would make her lie down and would sleep on her. She has stated that on one day the appellant caught PW4 and PW5, however, as PW4 started shouting, he left her and caught hold of PW5 and did the same thing with PW5. She has stated that the said incident was witnessed by PW6 and 'J' through the window and they disclosed the said incident to PW5's mother, after which everybody learnt about the sexual assault on the girls by the appellant.

Although, the said witness PW3 was cross-examined at length, nothing material was elicited in her cross-examination, so as to discredit her testimony, nor is there any challenge to the age of the said witness.

[11] PW4-Survivor D, was at the relevant time in standard IV. She has stated that the appellant was called as Mama and that he was residing in front of her house, alone. She has stated that the appellant used to ask her to bring matchbox from the shop for him and after bringing the same, he would catch her and thereafter sexually assault her; that he did the said act for about 5 to 6 times. She has stated that the said act was done in his house as well as in a hut on a plot, when she and others had gone for eating cucumber. She has further deposed that she did not disclose the incident to anyone, as the appellant had abused her and told her that he would burry her, 'Gadun Takin'. PW4 has stated that she had pains in her private part and that she had informed her mother about the pains at the time of taking a bath. She has deposed that her mother learnt of the incident from PW2's mother, after PW6 and 'J' saw the incident. She also disclosed about the incident, which took place on PW5.

Again, the cross examination of this witness is not on the actual incident of sexual assault. Infact, in para 7 of the cross-examination, witness has stated that "it has happened that Mama took all of us inside the hut and removed our nickers". The suggestions given to PW4, have been denied by the said witness. It may also be noted that there is no challenge to the age of the said witness.

[12] PW5-Survivor E was aged around 9 years at the relevant time. She too has disclosed that the appellant was known as Mama and that he would stay alone in the house near theirs; that he would ask her to bring matchbox for him and thereafter would sexually assault her by gagging her mouth. She has stated that the said act was not only done in his house but also in a hut on a plot. She has further stated that PW6

and 'J' had witnessed the incident in the hut in the house of Mama and had disclosed the incident to PW2's mother, after which, PW2's mother approached the police.

Again, there is no cross with respect to the incident of sexual assault on PW5 nor any challenge with respect to her age. There is nothing material in the cross-examination, so as so discredit the evidence of this witness.

[13] PW6 was also studying in standard IV in the same school alongwith other prosecutrix at the relevant time. He has stated that the appellant was called as Mama and that he would ask the children to bring bidi, match box and sugar and that he would tell PW1 and PW2 to clean utensils. According to PW6, on the day of incident, he, PW4 and PW5 were playing near the house of the appellant and he called them. He has stated that on one such occasion, he had followed the appellant to see what he was doing. He has stated that he saw the appellant sexually assaulting PW2, PW4 and PW5. He has stated that the appellant used to threaten all the children not to disclose the incident or he would burry them. He has further stated that he and 'J' disclosed the incident to everyone.

Again, in the cross-examination, there is nothing which has come on record to disbelieve or discredit the evidence of the said witness. Infact, there is no cross-examination to what was deposed by the said witness with respect to him having witnessed sexual assault on the victim girls.

[14] The complainant/first informant was examined as PW7. She has stated that on 17th March 2013, she learnt from PW6 that the appellant sexually assaulted PW5; that he had seen the incident from the gap of a hole. She has stated that thereafter PW1 disclosed that the appellant was doing the same thing with her, when he would call her to clean the utensils and that he did the said act about 10 to 12 times. Pursuant thereto, PW7 lodged an FIR with Valiv Police Station, Vasai, Thane, against the appellant. The said FIR is exhibited as Exhibit 23.

[15] The aforesaid evidence i.e. of the survivors as well as PW6 and PW7 is consistent and corroborates each other. The said evidence is also duly corroborated by the medical evidence and Chemical Analyser's report, which has come on record.

[16] PW8-Dr. Sheela Chakre was attached to G.S. Medical College and K.E.M. Hospital, at the relevant time. She has stated that on 21st March 2013, five minor girls were referred for medical examination and that she and two other doctors from the Gynaecological Department examined the said girls.

PW8 has deposed that the date of birth of PW1 was given as 25th May 2000 and that she was about 13 years of age at the time of examination. She has stated that PW1 disclosed to her that she was sexually abused by her Mama i.e. her aunt's husband for 2 years; that the said act was done at his home and in the farm. She has further deposed that PW1 gave history of sexual assault of penis penetration and feeding of breast; of wiping of genitals by cloth (towel/bed sheet) by the appellant; and of using oil at the

time of the act. PW8, on examination, found that the hymen was ruptured and there was cornuculae formation seen. On physical examination, it was found that there was penetration. PW8 has deposed that the age of PW1 was around 13 to 14 years.

According to PW8, she also examined PW2 on the same day i.e. on 21st March 2013; that the date of birth of PW2 was 11th June 2004 and as such, she was 9 years of age at the time of her examination; that the history given by PW2 was that the sexual assault, one month prior to her examination; that there was an attempt of penetration but as she screamed, the appellant gagged her and thereafter stopped the act. On physical examination, PW8 found a small tear of 4 O'clock position over the hymen and that the hymen was not totally ruptured and as such, opined that there was evidence of chronic vaginal penetration but no evidence of any pysical abuse. She has stated that the age of the survivor was 9 years and as her vagina was not fully developed, inspite of chronic penetration, it has not gone inside and as such, there was only a tear at 4 O'clock position.

PW8 thereafter examined PW3, who gave her date of birth to be 9 years. According to PW8-Dr.Chakre, PW3 also gave history of penile penetration, which she resisted; that she was threatened not to reveal the act to any person. On examination, PW8 found that there was an old multiple tear to hymen from 7 O'clock to 9 O'clock position; that the hymen was not totally ruptured, however, on examination, evidence was found of chronic vaginal penetration. She has stated that as PW3 was aged 9 years, her vagina was not fully developed, inspite of chronic penetration, it has not gone inside and hence, a tear at 7 O'clock to 9 O'clock position was seen. She has stated that on hitting of penis on vagina, such tear can be caused.

PW5 was also examined on 21st March 2013 by PW8. PW8 has given PW5's date of birth as 15th July 2003. She has further deposed that the history given by PW5 was attempted penial penetration along with holding hands and history of showing porn video. On examination, it was found that there was a small tear at 4 O'clock position with presence of slight inflammation around the opening of hymen. The inflammation indicated recent sexual assault. PW8 also found that the hymen was not totally ruptured and as such, opined that there was evidence of recent vaginal penetration.

The said evidence of PW8 is duly supported by medical case papers, which have been exhibited as Exhibits 26, 28, 30, 33 and 37.

[17] Although PW10-Dr. Ravindra Deokar, who gave the report with respect to the ages of the survivors, was examined to prove the ages of the survivors, since there is no challenge by the appellant to the ages of the survivors, it is not necessary to deal with the said evidence, since the said evidence also show that the victim girls were all minors at the relevant time.

[18] Considering the aforesaid evidence, it is evident that all the five victim survivors were sexually assaulted by the appellant. Not only the evidence of the survivors inspires confidence but the same stands duly corroborated by the medical

evidence and the evidence of PW6 who had witnessed the incident of sexual assault. All the survivors were minors, between the age group of 8 to 13 years. Under Section 29 of the POCSO Act there is a presumption. The said presumption has not been rebutted by the appellant.

[19] Considering the aforesaid evidence on record, we do not find any infirmity in the impuguned judgment and order of conviction and sentence and as such, uphold the conviction and sentence imposed by the trial court. Accordingly, the Appeal stands dismissed.

[20] We would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms. Laxmi Raman, as an appointed advocate for the appellant, in conducting the appeal and Mr. A. R. Kapadnis, as an amicus curiae. High Court Legal Services Committee to award fees to both the learned counsel, as per Rules

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2024(2)PRC601

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Application (Bail) No 758 of 2024, 760 of 2024 **dated 10/09/2024**

Shailendra Yeshwant Garad; Saurabh Mahadev Dawne

Versus

State of Goa

BAIL GRANTED

Goa Children's Act, 2003 Sec. 8 - Protection of Children from Sexual Offences Act, 2012 Sec. 12 - Rights of Persons With Disabilities Act, 2016 Sec. 92 - Bharatiya Nyaya Sanhita, 2023 Sec. 126, Sec. 111, Sec. 351, Sec. 131, Sec. 3, Sec. 352, Sec. 192 - Bail Granted - Applicants were charged under various provisions including the Goa Children's Act and POCSO Act for wrongful restraint and abuse towards a handicapped individual and a minor - Incident arose from a parking dispute - Applicant Shailendra also filed a complaint which was not considered initially - Investigation did not show any organized crime involvement - Court observed that the altercation occurred in the heat of the moment and did not warrant continued judicial custody - Applicants granted bail with conditions - Bail Allowed

Law Point: Bail can be granted when an incident arises from a spontaneous altercation, and custodial interrogation is not necessary for further investigation.

Acts Referred:

Goa Childrens Act, 2003 Sec. 8

Protection of Children from Sexual Offences Act, 2012 Sec. 12

Rights of Persons With Disabilities Act, 2016 Sec. 92

Bharatiya Nyaya Sanhita, 2023 Sec. 126, Sec. 111, Sec. 351, Sec. 131, Sec. 3, Sec. 352, Sec. 192

Counsel:

C A Ferreira (Senior Advocate), Vibhav Amonkar, Nehal Govekar, S Karpe, Ritesh Rawal, Pravin Faldessai

JUDGEMENT

Bharat P. Deshpande, J.- [1] Heard learned Counsel for the parties. Case papers are now produced.

[2] Mr Ferreira submits that the complaint lodged by Applicant in B.A.(F) No.758/2024 with Mapusa Police Station was not taken to its logical conclusion. However, he now produces a copy of NC complaint registered on 10.09.2024 i.e. today at 12:15 hours and that too under Section 352, 351(2) of BNS 2023 (NC complaint).

[3] The incident took place on 23.08.2024 at around 23:45 hours. The complaint was lodged at Mapusa Police Station at around 13:51 hours on 24.08.2024.

[4] Along with the said complaint, the Accused by name Shailendra was also in the Police Station along with his written complaint dated 24.08.2024. However, such complaint was not considered by the investigating agency and only today it is registered as NC complaint, when the Accused is in custody from the date of arrest i.e. from 24.08.2024.

[5] Fir No.122/2024 is registered against the present Applicants for the offences punishable under Sections 111, 126, 192, 352, 131, 351(3), 3(5) of BNS 2023 along with Section 8 of Goa Children's Act, Section 92A of the Rights of Persons with Disabilities Act, 2016 and Section 12 of POCSO Act.

[6] Allegation against the Applicants and other Accused persons is that with a common intention, they wrongfully restrained the Complainant who is a handicapped, his students out of which one is minor, abused them with filthy words, insulted the Complainant in public by calling him as handicapped and made serious gestures to assault the Complainant and his students, threatened them with dire consequences and created a riotous situation at the spot.

[7] The application filed by the Applicant before the learned Sessions Court/Children's Court was rejected by order dated 30.08.2024. While rejecting such application, the learned Court observed in para 21 that in the present case, prima facie, Section 111 of BNS is not attracted as it cannot be said that it is a part of organized crime syndicate.

[8] Even otherwise, the complaint dated 24.08.2024 and the investigation carried out till date, prima facie, could not show that the offence lodged against the Applicant and others could be part of an organized crime syndicate.

[9] Though there is no doubt that Applicant by name Shailendra is facing various cases which are found mentioned in para No.1 of the reply itself, it is now reported that only four cases are pending as on date, whereas in remaining matters, said Shailendra has been acquitted.

[10] The fact remains that the complaint was lodged by Shailendra with Mapusa Police Station on 24.08.2024 itself wherein he has disclosed the entire incident and claimed that the Complainant and his associates fired the shots from the instruments which they were carrying in the car thereby creating an impression that such instruments are used as fire arms.

[11] Though along with the complaint, some certificates are produced stating that the said instruments are used in competitions as a sports event, it is clear that such instruments as per the licence are required to be used only as permitted therein i.e. during a practice session and that too in the firing range or during a competition organized by the concerned authorities having permission to do so.

[12] Though the incident occurred on 23.08.2024 as disclosed by both the sides i.e. the Complainant as well as the Accused Shailendra in their respective complaints, it is a fact that no cognizance of the complaint filed by Shailendra was taken by the concerned officer. However, it is now registered as NC complaint and that too at 12:15 hours today only. It is surprising that inspite of a written complaint, no steps were taken by the concerned officer in-charge of Mapusa Police Station.

[13] The allegations against the present Applicant would clearly show that the incident happened on the spur of moment and on a dispute with regard to parking of a scooter in front of a car used by the Complainant and his team members. The hurt certificate shows that there is no external injury caused to the Complainant though there are allegations of assault and giving threats including the minor.

[14] Even though there are cases pending against Accused Shailendra wherein he is attending the matters, peculiar circumstances of the matter in hand would go to show that the alleged incident happened only because of the parking of a vehicle and that too in a spur of moment. Though there are exchange of words and alleged threats, question of custody of the Applicant any further, would not be considered as necessary.

[15] As far as Shailendra is concerned, there are no allegations that he has violated the bail conditions in respect of the matters which are pending against him. In the given circumstances and the fact that the investigation in the present proceedings nowhere require custodial interrogation of the present Applicants who are admittedly in judicial custody, no purpose would be served by denying bail.

[16] Applicants are the permanent residents of the addresses disclosed in the application. Accordingly, they could be released on bail by imposing conditions.

[17] The application accordingly stands allowed. The Applicants shall be released on bail on furnishing personal bond of Rs.25,000/- with one solvent surety in the like amount to the satisfaction of the learned Children's Court and on the following conditions:

i. Applicants shall attend the Police Station as and when called.

ii. Applicants shall not in any manner try to influence the Complainant or the Prosecution witnesses or try to contact them directly or indirectly.

iii. Applicants shall not leave the State of Goa without the permission of the learned Children's Court.

[18] Application stands disposed of in the above terms.

[19] Parties to act on an authenticated copy of this order

2024(2)PRC604

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Bharat P Deshpande]

Criminal Revision Application No 3 of 2022 **dated 10/09/2024**

State of Goa

Versus

Manjunath Srisangi

VICTIM'S AGE DISPUTE

Goa Children's Act, 2003 Sec. 8 - Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 9, Sec. 10, Sec. 5, Sec. 8, Sec. 11, Sec. 4, Sec. 12 - Victim's Age Dispute - Appellant-State challenged the discharge of the respondent accused from charges under the Goa Children's Act - Victim was above 16 on the date of the incident, but her statement revealed that the accused had committed similar acts when she was under 16 - Court held that the trial court's focus on the incident date ignored prior acts which occurred when the victim was a minor - Impugned discharge order quashed and the case remanded to the Children's Court for trial on all incidents, including those from when the victim was under 16 - Petition Allowed

Law Point: For charges under the Goa Children's Act and POCSO, all incidents involving minors must be considered, including those occurring before the victim reaches the age of 16.

Acts Referred:

Goa Childrens Act, 2003 Sec. 8

Protection of Children from Sexual Offences Act, 2012 Sec. 6, Sec. 9, Sec. 10, Sec. 5, Sec. 8, Sec. 11, Sec. 4, Sec. 12

Counsel:

Pravin N Faldessai

JUDGEMENT

Bharat P. Deshpande, J.- [1] Heard Mr Pravin Faldessai, learned Additional Public Prosecutor for the Applicant State.

[2] Even though the respondent is duly served, he failed to appear in the present matter.

[3] On 28.07.2022, this Court has recorded as under:-

'P.C.

1. Advocate Ryan Menezes submits that he has instructions to appear on behalf of the Respondent and seeks time of two weeks to file Vakalatnama.

2. Time granted. Stand over to 29.08.2022.'

[4] However, till date, no one appears on behalf of the respondent.

[5] The challenge in the present revision is to the order dated 21.09.2021 passed by the learned Children's Court whereby the respondent was discharged from the offence punishable under Section 8(2) of the Goa Children's Act only on the ground that the victim was 16 years 4 months old on the day of the alleged incident which occurred on 14.02.2021.

[6] Mr Faldessai would submit that, first of all, such findings are perverse to the record itself and, more specifically, to the statement of the victim. He submits that though a complaint was filed on 16.02.2021, the alleged incident was much prior to that day and even continued when the victim was minor, i.e. below the age of 16 years.

[7] Mr Faldessai, while pointing out to the statement of the victim would submit that the learned Children's Court completely lost sight of such statement which would clearly go to show that the overt act of the accused started much prior to the date when the complaint was lodged and which actually started when the victim was in the Seventh Standard and probably about a year or so before the alleged incident. The chargesheet came to be filed by the Women Police Station, Panaji, against the respondent for various offences under IPC along with Section 8(2) of Goa Children's Act and Sections 4, 5, 6, 8, 9, 10, 11 and 12 of POCSO Act.

[8] The chargesheet was presented before the Children's Court on the premise that the victim was minor and even below 16 years of age at the time of alleged offence, thereby giving jurisdiction to the Children's Court to try the offences including the offences under the IPC as well as under POCSO Act.

[9] During the investigation, the statement of the victim was recorded and that too, in the presence of Victim Assistance Unit. Medical examination of the victim was carried out and the report is placed on record.

[10] The report clearly shows that the victim is the daughter of the accused. There are serious allegations against the accused by his own daughter. The statement recorded by the investigating agency on 16.02.2021 would clearly reveal that the last such act was committed on 14.02.2021. However, thereafter, the victim has narrated that such acts were performed on her forcibly by the accused even on earlier occasions. She has narrated the details and stated that such overt acts started when she was in the Seventh Standard. She also disclosed that she left school about a year back.

[11] The impugned order would show that the trial Court has only considered the alleged incident which occurred on 14.02.2021 and not the statement of the victim which discloses some acts performed by the accused on earlier occasions, spanning over a period of around one year prior to 14.02.2021.

[12] The learned trial Court failed to consider such aspects and observed that on 14.02.2021, the victim was above 16 years.

[13] As per the birth certificate, the date of birth of the victim is 30.09.2004. It may be correct that on 14.02.2021 the victim was above 16 years of age. However, that is not the sole incident which the victim has disclosed in the statement. Such overt acts were performed by the accused even prior to 14.02.2021, which are found in the statement of the victim. She has clearly disclosed that such acts started somewhere when she was in Seventh Standard, which means, around a year prior to 14.02.2021. Thus, if said statement is taken into account as the date of starting of such acts which is required to be taken into account as offences under the Children's Act, the victim was certainly below the age of 16 years. Thus, the observations of the learned Children's Court in the impugned order are found to be perverse and incorrect.

[14] The impugned order, therefore, needs to be interfered with. Accordingly, the order dated 21.09.2021 in Sp. Case No.29/2021, thereby discharging the accused/respondent for the offence punishable under Section 8(2) of the Goa Children's Act, 2002, is hereby quashed and set aside. The matter is, therefore, remanded back to learned Children's Court since it is reported that the chargesheet was returned to the Investigating Officer for presenting it before the learned Sessions Court/POCSO Court.

[15] The concerned Sessions Court/POCSO Court is, therefore, directed to hand over the chargesheet to the Children's Court. The case which was registered before the Children's Court bearing Sp. Case No.29/2021 is, accordingly, restored.

[16] The respondent to appear before the Children's Court on 23.09.2024 at 10:00AM. In the meantime, the file shall be transferred to the Children's Court.

[17] Copy of this order be forwarded to the learned Principal District & Sessions Judge, North Goa, for issuing necessary directions to the concerned Court.

[18] Revision Application stands disposed of

2024(2)PRC607

IN THE HIGH COURT AT CALCUTTA

[Before Ajoy Kumar Mukherjee]

Cr R (Criminal Revision) No 3247 of 2022 **dated 10/09/2024**

Chanchal Bishnu

Versus

State of West Bengal

QUASHING OF CHARGES

Indian Penal Code, 1860 Sec. 341, Sec. 354A, Sec. 34, Sec. 325, Sec. 354, Sec. 498A, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 156, Sec. 161, Sec. 164, Sec. 228 - Dowry Prohibition Act, 1961 Sec. 4, Sec. 3 - Protection of Children from Sexual Offences Act, 2012 Sec. 10, Sec. 17, Sec. 8, Sec. 12 - Quashing of Charges - Petitioners sought quashing of charges under IPC and POCSO Act - Dispute stemmed from marital issues between petitioner and wife - Victim's age disputed, with contradictory statements about whether she was a minor at the time of alleged offense - Court noted inconsistencies in statements under sections 161 and 164 of CrPC, suggesting charges were an afterthought - Charges under POCSO Act quashed, case returned to magistrate to continue under IPC sections for which cognizance had been taken. - Charges Quashed

Law Point: Charges based on contradictory and inconsistent statements, particularly when unsupported by concrete evidence, can be quashed, especially under serious laws like POCSO.

Acts Referred:

Indian Penal Code, 1860 Sec. 341, Sec. 354A, Sec. 34, Sec. 325, Sec. 354, Sec. 498A, Sec. 323, Sec. 506

Code of Criminal Procedure, 1973 Sec. 156, Sec. 161, Sec. 164, Sec. 228

Dowry Prohibition Act, 1961 Sec. 4, Sec. 3

Protection of Children from Sexual Offences Act, 2012 Sec. 10, Sec. 17, Sec. 8, Sec. 12

Counsel:

Tapas Kumar Ghosh, Tanmay Chowdhury, Anusuya Sinha, Jonaki Saha, Samrat Choudhury Debnandan Bhattacharyya

JUDGEMENT

Ajoy Kumar Mukherjee, J.- [1] This application pertains to a prayer for quashing of the proceeding being ST 05 (7) 2022 under sections 341/354/354A/506/ 34 of the Indian Penal Code (IPC) read with sections 8/10/12 of the Protection of Children from Sexual Offences Act 2012 (hereinafter called as POCSO Act), presently pending before learned Additional Special judge second Court, Suri, Birbhum.

[2] Petitioners contention is that about 20 years of marriage some dispute cropped up in between petitioner no.1 and his wife. As a result series of litigations are going on between the aforesaid husband and wife. It is alleged by the petitioner that the wife of petitioner just to harass and humiliate the petitioner no.1 filed a complaint on 14.03.2020 under section 156(3) of the Code of Criminal Procedure, with a prayer for directing concerned police station to start investigation under sections 498A/323/325/506 of the India penal Code read with section 3,4 of the Dowry Prohibition Act and as per direction, Suri police station case no. 23 of 2021, dated 22nd January, 2022 was registered for investigation. After completion of investigation police submitted charge sheet on August 31st 2021 under sections 341 /506/34 of the Indian Penal Code against the petitioners/accused persons.

[3] However, learned Magistrate on perusal of materials was of the view that this case is serious in nature and statement of the complainant under section 164 of the code is required to be recorded and as such learned magistrate directed for further investigation. Thereafter, statement of the complainant and the victim was recorded by the investigating authority and sections 8/10/12 of the POCSO Act was added. Thereafter police submitted charge sheet for the second time under sections 341/323/354A /506/34 of the Indian Penal Code, read with sections 8/10/12 of the POCSO Act, 2012 and the case was transmitted for disposal to the aforesaid Special Court constituted under POCSO Act. Thereafter on 22.07.2022 aforesaid court below framed charge against petitioner Amit Bishnu under section 354A of IPC read with section 08 of POCSO Act and under section 506 of IPC and section 17 of POCSO Act against chanchal Bishnu.

[4] Being aggrieved by the aforesaid proceeding, Mr. Ghosh learned counsel appearing on behalf of the petitioner submits that on perusal of the written complaint it appears that when the alleged occurrence took place the victim became major and as such alleged offence under POCSO Act against petitioners do not attract. He further submits that the entire core of dispute has arisen out of marital relationship by and between the petitioner no. 1 and his wife and several cases are pending against each other and the present complaint has been filed with a view to put the petitioners behind the bar on nasty allegations only to satisfy her ill motive. Accordingly petitioners have prayed for quashing the entire proceeding.

[5] Learned counsel appearing on behalf of the opposite party no.2 raised objection against the contention made on behalf of the petitioners and argued that on

plain reading of the complain as well as materials available in the case diary clearly suggest that when the offence committed upon the victim, she was minor and accordingly after recording statement of the defacto complaint and the victim under section 164 of Cr.P.C, charge-sheet has been submitted under the relevant provisions of the POCSO Act and the charge has been framed rightly under the relevant provisions of the POCSO Act. He further submits that the truth will reveal after conclusion of trial and at this stage the question of discharging the accused persons under which they are being charged do not arise and as such he prayed for dismissal of the present application.

[6] Ms. Sinha learned counsel appearing on behalf of the state placed the case diary and leaves the matter for the discretion of the court.

[7] I have considered submissions made by both the parties.

[8] From the documents available on record, it appears that in the FIR the date of occurrence has been stated as 02.10.2021, 05.10.2021 and 06.10.2021. In the FIR, it has also been stated that the victim was born in the year 2003. However from the annexed documents it appears that the victim was born on 21.04.2000. In the FIR it has also been alleged that when the victim was aged about 8 years the accused no.2 has allegedly committed sexual offences which may attract POCSO Act. It has been argued by the petitioners that even if said statement of the FIR is taken to be true then victim attended 8 years in the year 2008 since she was born in 2000 and the POCSO Act came into force in 2012 and as such present case does not attract POCSO Act. In support of the date of birth of the victim, petitioners have also relied upon complainants another Application filed under section 12 of the Protection of Women from Domestic violation act 2012, wherein complainant has stated that the victim was aged 20 years and the said application was filed on 14th December, 2020.

[9] It is curious enough as appearing from order of the Magistrate dated 17.02.2022 passed in G.R. Case no. 1584 of 2021, that the charge sheet against the accused person was filed for the first time under sections 341/323/354/506/34 IPC and learned Magistrate accepted the charge sheet and cognizance also taken under the said offences but on the self same day by a later order he observed that no prayer was made on behalf of the investigating authority for recording statement of defacto complainant and victim under section 164 Cr.P.C., though there is allegation to the effect that the victim was minor when the offence was committed against her.

[10] After accepting charge sheet and after taking cognizance of said offences, the subsequent order of making further investigation with the observation that allegation discloses that the victim was minor at the time of offence, is clearly a perverse finding.

[11] In view of such order, which suffers from impropriety, Magistrate recorded statement of the defacto complainant and the victim under section 164 of the Cr.P.C. wherein victim who has been tutored in the meantime said that when she was 17 years, the alleged offence under the POCSO Act occurred. Be it mentioned that the order for

recording statement was made on 17.02.2022 and the statement of victim was recorded on 23.02.2022 and previously no statement of victim was recorded. However, defacto complainant though made statement under section 164 of Cr.P.C after order of Magistrate but she had not stated anything clearly, that the victim was minor, when the alleged offence committed upon her.

[12] Be it also mentioned that the statement of defacto complainant was recorded under section 161 of Cr.P.C., on 20.12.2021 i.e. before the aforesaid direction made by the magistrate on 17.02.2022 and in the said statement defacto complainant has not made any allegation against the accused persons that they had committed any offence against the victim when she was minor. However the statement of the victim and the defacto complainant recorded after passing the aforesaid order dated 17.02.2022 discloses that victim has stated that the alleged offence was committed when she was 17 years old. The statements under section 161 Cr.P.C was further recorded by police on 21.02.2022., after aforesaid order of Magistrate on 17.02.2022.

[13] The aforesaid contradiction in recorded statements of victim and defacto complainant under section 161 of Cr.P.C. and their subsequent statement recorded under section 164 Cr.P.C. clearly discloses that the subsequent allegations made in the statements recorded under section 161 and 164 of the Cr.P.C. are clearly afterthought and tutored and not at all believable and has been made wrecking vengeance upon the petitioners in order to spite them. It is also not clear from the order of the court below as to whether he had at all taken cognizance upon offence under the said provisions of POCSO Act 2012 though by order no.1 he had framed charge under section 354A read with section 8 of the POCSO Act against accused Amit Bishnu and section 506 of IPC and section 17 of POCSO Act against accused Chanchal Bishnu.

[14] While framing charge under section 228 of Cr.P.C, the court must ensure that the accusation made against the accused is not frivolous and there are some materials for proceeding against him. The mere fact that Magistrate referred the matter for recording statement of victim and defacto complainant and upon such direction their statements were recorded may not be enough to hold that there is reasonable probability or chance of the accused being found guilty inspite of abovementioned contradictions in the statements, which shows mala fide on the part of prosecution witnesses. Time and again it has been reiterated that at the time of framing charge, court can neither act merely as post office nor mouth piece of prosecution but he has to find out whether a prima facie case is made out against the petitioners/accused under the Act or not.

[15] In view of aforesaid discussion, the order no.1 dated 22.07.2022 in ST 05(7) 2022 by which the court below has framed abovementioned charges against the accused person and all subsequent orders are hereby quashed. The court below is directed to transmit the case record to learned Magistrate from whom the record was received and the said learned Magistrate is directed to continue the criminal

proceeding from the stage where he took cognizance under sections 341/323/354/506/34 IPC, vide order dated 17.02.2022 in G.R. case no. 1584 of 2021.

[16] Crr 3247 of 2022 is accordingly disposed of. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities

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2024(2)PRC611

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before A Badharudeen]

Crl M C (Criminal Miscellaneous Case) No 4268 of 2022 **dated 10/09/2024**

M J Sojan

Versus

State of Kerala; XXX

QUASHING POCSO COMPLAINT

Code of Criminal Procedure, 1973 Sec. 482, Sec. 473, Sec. 468 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3 - Protection of Children from Sexual Offences Act, 2012 Sec. 28, Sec. 23, Sec. 33, Sec. 4 - Quashing POCSO Complaint - Petitioner sought quashing of a private complaint under CrPC Sec. 482 in relation to a media comment made about the sexual assault of minor children - Allegations were made under POCSO Sec. 23 and SC/ST Act, claiming the petitioner's comments insulted the victims - Petitioner argued the comments were not intended for media publication and were instead a private exchange, later aired without consent - Court found the complaint against petitioner unsustainable, as the media was responsible for airing the comments - Complaint quashed, with potential action against media personnel - Complaint Quashed

Law Point: Section 23 of POCSO Act applies to media personnel or those who deliberately present comments about minors in public; liability requires intent to publish.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 473, Sec. 468

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3

Protection of Children from Sexual Offences Act, 2012 Sec. 28, Sec. 23, Sec. 33, Sec. 4

Counsel:

Thomas J Anakkallunkal, Jayaraman S, Nirmal Cheriyan Varghese, Litty Peter, Anupa Anna Jose Kandoth, Dhanya Sunny, Ann Milka George, Renjit George, P V Jeevesh

JUDGEMENT

A Badharudeen, J.- [1] This Crl.M.C. has been filed under Section 482 of the Code of Criminal Procedure (Cr.P.C. for short hereinafter) by the sole accused in S.C. No.551/2022 on the files of the Special Court, Palakkad, under the Protection of Children from Sexual Offences Act (POCSO for short hereinafter), seeking to quash Annexure-A1 complaint, Annexure-A4 order and further proceedings thereof.

[2] Heard the learned Senior Counsel for the petitioner, the learned counsel appearing for the 2nd respondent/defacto complainant. Heard the learned Public Prosecutor appearing for the 1st respondent.

[3] Here a private complaint was lodged by the 2nd respondent herein before the Special Judge under the POSCO Act, Palakkad under Section 28 read with 33 of the POCSO Act, alleging that the petitioner, who is arrayed as accused in the above complaint committed an offence punishable under Section 23(1) of the POCSO Act as well as Section 3(1)(r) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. 1989 (SC/ST Act for short hereinafter). Shorn of embellishments, the allegations which would throw light as to commission of the above offences could be gathered from Paragraphs 8 and 9 of the complaint and the same are extracted as under;

"8. After the acquittal of the accused, there were large scale public protests against the action of the police all over Kerala. In the meanwhile on 13.1.2019 the accused who investigated and laid the final report in the death of the two children of the Complainant furnished an information against the two deceased children on the effect that in fact the two children 'enjoyed' the sexual acts committed by the accused. It was given through a programme in 24 news channel which was anchored by Dr. Arun Kumar and the statement was made to the reporter Shanoob Meerasahib. The accused provided the false information against the children, knowing it to be false and thereby victimized the children again in the same offence. He further stated to the reporter of the 24 channel that the accused person committed sexual assault on the children with their consent. The Complainant submits that the comments made by the accused are absolutely false and frivolous. It is submitted that the accused had no occasion to interact with the children. He gave this comment without having any authoritative information. It is further submitted that the Complainant is a woman belonging to cheruma community which is included in the scheduled caste with respect to Kerala state as per clause 24 of Article 366 r/w article 341 of the Constitution of India. Being the investigating officer in the case of the deaths of the children, the accused was fully aware that the deceased children belong to scheduled caste. The accused made the comment against the children with the intention to insult and humiliate the children as well as the Complainant within the public view. Copy of that video clipping is produced along with this complaint. The video of the programme is uploaded in their you tube channel.

9. The conversation between the reporter Shanoob Meerasahib and the accused was telecasted in 24 news channel on 13.1.2019 and the same was seen and heard by thousands of people all over Kerala as well as outside Kerala. This statement of the accused have caused ill feelings against the deceased children who met pathetic death from the hands of the murderers. The statement would have harmed the reputation of the children if they were alive. The imputations were intended to be harmful to the feelings of the Complainant who is their mother and guardian. The reputation of the deceased children as well as the Complainant cannot be allowed to be crucified at the altar of the whims and fancies of the accused. It is submitted that the Complainant is an aggrieved person in this matter. By providing false information against the children, knowing it to be false the accused has committed the offence falling u/s 23(1) of the POCSO Act 2012 and also under sec 3(1)(r) of SC ST (Prevention of atrocities) Act 1989."

[4] While seeking quashment of Annexure-A1 complaint and Annexure-A4 order, whereby the learned Special Judge took cognizance and decided to proceed against the accused for the offence punishable under Section 23(1) read with 23(4) of the POCSO Act, learned Senior Counsel appearing for the petitioner fervently submitted that no offence under Section 23(1) would attract in the facts of the case as borne out from the averments in the complaint as well as from the statement recorded as that of CW1 and CW2. It is submitted further that Section 23 of POCSO Act deals with the caption "procedure for media" and the same is intended to punish media persons who report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information. Referring to Section 23(3) of the POCSO Act, the learned Senior Counsel argued that Section 23(3) makes the position more clear that this Section encompasses the publisher or owner of the media or studio or photographic facilities and not a third person. Therefore, going by the plain meaning of Section 23 as a whole, prima facie offence under Section 23(1) read with Section 4 of the POCSO Act would not attract in the facts of the case. Therefore, the learned Special Judge wrongly took cognizance for the offences on misreading the provision of law and the materials placed by the complainant and the facts involved in this case. Therefore, quashment prayer is liable to succeed.

[5] The learned counsel for the 2nd respondent also read out Section 23 in detail to counter the arguments advanced by the learned Senior Counsel on the submission that the term "no person" referred in Section 23 and the term "any person" referred in Section 23(4) have a wider canvas to include a third person, excluding the media persons, under the purview of the Section when the said person makes any report or present comments on any child from any form of media or studio or photographic facilities and therefore, the petitioner herein who also did the said overt acts through the media, would squarely come under the purview of Section 23 of POCSO Act. Accordingly, cognizance for the said offence by the Special Court as per Annexure-A4 is perfectly justified, for which no interference is necessary.

[6] Apart from the above contention, the learned Senior Counsel also would submit that since the punishment provided for the offence under Section 23(1) read with Section 4 is less than 6 months, in relation to an occurrence on 03.01.2017 for which complaint filed on 20.11.2021 is barred by limitation and therefore, the cognizance is hit under Section 468 of Cr.P.C.

[7] Repelling this contention, the learned counsel for the 2nd respondent submitted that in so far as continuing offence/s dealt under Section 473 of Cr.P.C. are concerned, Section 468 has no application. It is also submitted that even otherwise, Section 473 Cr.P.C. would give ample power to the court to condone the delay upon satisfaction of the materials and therefore, it has to be understood that while taking cognizance, the Special Court adverted to the power under Section 473 and therefore, the question of limitation is of no significance and the said contention is liable to fail.

[8] Attenuating the arguments on and of the issue, the question to be considered is; who are the persons covered under Section 23 of POCSO Act?

[9] In this connection, it is useful to refer Section 23 of POCSO Act and the same reads as under;

23. Procedure for media.--(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child. (3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

[10] Section 23(1) provides that making any report or presenting comments on any child through any form of media or studio or photographic facilities which may have the effect of lowering the reputation or infringing upon the privacy of the child/children without having complete and authentic information is an offence. As pointed out by the learned Senior Counsel, Section 23 is put under the caption "procedure for media". At the same time, the legislature not used "media persons" instead of "no person" in Section 23(1). Similarly, there was no legislative intention to

use "media persons", instead of "any person" in Section 23(4). It is the settled law that 'heading' or 'title' prefixed to sections or group of sections have a limited role to play in the construction of the Statutes. In the decision reported in Joseph Kuzhinjalil (Fr.) v Visalakshi,2024 KHCOnLine 753, this Court considered the same in Paragraph 13 referring to the Apex Court decision in this regard. Paragraph 13 reads as under;

"13. Similarly, another five bench decision of the Apex Court in Sarah Mathew and Others v. Institute of Cardio Vascular Diseases and Others,2013 4 KHC 806 with reference to paragraph No.38, where it has been held as under;

38. So far 'heading' of the chapter is concerned, it is well settled that 'heading' or 'title' prefixed to sections or group of sections have a limited role to play in the construction of Statutes. They may be taken as very broad and general indicators or the nature of the subject matter dealt with thereunder but they do not control the meaning of the sections if the meaning is otherwise ascertainable by reading the section in proper perspective along with other provisions. In **M/s. Frick India Ltd. v. Union of India and Others**, 1990 1 SCC 400: 1990 KHC 723: AIR 1990 SC 689: 1990 (27) ECC 8: 1990 (48) ELT 627, this Court has observed as under:

"It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provisions; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or subheading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."

[11] Going by the legislative intention, even though the title heading of Section 23 is 'procedure for media', it could not be held that the section is limited in operation in relation to media persons alone, since the Section empowers a wide canvass by referring the offender under the caption "No person" in Section 23(1) and "any person" in Section 23(4), who makes any report or presenting comments on any child through any form of media or studio or photographic facilities without having complete and authentic information.

[12] Reverting to the pertinent question, whether the petitioner herein would come within the ambit of Section 23 of the POCSO Act?, it is relevant to refer the factual averments in the complaint. Going by the allegations in the complaint in Paragraphs 8 and 9, as extracted herein above, the statement of CW1, Shanoob Meerasahib, whose sworn statement was recorded as part of the enquiry by the Special Judge is relevant. As per the statement given by CW1 before the Special Court, his version is that he made a talk with the petitioner herein, who was the Investigating Officer and the accused stated that the accused persons engaged in sexual intercourse with the minor girls with their consent and they enjoyed the same. Further, his version is that at the

time when the information was passed during the talk, he was working in 24 News Channel and he had given the statement given by the accused to the News Channel along with the record. Accordingly, on 13.01.2019, the same was telecasted. Going by the statement given by CW1, it is perceivable that the petitioner herein did not give the statement which is derogatory during an interview with the media nor he was talking to the media directly. He made such derogatory statement during a talk in between the petitioner and CW1. But the said talk was recorded by CW1 and it was CW1, who had given the same to the media, in turn, the same was telecasted on 13.01.2019.

[13] During inquiry, the learned Special Judge recorded the statement of CW3, one Salil Ahammed. His statement is that he was working as an IT Professional and he was disturbed after the occurrence. According to him, before the court's verdict, Mr.Sojan, the Investigating Officer, disclosed in an interview that the overt acts were consented by the victims and the same disturbed him. When the complainant decided to lodge the complaint, he downloaded the visuals in his laptop and handed over the CD to the complainant. Here the version of CW1 is very crucial. According to CW1 Shanoob Meerasahib, Sojan disclosed that the accused persons engaged in sexual intercourse with the minor girls with their consent and they enjoyed the same when he asked about him as part of investigative journalism. Later, he handed over the same to the head of the channel along with record. After analysing the crucial question, it is discernible that as per the version of CW1, who recorded the statement of the petitioner herein, it is revealed that the petitioner not directly disclosed anything through the media and he disclosed the derogatory statement to CW1, who in turn recorded the same and handed over to the channel head.

[14] Thus it is perceivable that 24 News Channel telecasted report and comments against the victims of rape which have the effect of lowering the reputation of the children/victims without an authentic information. Be it so, the offence under Section 23(1) may attract against CW1 and other officials responsible for telecasting the same in the channel. But the 1st respondent did not array them as accused in the complaint and they aimed at selective prosecution. On abridging the discussion, it is held that prosecution materials do not support that the petitioner herein divulged anything knowing that the same was intended to be published or telecasted through media so as to attract offence under Section 23(1) of POCSO Act.

[15] In view of the above findings, the question of delay doesn't arise for consideration.

[16] In the result, this Crl.M.C. stands allowed. Annexure A1 complaint led to Anenxure A4 order and the consequential proceedings thereof are hereby quashed.

[17] It is specifically made clear that disposal of this petition will not stand as a rider for the complainant to move against CW1 and the channel in accordance with law.

Registry is directed to forward a copy of this order to the Director General of Police, Thiruvananthapuram for considering investigation as against CW1 and others, as per law, in view of the facts of the case discussed herein above, if found necessary.

APPENDIX OF CRL.MC 4268/2022	
PETITIONER'S ANNEXURES	
Annexure A1	**A CERTIFIED COPY OF THE COMPLAINT IN CMP NO.3313/2021 DATED 20.11.2021, WHICH IS NOW PENDING AS SC NO.551/2022 ON THE FILES OF 1ST ADDITIONAL SESSIONS COURT (POCSO), PALAKKAD.**
Annexure A2	**A CERTIFIED COPY OF THE SWORN STATEMENT OF THE 2ND RESPONDENT.**
Annexure A3	**A CERTIFIED COPY OF THE DEPOSITION OF VW1 IN CMP NO.3313/2021 BEFORE THE SPECIAL COURT FOR POCSO CASES, PALAKKAD ON 06.01.2022.**
Annexure A4	**A TRUE COPY OF THE ORDER DATED 11.05.2022 IN THE CMP NO.3313/2021 BY THE SPECIAL JUDGE FOR POCSO CASES, PALAKKAD**

2024(2)PRC617

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before A Badharudeen]

Crl M C (Criminal Miscellaneous Case) No 5035 of 2023 **dated 10/09/2024**

Praveen Prakash

Versus

State of Kerala

QUASHING HARASSMENT FIR

Indian Penal Code, 1860 Sec. 354D - Code of Criminal Procedure, 1973 Sec. 482 - Protection of Children from Sexual Offences Act, 2012 Sec. 11, Sec. 12 - Quashing Harassment FIR - Petitioner sought quashing of an FIR under IPC Sec. 354D and POCSO Sec. 11(iv) and Sec. 12 for allegedly sending messages and disturbing a 17-year-old victim - There was no evidence of sexual intent in the messages, and the prosecution did not provide any such records - Despite settlement between parties, the Court ruled that sexual offenses under POCSO cannot be quashed based on an affidavit of settlement - However, since no material evidence supported the allegations, the proceedings quashed on merits - FIR Quashed

Law Point: Sexual harassment under POCSO Sec. 11(iv) requires explicit evidence of sexual intent; mere communication does not suffice without incriminating content.

Acts Referred:

Indian Penal Code, 1860 Sec. 354D

Code of Criminal Procedure, 1973 Sec. 482

Protection of Children from Sexual Offences Act, 2012 Sec. 11, Sec. 12

Counsel:

Mithun Baby John, N U Harikrishna, M P Prasanth

JUDGEMENT

A Badharudeen, J.- [1] This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, to quash Annexure A1 FIR, Annexure A2 Final Report and all further proceedings against the petitioner in S.C.No.280/2022 on the files of the Additional Sessions Court, Kozhikode, arose out of crime No.691/2021 of Nadakavu Police Station, Kozhikode. The petitioner herein is the sole accused in the above crime.

[2] Heard the learned counsel for the petitioner, the learned counsel for the defacto complainant and the learned Public Prosecutor in detail. Perused the relevant documents.

[3] In this matter, the prosecution alleges commission of offences punishable under Section 354D of the Indian Penal Code (hereinafter referred to as 'IPC' for short) as well as under Section 12 r/w 11(iv) of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'PoCSO Act' for short).

[4] According to the learned counsel for the petitioner, going by the First Information Statement as well as the additional statement given by the victim, the only allegation is that the accused used to send messages and calls to the victim, who was aged 17 years, to her mobile phone and disturbed her. It is pointed out that the messages so sent are neither disclosed in the statements nor available in the prosecution records. Therefore, none of the offences made out from the prosecution records so that the matter would require quashment on merits. He also submitted that now the victim filed an affidavit stating that the matter has been settled and further action in this matter is not necessary. The learned counsel for the defacto complainant also conceded filing of affidavit, supporting settlement.

[5] The learned Public Prosecutor opposed quashment of the proceedings against the petitioner and submitted that acting on the affidavit filed by the victim or their parents, settlement of PoCSO offences is not legally permissible.

[6] As rightly pointed out by the learned Public Prosecutor, settlement of PoCSO offences, acting on the affidavit filed by the victim or their parents, is not legally

permissible. Therefore, quashment on the ground of settlement could not yield. However, on reading the First Information Statement and the additional statement given by the victim, it could be seen prima facie that the allegation is confined to sending of messages and making calls to the victim, who is aged 17 years and the disturbance on that count.

[7] Section 11 of the PoCSO Act deals with sexual harassment. It is provided that a person is said to commit sexual harassment upon a child when such person with sexual intent commits overt acts dealt in sub-sections (i) to (vi) mentioned therein. Here, the prosecution allegation is that the petitioner herein committed offence punishable under Section 11(iv) r/w. 12 of the PoCSO Act. Section 11(iv) provides that a person said to commit sexual harassment upon a child when such person with sexual intent, repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means. Thus mere sending of messages or having chats with a child would not constitute an offence under Section 11(iv) punishable under Section 12 of the PoCSO Act unless the messages or chats would prima facie depict the sexual intent. In order to find the ingredients to bring home an offence under Section 11(iv) of PoCSO Act, the messages or chats to be part of the prosecution records so as to scrutinize the same to find as to whether the materials would prima facie show that the accused committed the offence. Thus it is not justifiable to fasten criminal culpability to an accused without having scrutiny of the chats or messages or any other overt acts with certainty. When the messages or chats not even collected and made part of the prosecution records, it is incorrect to hold that offence under Section 11(iv) of the PoCSO Act is made out prima facie.

[8] Here, the prosecution allegation is confined to that of sending of messages and calls to the victim to her mobile phone and in turn the same disturbed her. But nothing available from the prosecution records to find prima facie that the accused herein repeatedly or constantly followed or contacted the child through electronic digital or any other means with sexual intent, so as to attract offence under Section 11(iv) r/w. 12 of the PoCSO Act and Section 354D of IPC. Therefore, this matter would require quashment on merits.

Accordingly, this petition stands allowed. Annexure A1 FIR, Annexure A2 Final Report and all further proceedings against the petitioner in S.C.No.280/2022 on the files of the Additional Sessions Court, Kozhikode, arose out of crime No.691/2021 of Nadakavu Police Station, Kozhikode, as against the petitioner stand quashed.

Registry is directed to forward a copy of this order to the jurisdictional court for information and further steps.

APPENDIX OF CRL.MC 5035 of 202 3	
PETITIONER ANNEXURES	
ANNEXURE	**TRUE COPY OF FIR DATED 15.10.2021 ALONG WITH FIS**

A1	**IN CRIME NO.691/2021, NDAKKAVU POLICE STATION, CALICUT DISTRICT**
ANNEXURE A2	**A TRUE COPY OF FINAL REPORT DATED 20.01.2022 IN SC 280/2022 ON THE FILES OF HON'BLE ADDITIONAL DISTRICT & SESSIONS COURT, (POCSO ACT), CALICUT**
RESPONDENTS ANNEXURES: NIL	

2024(2)PRC620

DELHI HIGH COURT

[Before Amit Mahajan]

Crl L P (Criminal Leave Petition) No 547 of 2019 **dated 09/09/2024**

State

Versus

Sarjeet

ACQUITTAL IN RAPE CASE

Code of Criminal Procedure, 1973 Sec. 161, Sec. 378 - Protection of Children from Sexual Offences Act, 2012 Sec. 3, Sec. 4 - Acquittal in Rape Case - Respondent was charged under POCSO for raping a 17-year-old girl - Victim initially stated she ran away with the respondent voluntarily due to familial pressure to marry someone else - Later, she claimed abduction and rape under threat of harm to her brother - Trial court noted contradictions in her testimony and found no corroborative evidence of sexual assault - Medical examination showed torn hymen but no semen - Court also found discrepancies regarding the victim's age, favoring her birth certificate which indicated she was not a minor - Acquittal upheld due to lack of reliable evidence. - Petition Dismissed

Law Point: Contradictory testimony and absence of corroborative evidence weaken the prosecution's case, especially when the victim's age and consent are in dispute.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 161, Sec. 378

Protection of Children from Sexual Offences Act, 2012 Sec. 3, Sec. 4

Counsel:

Pradeep Gahalot, Sanyam Bansal, Sonali Sharma, Neelakshi, Azhar Alam

JUDGEMENT

Amit Mahajan- [1] The present petition is filed under Section 378 of the Code of Criminal Procedure, 1973 ('CrPC') seeking grant of leave to challenge the judgment

dated 24.04.2019 (hereafter 'the impugned judgment'), in Sessions Case No. 440696/2016 arising out of FIR No.116/2014, registered at Police Station Jaffarpur Kalan, whereby the learned Trial Court had **acquitted** the respondent of the offence under Section 4 read with Section 3(i) of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

[2] The brief facts of the present case are that the respondent allegedly raped the prosecutrix, who was 17 years old at the time of the incident. The victim had been missing after leaving her house for school on 19.05.2014. The victim's father made a missing persons complaint on 20.05.2014 at 00:45 AM, and mentioned that he suspected the respondent, who was a resident of the village where the victim's maternal uncle resided. The present case was registered on the said complaint. Thereafter, the police visited the respondent's house in Haryana, and found him to be missing. At around 12:30 PM on 20.05.2014, the complainant went to the police station with the victim and the respondent. In her statement under Section 161 of the CrPC, the victim stated that she had gone with the respondent of her own free will, as she considered the respondent as her husband and that she had known him since November, 2013. She stated that she had tried to persuade her parents, however, they intended to get her married to some other person. She stated that she had thus ran away with the respondent. She further stated that they spent the night in a Hotel near New Delhi Railway Station, where they had physical relations. She stated that her parents had asked them to return and promised to arrange their marriage, however, the victim did not want to live with them.

[3] The learned Trial Court framed the charge against the respondent vide order dated 04.08.2014 for the offence under Section 4 read with Section 3(i) of the POCSO Act.

[4] The learned Trial Court, by the impugned judgment, **acquitted** the respondent of the charged offence and observed that testimony of the victim was unreliable due to contradictions. It was noted that there was a lack of supporting evidence to prove the offence.

[5] The learned Trial Court held that the prosecution had failed to prove beyond reasonable doubt that the victim was a minor at the time of the incident as her age as per the birth certificate (Ex. PW-5/DA) was 01.05.1996. It was also noted that the victim had given contradictory statements wherein she had initially admitted that she had gone with the applicant willingly, however, in her testimony, she had stated that she had no friendship with the respondent and she had gone with him under threat that he would murder her brother.

[6] It was noted that even if the victim was assumed to be under 18 years of age, the prosecution failed to prove that the respondent had kidnapped her. Reliance was placed on the case of Vardhrajan v. State of Madras, 1965 AIR(SC),942 where the Hon'ble Apex Court had held that the offence of kidnapping was not made out as the

girl, who was 17 years of age at that time, had voluntary gone with the accused therein having the capacity to know the import of doing so. Further, it was noted that while the hymen of the victim was torn, no semen was found in the MLC.

[7] It was also noted that the prosecution had miserably failed to prove its case and the accused was therefore **acquitted** in the present case.

[8] The learned Additional Public Prosecutor for the State submitted that the impugned judgment is based on conjectures and surmises and as such cannot stand the scrutiny of law and liable to be set aside.

[9] He submitted that the learned Trial Court has **acquitted** the respondent on account of some discrepancies in the statement of the victim. He contended that the courts should examine the broader probabilities of a case and not get swayed by minor or insignificant discrepancies in the statement of the child victim, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

[10] He submitted that the testimony of the victim is corroborated by the FSL report which mentioned that at the time of medical examination, the victim's hymen was freshly torn.

[11] He submitted that it is trite law that conviction can be sustained on the sole testimony of the victim and in the present case the prosecutrix has clearly named the accused in her statements.

[12] He submitted that the learned Trial Court failed to appreciate the testimony of Dr. V.N.V. Satish, Junior Staff surgeon (PW-14) who had deposed that "as the upper second molars had not erupted, the possibility of her being 18 years of age or more is very bleak".

[13] The learned counsel for the respondent submitted that the testimony of the victim was riddled with discrepancies.

[14] He submitted that in the statements of the victim that were recorded under Sections 161 and 164 of the CrPC, the victim had stated that she wished to marry the respondent, however, the victim presented a different version in her testimony where she deposed that the respondent had threatened to kill her brother in custody of his friends.

[15] He submitted that the version of the prosecution is not supported by the statements of PW-2 (father of victim) and PW-5 (mother of victim) as the victim had made no mention of the alleged threats to them.

[16] He submitted that the victim's statement that the accused raped her by threatening to kill her brother whom he had kidnapped is contradicted by the statement of her mother (PW-5) who deposed that on the date of the alleged incident, the victim's brother was at home.

[17] He submitted that the victim was a major on the day of the incident, that is, 19.05.2014, as her date of birth on the birth certificate which was corroborated by the victim's mother is 01.05.1996. He submitted that the school certificate was unreliable since the date of birth was recorded merely on the word of the victim's parents at the time of admission, and no document was given to substantiate the same.

ANALYSIS

[18] It is trite law that this Court must exercise caution and should only interfere in an appeal against acquittal where there are substantial and compelling reasons to do so. At the stage of grant of leave to appeal, the High Court has to see whether a prima facie case is made out in favour of the appellant or if such arguable points have been raised which would merit interference.The Hon'ble Apex Court in the case of **Maharashtra v. Sujay Mangesh Poyarekar**, 2008 9 SCC 475 held as under:

"19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted."

(emphasis supplied)

[19] In the present case, the prosecution allegations are sought to be proved only on the basis of statement of the prosecutrix. It is an admitted case that that the same is not corroborated by any other independent evidence.

[20] It is trite law that the accused can be convicted solely on the basis of evidence of the complainant / victim as long as same inspires confidence and corroboration is not necessary for the same. The law on this aspect was discussed in detail by the

Hon'ble Apex Court by Nirmal Premkumar v. State,2024 SCCOnLineSC 260. The relevant portion of the same is produced hereunder:

"11. Law is well settled that generally speaking, oral testimony may be classified into three categories, viz.: (i) wholly reliable; (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable. The first two category of cases may not pose serious difficulty for the Court in arriving at its conclusion(s). However, in the third category of cases, the Court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

12. In Ganesan v. State4 , this Court held that the sole testimony of the victim, if found reliable and trustworthy, requires no corroboration and may be sufficient to invite conviction of the accused.

13. This Court was tasked to adjudicate a matter involving gang rape allegations under section 376(2)(g), I.P.C in Rai Sandeep v. State (NCT of Delhi)5 . The Court found totally conflicting versions of the prosecutrix, from what was stated in the complaint and what was deposed before Court, resulting in material inconsistencies. Reversing the conviction and holding that the prosecutrix cannot be held to be a 'sterling witness', the Court opined as under:

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the crossexamination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any

corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged." (underlining ours, for emphasis)

14. In Krishan Kumar Malik v. State of Haryana6 , this Court laid down that although the victim's solitary evidence in matters related to sexual offences is generally deemed sufficient to hold an accused guilty, the conviction cannot be sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences. 32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant."

15. **What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a "sterling witness" without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistences excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded."**

(emphasis supplied)

[21] It has been argued by the learned APP that the respondent ought not to have been **acquitted** merely on account of minor discrepancies in the statements of the victim. It is relevant to note that the discrepancies in the versions of the victim are not minor. As rightly noted by the learned Trial Court, the victim initially admitted to

having gone with the respondent and stated that she wanted to marry him but her parents were objecting to the same. However, during her testimony, she took a diametrically opposite stand and alleged that the respondent had kidnapped her and raped her under the threat of harming her brother. The said contradiction goes to the root of the matter and cannot be said to be so minor so as to not affect the prosecution's case. The testimony of the victim is rendered doubtful due to her inconsistent and dubious stand and the same does not inspire confidence.

[22] The victim in her testimony had made allegations of kidnapping against the respondent. The learned Trial Court had rightly noted that the victim had not made any such allegations at the outset and neither informed about the same to her parents or the police. The brother of the victim at that time was at home as per her parents as well. The allegation that the victim had accompanied the respondent and he had raped her under threats of harm to the victim's brother is a significant improvement over the initial stance of the victim and seems improbable. As noted above, initially the victim had maintained that she had left her home voluntarily as her parents were not agreeing to her relationship with the respondent and wanted to get her married to someone else. In such circumstances, it does not seem that the victim was enticed away from lawful guardianship or forced into sexual relations.

[23] However, it is settled law that the consent of a minor is no consent. Insofar as the age of the victim is concerned, two contradicting documents were brought forth by the parties. While the prosecution placed reliance on the Admission Register for the period 19.07.1991 to 04.04.2008 of the victim's school to establish the date of birth of the victim as 01.05.1997, the defence relied upon a birth certificate (Ex. PW-5/DA) that was registered on 10.05.1996 where the date of the birth of the victim was shown as 01.05.1996. In the opinion of this Court, the learned Trial Court rightly favoured the birth certificate to determine the age of the victim. It was rightly appreciated that while the principal of the school (PW4) supported the Admission Register, however, she deposed that at the time of admission, no documents were produced by the parents of the victim regarding her age. Moreover, PW-5 (mother of the victim) had admitted the date in the said birth certificate and PW-2 (father of the victim), in his testimony, had admitted to lowering the victim's age at the time of admission. In the opinion of this Court, the learned Trial Court rightly noted that the prosecution had been unable to establish that the victim was a minor at the time of the incident.

[24] It is relevant to note that there is no cogent proof regarding the sexual relations being established either. While the MLC suggests that the hymen of the victim was torn, it was rightly noted by the learned Trial Court that no semen was found so as to suggest sexual relations had been established between the parties. It was also noted that PW2 (father of victim) and PW3 (Investigating Officer) had not stated that the victim had told them that the respondent has established sexual relations with her and their testimonies thus don't help the case of the prosecution. It seems that there

was a typographical error and the learned Trial Court was referring to PW5 (mother of victim) instead of PW3 as it was also mentioned that apart from the said witnesses, the rest of the witnesses were official witnesses.

[25] Furthermore, the learned Trial Court rightly noted that it was peculiar that the respondent accompanied the victim and her father to the police station. It seems odd as to why the respondent would present himself up for arrest and the same created a doubt in the story of the prosecution.

[26] Insofar as the argument regarding the presumption of guilt under Section 29 of the POCSO Act is concerned, the same comes into play once the prosecution establishes the foundational facts. It can be rebutted by discrediting the witnesses through cross-examination as well [Ref. Altaf Ahmed v. State (GNCTD of Delhi),2020 SCCOnLineDel 1938]. The respondent has successfully cast doubt over the age of the victim.

[27] Having noted that the testimony of the prosecutrix is in doubt and that there is no independent corroboration in the form of MLC or FSL, the possibility of the respondent's false implication cannot be ruled out.

[28] In view of the aforesaid discussion, this Court is of the opinion that the State has not been able to establish a prima facie case in its favour and no credible ground has been raised to accede to the State's request to grant leave to appeal in the present case.

[29] The leave petition is dismissed in the aforesaid terms

2024(2)PRC627

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before A S Gadkari; Dr Neela Gokhale]

Civil Writ Petition No 12147 of 2024 **dated 05/09/2024**

XYZ

Versus

State of Maharashtra

MINOR'S PREGNANCY TERMINATION

Indian Penal Code, 1860 Sec. 376 - Medical Termination of Pregnancy Act, 1971 Sec. 3 - Medical Termination of Pregnancy Rules, 2003 Rule 3B - Minor's Pregnancy Termination - A 17-year-old petitioner sought permission for medical termination of pregnancy caused by sexual abuse - Medical Board constituted by J.J. Hospital examined the petitioner and recommended termination due to mental stress caused by unwanted pregnancy - However, the petitioner expressed her inclination to continue the pregnancy - The Court considered her autonomy and right to reproductive freedom,

allowing the petitioner to continue if desired but permitting medical termination if chosen - Court issued directions for medical care and possible adoption, while also addressing larger societal issues of lack of support for victims of sexual abuse and ensuring future legal safeguards for such women - Petition Allowed

Law Point: A minor victim of sexual abuse is entitled to choose whether to terminate pregnancy, with medical and legal support ensuring her health, safety, and future.

Acts Referred:

Indian Penal Code, 1860 Sec. 376

Medical Termination of Pregnancy Act, 1971 Sec. 3

Medical Termination of Pregnancy Rules, 2003 Rule 3B

Counsel:

Snehal Chaudhari, M P Thakur, Dr Abhinav Chandrachud

JUDGEMENT

[1] The Petitioner, a minor of 17 years of age, is in the 26th week of pregnancy, being a victim of child abuse. There is a F.I.R. filed against the accused in the said crime. She seeks permission for medical termination of the pregnancy.

[2] By an Order dated 28th August 2024, this Court directed the Authorities of J.J. Group of Hospitals and Grant Medical College, Mumbai to constitute a Medical Board in terms of the provisions of Section 3(2-D) of the Medical Termination of Pregnancy (Amendment) Act of 2021 (M.T.P. Act) read with the Medical Termination of Pregnancy Act, 1971, to examine the Petitioner and to submit a report to this Court. The Medical Board while forming its opinion was also requested to evaluate the physical and emotional well-being of the Petitioner as well as the impact and repercussions of the continuance/termination of pregnancy.

[3] Accordingly, a Medical Board was constituted by the J.J. Group of Hospitals and Grant Medical College, Mumbai and a report dated 2nd September 2024 is submitted before us today. We have perused the report. It is taken on record and marked "X" for identification. The report is unanimous.

[4] The conclusive Committee opinion is as under:

"On interviewing the victim and her mother, the following facts were revealed:

- That the mother is widowed since past two years.

- That she is the sole breadwinner and also has two other children (an older son and a younger daughter) dependent on her.

- That they were seeking treatment in K.E.M. Hospital which is not only close by to their residence but is also very convenient.

- That this pregnancy is an incidental finding while seeking treatment for fever. It is begotten from a consensual relationship with a 22 year old male, named Sujit Sonkar, a known person and that the victim and her male partner are willing to marry, settle down and accept the child as their own in due course of time, a scheme of arrangement that has blessings of the mother.

- That travelling up to J.J. Hospital every day is a harrowing experience for the mother resulting in the loss of daily earnings. She'd much rather prefer receiving further treatment at K.E.M. Hospital.

After thorough investigation and examination of the patient, the committee has found that at present the mother is 17 year old, unmarried primigravida with BD? BS 24 weeks + 5 days of gestational age with no congenital anomaly in the fetus.

As the patient has filed a complaint under section 376 of I.P.C. and sought High Court Order for the opinion of the Medical Termination of Pregnancy, the Committee is of the opinion that as mother is underage and a case of P.O.C.S.O., carrying unwanted pregnancy to term will cause mental stress to the teenage-mother. The patient, in her current state of health, is not fit for undergoing the procedure as opined by specialists in the discipline of Medicine & Anaesthesia. Patient needs to be stabilized and revaluated for fitness which can be done in 2 to 3 weeks.

Medical termination of pregnancy may be undertaken thereafter pursuant to the final decision of the Honourable High Court."

[5] Ms. Chaudhari, learned counsel appears for the Petitioner and Ms. Thakur, learned A.G.P. represents the State.

[6] The report of the Board was shared with both the counsels. Ms. Chaudhari requested one day's time to take instructions from the Petitioner and her mother. Accordingly, the matter was listed today on 3rd September 2024.

[7] Ms. Chaudhari on instructions submits that, considering the opinion of Medical Board, the Petitioner and her mother have shown their inclination to continue the pregnancy and take it to its full term. Ms. Thakur submitted that, appropriate orders in the interest of justice may be passed considering the findings and opinion of the Medical Board.

[8] Conscious of the right of Petitioner to reproductive freedom, her autonomy over the body and her right to choice and having considered the findings and opinion of the Medical Board, we permit the Petitioner to medically terminate the pregnancy, if she so desires. However since she has expressed her willingness and desire to continue with the pregnancy, she is fully entitled to do so. The present case squarely falls within the purview of the Explanation-2 to Section 3(2) of the M.T.P. Act read with Rule 3-B(a) and (b) of the M.T.P. Rules of 2003.

[9] The Petitioner and her mother have indicated their desire that, the delivery procedure, etc. to be done in the K.E.M. Hospital, Mumbai, which is close to their

residence and convenient to them. In these facts and circumstances, we issue the following directions:

i) We permit the Petitioner to medically terminate the pregnancy, if she so desires.

ii) The finding of the Medical Board indicates that, the minor-Petitioner, in her current state of health is not fit for undergoing the procedure as opined by the specialist and she needs to be stabilized and revaluated for fitness, which can be done in 2-3 weeks. It is only thereafter that, the termination procedure can be done. Thus in case, the Petitioner opts to terminate the pregnancy, the procedure shall be carried out only at such time as advised by the doctors concerned with the procedure.

iii) The Hospital shall also provide post-delivery care to the Petitioner including neo-natal care for the baby, if so required. Considering that, the Petitioner is a victim of sexual abuse, the Hospital Authorities shall also provide for counseling, post-delivery.

iv) Given that there is an allegation of sexual assault, the Authorities of the Hospital will preserve the appropriate tissue/DNA sample of the fetus/child after its birth and forward the same to the Investigating Officer for ensuing criminal trial.

v) In the event that the Petitioner desires to give the child in adoption after the delivery, the State and its agencies will assume responsibility of the child and take such steps as necessary to rehabilitate the child including exercising the option of placing the child in foster care/adoption by following the due legal process. This shall not however be construed as a direction of this Court binding the Petitioner and the State shall abide by the wishes as expressed at the appropriate stage.

[10] The Petition is allowed in the aforesaid terms.

[11] All concerned to act on the production of authenticated copy of this order.

[12] While we allow the present Petition, we find the predicament of young women finding themselves in these situations disturbing. Their plight in dealing with the situation, without support from their families and more importantly the partner, who is equally responsible for the situation, is disquieting. It is distressing to see the victim being left alone to fend for herself while understanding the nuances of the pregnancy itself, accepting the anatomical changes brought about by the pregnancy, the dilemma of disclosing the fact to her parents and the partner leading to the pregnancy advancing beyond 24 weeks and thereby compelling her to approach the Court for permission to terminate the pregnancy, facing a Medical Board alone and finally undergoing the procedure of either termination or the delivery all by herself.

[13] In our recent Order dated 8th July 2024 passed in Civil Writ Petition No. 8920 of 2024, we had already expressed our anguish in respect of the difficult circumstances in which women such as the Petitioner find themselves. We were hopeful that the Government would address this complexity by devising proactive

measures and putting in place an effective mechanism to provide much needed succor to the women victims.

[14] We now intend to ensure that, the victims are not left without support to face the challenges presented by such pregnancies. We thus deem it appropriate to appoint amicus curiae to assist the Court in its endeavor to determine a suitable mechanism so as to facilitate involvement, accountability and participation of the partner in these testing times of the women.

[15] We have thus requested Dr. Abhinav Chandrachud, learned counsel to assist us in regard to the aforesaid issue.

15.1) The Registry is directed to supply a copy of complete compilation of present Petition alongwith the report of Medical Board. We request Dr. Chandrachud to submit his note within a period of two weeks from today.

[16] List the matter on 20th September 2024 for further consideration

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2024(2)PRC631

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[From NAGPUR BENCH]

[Before G A Sanap]

Criminal Appeal No 258 of 2022 **dated 04/09/2024**

Mahadeo @ Mahadya Uttam Gonde

Versus

State of Maharashtra; XYZ

ATTEMPT TO COMMIT INTERCOURSE

Indian Penal Code, 1860 Sec. 511, Sec. 377 - Protection of Children from Sexual Offences Act, 2012 Sec. 9, Sec. 10, Sec. 7, Sec. 4, Sec. 3 - Attempt to Commit Intercourse - Appellant challenged conviction for penetrative sexual assault under Sec. 4 of POCSO Act and Sec. 377 IPC - Victim, an 11-year-old boy, alleged assault by appellant in a field - Medical evidence showed external injury but no penetration - Court found inconsistencies in victim's statement and medical report, concluding no penetration occurred - Conviction under Sec. 4 POCSO Act set aside, but appellant convicted for aggravated sexual assault under Sec. 10 POCSO Act and attempt to commit carnal intercourse under Sec. 377 read with Sec. 511 IPC - Sentence of 5 years under Sec. 10 maintained. - Appeal Partly Allowed

Law Point: Conviction for penetrative sexual assault requires evidence of penetration - In its absence, conviction may be sustained for aggravated sexual assault or attempt to commit carnal intercourse.

Acts Referred:

Indian Penal Code, 1860 Sec. 511, Sec. 377

Protection of Children from Sexual Offences Act, 2012 Sec. 9, Sec. 10, Sec. 7, Sec. 4, Sec. 3

Counsel:

Mahesh Rai, R V Sharma, Sunita Paul

JUDGEMENT

G A Sanap, J.- [1] In this appeal, challenge is to the judgment and order dated 28.03.2022, passed by the learned Special Judge, Special Court (POCSO), Chandrapur, whereby the learned Judge held the accused guilty of the offences punishable under Sections 4 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") and under Section 377 of the Indian Penal Code, 1860 (for short, "IPC"). He has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/- and in default to suffer rigorous imprisonment for six months for the offence punishable under Section 4 of the POCSO Act, and rigorous imprisonment for 5 years and to pay a fine of Rs.2,000/- and in default to suffer rigorous imprisonment for six months for the offence punishable under Section 10 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 377 of the IPC.

[2] BACKGROUND FACTS:

PW-2 is the victim boy. On his report, a crime was registered against the accused at Gadchandur Police Station, Dist. Chandrapur. The case of prosecution, which can be gathered from the report and other materials, is that, on the date of the incident, the victim was 11 years old. The victim and the accused are the residents of village Nimani, Tah. Korpana, Dist. Chandrapur. On the date of the incident, the victim was studying in 5th Standard. On the date of the incident, the victim and his friend had gone to the field for grazing their goats. They were grazing their goats in the field of one Natthu Mama. The field of the accused is near to the field of Natthu Mama. The accused came to the said field on his motorcycle. The accused told the victim and his friend Ayush that there is a crop of green grams in his field. The accused lured them to accompany him. On the promise of giving them green grams, the victim and his friend Ayush accompanied the accused on his motorcycle to his field. After reaching his field, they got down from the motorcycle. At that time, the accused tried to catch hold of them. They ran away towards the road; however, the accused managed to catch hold and overpower the victim.

[3] It is stated that Ayush ran away from the spot towards the road. The accused overpowered the victim and carried him on his shoulder in his field by the side of the bullock-cart road. The accused removed the pant of the victim. The accused also removed his pant. The accused pressed the scrotum and penis of the victim. The

accused tore his shirt and threw it away. The accused pressed his chest. The accused forcefully laid him on the ground. He inserted his penis into his anus. At that time, they heard the horn of the vehicle. The accused released him and pushed him into the thorny bushes. The victim sustained injury to his hand. He put on his pant and shirt and went towards the road. His friend Ayush met him on the road. He narrated the incident to Ayush. They went home. The victim narrated the incident to his mother. The mother of the victim called one Praful Gourkar, an acquaintance of them. They went to the police station and lodged the report. On the basis of this report, a Crime bearing No.111/2020 was registered against the accused at Gadchandur Police Station.

[4] PW-8 carried out the investigation. He forwarded the victim to the hospital for his medical examination. He drew the spot panchanama. He arrested the accused. He seized the cloths of the victim and the cloths of the accused. He forwarded the cloths and samples to F.S.L., Nagpur. He recorded the statements of the witnesses. On completion of the investigation, he filed the charge-sheet against the accused.

[5] The learned Special Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of his enmity with Umesh Rajurkar, who, at the time of the incident, was Up-Sarpach. Umesh Rajurkar is the friend of Praful Gourkar. Praful Gourkar demanded money from the mother of the victim. The mother of the victim had no money, and therefore, on the say of Praful Gourkar, the false report was lodged against him.

[6] The prosecution, in order to bring home the guilt of the accused, examined eight witnesses. The learned Special Judge, on consideration of the evidence, convicted and sentenced the accused as above. The appellant has filed this appeal against the said judgment and order.

[7] I have heard Mr. Mahesh Rai, learned advocate for the appellant/accused and Ms. R. V. Sharma, learned APP for respondent No.1/State. Perused the record and proceedings.

[8] Learned advocate for the appellant/accused submitted that there is no independent corroboration to the evidence of the victim. The evidence of PW-5 Ayush and PW-6 Praful Gourkar is not cogent, consistent, and reliable. Learned advocate submitted that, even if the evidence of the victim is considered at its face value, coupled with the medical evidence, it would not be sufficient to prove the offence of carnal intercourse as defined under Section 377 of the IPC and penetrative sexual assault as defined under Section 3 of the POCSO Act. Learned advocate first and foremost submitted that the evidence on record is not sufficient to prove the charge against the accused. It is pointed out that, at the most, the offence of attempt to commit sexual act would get attracted in this case. Learned advocate took me through the evidence of PW-3, the Medical Officer, and submitted that the doctor has not recorded a candid opinion with regard to the carnal intercourse with the victim. Learned advocate further submitted that the medical examination report of the accused at

Exh.56 would show that not a single injury was found on the body as well as on the private part of the accused. Learned advocate submitted that the doctor, who had examined the accused, has not opined that his findings of examination of the accused suggested that in the recent past he had a carnal intercourse. Learned advocate submitted that there was no injury to the anus of the victim to suggest that there was even a slightest penetration. Learned advocate submitted that the learned Judge has failed to properly appreciate the evidence and, as such, came to a wrong conclusion.

[9] Learned APP submitted that the victim, who was about 11 years old, has placed on record the first-hand account of the incident. There is no reason to discard and disbelieve the evidence of the victim boy. The defence of the appellant/accused is not at all probable. The victim and his mother had no motive to falsely implicate the appellant/accused. The victim, on the fateful day, was grazing his goats in the field of Natthu Mama, and the accused, in order to satisfy his lust, lured the victim and Ayush to his field. Learned APP submitted that there was no delay in lodging the report. The evidence of PW-5 Ayush and PW-6 Praful Gourkar, who are the independent witnesses, is consistent. The evidence of the victim has been corroborated by PW-5, who, at the relevant time, was with him and could manage to escape, when the accused tried to catch hold of him as well. Learned APP submitted that the medical evidence clearly suggests that there was a forceful attempt to penetrate, and therefore, the learned Judge was right in holding that the charge of the penetrative sexual assault was proved. Learned APP submitted that even if it is held that there was no penetration or partial penetration, the act of the accused would amount to manipulation of the body part of the victim for the purpose of penetration into his anus. Learned APP laid a stress, to substantiate this submission, on the provisions of Section 3(c) of the POCSO Act.

[10] In this appeal, the Court has to answer two primary questions. (i) Whether the incident as narrated by the victim occurred or not? (ii) Whether the accused committed the penetrative sexual assault on the victim as stated by the victim or not? As far as the incident is concerned, the evidence of the victim and his friend Ayush is sufficient. The victim (PW-2) has narrated the vivid account of the incident. He has stated that he and Ayush were grazing their goats in the field of Natthu Mama. The accused came there on his motorcycle. The accused promised to give them green grams from his field. He lured the victim and Ayush to accompany him. They sat on his motorcycle and went to his field. After going to the field, they saw that there were no green grams in his field. The accused, at that time, tried to catch hold of both of them. Ayush ran away from the spot. The accused overpowered him, lifted him on his shoulder, and carried him in his field. The accused removed the pant of the victim. The accused also removed his pant. The victim has stated that the accused pressed his scrotum and his penis. The accused pressed his chest. He has stated that he pushed him on the ground with force. He has stated that he inserted his penis into his anus. He cried for help. He has stated that, at that time, they heard the horn of a motorcycle passing through the

road, and therefore the accused released him. The accused pushed him into the thorny bushes, and therefore he sustained injury to his hand.

[11] As far as the first part of the incident is concerned, Ayush has supported him. Ayush has stated that they were grazing their goats in the field of Natthu Mama. The version of Ayush is consistent with the version of the victim. Ayush has stated that the accused took them to his field on the pretext of giving them green grams. He has stated that when they went to his field, they found that there were no green grams. He has stated that, at that time, the accused tried to catch hold of them. He managed to flee from the spot, but the accused caught hold of the victim and carried him in the field on his shoulder. He has stated that he ran away towards the road. He has further stated that, after some time, the victim came towards him and narrated the unfortunate incident to him.

[12] Perusal of the cross-examination would show that their evidence as to the occurrence of this incident is consistent. Their evidence has not at all been shaken. The occurrence of the incident has been proved on the basis of their evidence. The incident occurred on Sunday. The victim and Ayush are from poor families. On Sunday, they would go to graze their goats. It is not the defence of the accused that they did not have goats. The victim and Ayush have categorically stated that they went home. The victim narrated the incident to his mother. The mother of the victim called PW-6 Praful Gourkar. The victim narrated the incident to him as well. The victim (PW-2) and PW-5 have stated that Praful Gourkar (PW-6) carried them and the mother of the victim to the Police Station, Gadchandur, and the victim lodged the report. It is necessary to mention at this stage that there was no delay in lodging the report. The incident occurred on 15th March, 2020, at 4:00 p.m. The report was lodged at 21:00 hours. The victim was sent for medical examination by the police in the night itself.

[13] In this context, it would be necessary to see the evidence of PW-6 Praful Gourkar. He has stated that he has acquaintance with the family of the victim. He has stated that, on the date of the incident, at about 4:00 p.m., he was standing near the Pan Thela of Temburde. He has stated that he came to know from the discussion of the people about the incident, and therefore he went to the house of the victim. He has stated that he saw that the victim and his mother were weeping. The victim narrated the incident to his mother. He has stated that Ayush was present on the spot. The incident, as stated by him, was narrated by the victim to her mother. He has reiterated the incident as narrated by the victim in his evidence. He has stated that the mother of the victim requested him to accompany them to the police station. He has stated that, therefore, he carried them on his motorcycle to the police station. In the police station, the victim lodged the report.

[14] He was subjected to cross-examination. The main thrust of the cross-examination is on the point of his enmity with the accused. He has denied that in order to take revenge, he has prevailed upon the mother of the victim to lodge the false

report against the accused. He has denied all the suggestions put to him. He has stated in his cross-examination that during the bad times of the mother of the victim, he had helped her. He has denied the suggestion that in order to help his friend Umesh Rajurkar, who had enmity with the accused, he prevailed upon the mother of the victim to lodge a false report. In my view, the defence of the accused put forth to the victim, Ayush, and this witness has not been admitted by them. The accused has not adduced any independent evidence to substantiate his defence. Similarly, the accused has not been able to probablise his defence. He has not pointed out any material from the record to substantiate his defence. As far as the incident is concerned, the evidence is consistent. I have no reason to discard and disbelieve the evidence as to the occurrence of the incident. The evidence is sufficient to prove the incident.

[15] The next important question is with regard to the actual nature of the incident. The Court has to consider whether there was a penetrative sexual assault or merely an attempt or sexual assault by touching the anus of the victim by the accused. At this stage, it would be appropriate to consider the submission advanced by the learned APP that the evidence on record would be sufficient to establish that there was manipulation of the part of the body of the victim so as to cause the penetration into his anus, and therefore it would be sufficient to prove the offence of penetrative sexual assault.

[16] It is to be noted that if the evidence on record is not sufficient to prove the penetration or partial penetration, then by invoking clause (c) of Section (3) of the POCSO Act, it would not be possible to accept the case of prosecution viz-a-viz the charge under Section 3 of the POCSO Act. Even for the offence punishable under Section 3 of the POCSO Act, there has to be penetration or partial penetration. The question is whether the simple act of touch can be considered to be manipulation under Section 3(c) of the POCSO Act. A plain reading of Section 3(c) of the POCSO Act would show that for an act to be a penetrative sexual assault, the accused has to manipulate any part of the body of the child so as to cause penetration. The act committed as per this section must constitute a penetrative sexual assault. Section 7 of the POCSO Act provides for an offence in case of touch. The act of simple touch with sexual intent cannot be considered to be manipulation under Section 3(c) of the POCSO Act. In view of the separate and distinct nature of the offences under Sections 3 and 7 of the POCSO Act, the Court has to consider the evidence on record. If the evidence on record is sufficient to prove that there was penetration or partial penetration, then the offence under Section 3 of the POCSO Act would get attracted. Similarly, the offence under Section 3(c) of the POCSO Act would get attracted only when there is manipulation of any part of the body of the child so as to cause penetrative sexual assault.

[17] The question is whether the evidence on record is sufficient to establish penetration, partial penetration, or manipulation of any part of the body of the victim

so as to cause penetration. PW-3 is the Medical Officer, who had examined the victim. His evidence requires careful scrutiny and consideration. The fate of the case of prosecution hinges on his testimony and on his findings and opinion. It appears that the doctor has committed a mistake while mentioning the date of the examination of the victim. The doctor has mentioned in his report that the incident occurred on 14th March, 2020, at 4:00 p.m. to 5:00 p.m. Similarly, the doctor has mentioned in his report that the victim was examined by him on 15th March, 2020, at 2:40 a.m. The report further shows that it was finally prepared on 15th March, 2020, at 3:40 a.m. In my view, this is nothing short of a casual and careless act of the doctor. The report was lodged on 15th March, 2020, at 21:00 hours. The victim was referred to the doctor after lodging the report. Therefore, the date of examination mentioned by the doctor in his report being 15th March, 2020, at 2:40 a.m., appears to be a mistake. It is a result of the careless and negligent approach of the doctor. Exh.33 is the OPD paper. The OPD paper is the first document prepared when a patient is taken to the government hospital for examination. In this OPD paper, the correct date and time has been mentioned. It is mentioned that the OPD paper was issued on 16th March, 2020, at 2:40 a.m. It is to be noted that, fortunately for the prosecution, this OPD paper is part of the record. The doctor had no reason and occasion to examine the victim prior to 16th March, 2020, at 2:40 a.m. The date and time mentioned in the report of the doctor appears to be a mistake.

[18] PW-6 has stated that, on examination, he found that there was an abrasion on the left wrist joint of the victim. He also noticed a contusion over the internal region of anus. The digital examination of the anal sphincter was painful. The doctor has stated that the possibility of an unnatural sexual act could not be ruled out. The doctor was cross-examined in detail. He has admitted that for the purpose of injury of tissue, the amount of force is required. He has admitted that the rate of application of force to the tissue is also one of the factors to cause injury. He has stated that the target area is also important from where the injury is caused. He has stated that the anal region is a combination of flesh tissue. The doctor, in his evidence, has agreed with the view of Modi, a celebrated author of Medical Jurisprudence, that if the blunt object hits a particular portion with force, then the contusion is caused. He has stated in his report that he has not mentioned the age of the injury. The doctor had collected the anal swab of the victim. The report of the examination of the anal swab shows that neither blood nor semen was detected. The doctor did not notice any bleeding injury to the anus. There was no tear suggesting the forcible penetration. The doctor, on the basis of his findings, has simply recorded that the possibility of unnatural sexual act is not ruled out. In my view, this opinion is not sufficient to establish that, indeed, there was a penetrative sexual assault. There was no internal injury to the anus. The doctor has stated that the victim was having pain. The evidence of the doctor, if read at its face value, would not be sufficient to conclude that there was a penetration or partial penetration in the anus. At the most, it could be said that there was an attempt to

commit the carnal intercourse. It is to be noted that the offence of carnal intercourse would not be complete unless and until there is a penetration or partial penetration.

[19] It is to be noted that the examination of the accused also can prove the involvement of the accused in the penetrative sexual assault. The accused was examined by the doctor. The doctor, who had examined the accused, has not been examined. However, the report of his examination is on record. The accused was arrested on 16th March, 2020. He was examined by the doctor on 16th March, 2020, at 1:00 p.m. The cloths of the accused had been seized. The doctor did not find any injury on his body. Similarly, the doctor did not find any injury to his penis. At the time of his examination, urethral swab and the swab from his discharge had been collected. The Medical Officer did not observe any deformity or injury to his genitals. The doctor did not notice injuries on the prepuce, glans penis, phrenum, and scrotum. The column about presence or absence of smegma is blank. If the accused had committed forceful sexual intercourse as stated by the victim, then there would have been some injury either on his body or on his penis. The doctor has not opined that the examination of his genitals suggested a penetrative sexual assault by him in the recent past. In my view, therefore, this report of the medical examination of the accused does not support the case of prosecution that there was a penetrative sexual assault.

[20] The victim has stated that the accused forcibly pushed him down on the ground, removed his pant and inserted his penis into his anus. In my view, the other evidence is not sufficient to believe this statement. The evidence is sufficient to prove the occurrence of the incident; however, the Court has to find out whether it was a sexual assault, penetrative sexual assault, or simply an attempt to commit the carnal intercourse. The learned Judge has mainly relied upon the evidence of the Medical Officer. In my view, the contusion over the external part of the anus by itself would not be sufficient to establish the penetrative sexual assault. At the most, it would show that the accused attempted to commit the penetrative sexual assault and in the process, he touched the anus of the victim. Touching of the anus in this manner as stated above could not be a manipulation of any part of the body of the victim so as to cause penetration in the anus. In the facts and circumstances, in my view, the offence, as defined under Section 3 of the POCSO Act, has not been made out.

[21] In this background, at this stage, it would be necessary to see the oral evidence of the victim before the Court and the facts stated by him in his report at Exh.33. In his evidence, he has stated that the accused inserted his penis into his anus. In the report, he has stated that the accused touched his penis to his anus and tried to insert it. He has stated that, therefore, he made a hue and cry. He has stated that someone on a vehicle came there, and after hearing the horn of the vehicle, the accused released him. In the report, the victim has not stated that the accused inserted his penis into his anus. He has stated that the accused touched it and attempted to insert it into

his anus. Before Court, he has improved his version. In my view, this is another important factor to come to a conclusion that there was no penetration.

[22] The victim, on the date of the incident, was about 11 years old. The prosecution has produced on record ample oral and documentary evidence to prove the birth date of the victim. The victim has stated that his birth date is 11th February, 2009. His birth certificate collected by the Investigating Officer at the time of the investigation is at Exh.25. The prosecution has examined PW-7, an independent witness, to prove this fact. He is Gram Sevak of Gram Panchayat, Nemani. He has produced before the court the birth entry register of Gram Panchayat Nemani. He has stated that, in the said register, there is an entry for the birth of the victim, and his birth date is 11th February, 2009. The information of the birth of the victim was given by the father of the victim on 21st February, 2009. The extract of the relevant entry from the register is at Exh.51. The register was duly verified by the learned Judge before giving exhibit to the certified extract. Exh.25 was shown to this witness. He has stated that it was prepared on the basis of the very same entry. On perusal of this evidence, it has been proved beyond doubt that, on the date of the incident, the victim was 11 years old. It is necessary to mention, at this stage, that the prosecution has proved the occurrence of the incident. However, the evidence of prosecution is not sufficient to prove the penetrative sexual assault or the carnal intercourse. In view of the proof of the incident, it is necessary to see the offence made out against the accused.

[23] As far as Section 377 of the IPC is concerned, the offence made out would be an attempt to commit carnal intercourse, read with Section 511 of the IPC. As far as the provisions of the POCSO Act are concerned, the offence made out would be an aggravated sexual assault as defined under Section 9 and punishable under Section 10 of the POCSO Act. The victim, on the date of the incident, was 11 years old. The appellant/accused is, therefore, liable to be convicted under Section 377 read with Section 511 of the IPC and under Section 10 of the POCSO Act. The learned Judge, on his conviction under Section 10 of the POCSO Act, has awarded the sentence of five years rigorous imprisonment. Under Section 4 of the POCSO Act, the learned Judge has sentenced him to suffer rigorous imprisonment for ten years. In my view, in this case, the conviction under Section 4 cannot be sustained. It is required to be set aside. The conviction under Section 10 has to be maintained. Similarly, the accused is required to be convicted under Section 377 read with Section 511 of the IPC. As per Section 10 of the POCSO Act, in case of aggravated sexual assault, the minimum sentence is five years and the maximum sentence is up to seven years. Therefore, in this case, the sentence awarded under Section 10 of the POCSO Act is required to be maintained. Hence, the following order:

ORDER

i] The Criminal Appeal is **partly allowed.**

ii] The order with regard to the conviction and sentence of the appellant dated 28.03.2022, passed by the learned Special Judge, Special Court (POCSO), Chandrapur, for the offence punishable under Section 4 of the POCSO Act, is quashed and set aside.

iii] The conviction and sentence for the offence punishable under Section 10 of the POCSO Act, is maintained.

iv] The appellant/accused - Mahadeo @ Mahadya Uttam Gonde is also convicted for the offence punishable under Section 377 read with Section 511 of the IPC.

v] The sentence awarded for the offence punishable under Section 10 of the POCSO Act is five years. Therefore, there is no need to award separate sentence for the offence punishable under Section 377 read with Section 511 of the IPC.

vi] The Criminal Appeal stands disposed of in the above terms.
