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

CRIMINAL APPEAL NO. 67 OF 2021

APPELLANT : Pravin Ruprao Harde, Aged about 27 Years, Occ. Labourer, R/o. Udkhed, Tah. Morshi, Dist. Amravati.

//VERSUS//

RESPONDENT : State of Maharashtra, through P.S.O. Morshi Police Station, Dist. Amravati.

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Mr. R.M. Patwardhan, Advocate (appointed) for the Appellant.
Mr. Suraj Hulke, APP for the Respondent/State.

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CORAM : G. A. SANAP, J.
DATED : 25th JULY, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order dated 17.12.2019, passed by the learned Additional Sessions Judge-2, Amravati, whereby the learned Judge held the accused guilty of the offences punishable under Section 376(2)(i)(j) of the Indian Penal Code, 1860 (for short, "IPC") and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") and sentenced him on both the counts to suffer

rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- and in default to suffer rigorous imprisonment for three months.

02] BACKGROUND FACTS:

PW-8 is the victim girl of five years old. PW-1 is the mother of the victim girl. The crime was registered on the report of PW-1. It is the case of prosecution that on 11th January, 2017 at about 12:00 noon, the victim was playing with other children in the courtyard of the house. The accused called the victim girl inside the house and made her sit on his lap. It is stated that the accused inserted his finger in the vagina of the victim girl. He touched his penis to the private part of the victim. The victim girl came crying out of the house of the accused and narrated the incident to her aunt (PW-6) and her sister (PW-9). She narrated the incident to her parents when they came back from the field. It was late in the night and therefore, they did not go to the police station.

03] On the next day, i.e., on 12th January, 2017, the informant took the victim to the Morshi Police Station and reported the incident to the police. On the basis of her report, a Crime bearing No.28/2017 was registered against the accused. PW-

12 (API) conducted the investigation. The victim was referred to Government Hospital at Morshi for medical examination. PW-3 examined the victim. He did not find any injury on the body as well as on the private part of the victim. PW-12 recorded the statements of the witnesses. The statements of the witnesses were recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.PC"). The samples and articles were sent to Chemical Analyzer, Nagpur for analysis.

04] On completion of the investigation, PW-12 filed the charge-sheet against the accused. Learned Additional Sessions Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of the enmity between him and the parents of the victim, as there was a dispute between them with regard to the house property. The prosecution examined 12 witnesses. The learned Additional Sessions Judge, on consideration of the evidence, found the said evidence trustworthy and reliable and, on conviction, sentenced the accused as above. The appellant/accused is before this Court in appeal.

05] I have heard learned advocate Mr. Patwardhan for the accused and learned APP Mr. Suraj Hulke for the State. Perused

the record and proceedings.

06] Learned advocate Mr. Patwardhan submitted that there are major omissions and inconsistencies in the evidence of the material witnesses as to the actual occurrence of the incident and the involvement of the accused in the incident. Learned advocate took me through the evidence of all the material witnesses and pointed out that the witnesses have exaggerated and improved their version as to the actual occurrence of the incident before Court. Learned advocate submitted that, on the occurrence of the incident and the involvement of the accused in the incident, there is variance in the evidence of the victim on the one hand and the evidence of other witnesses on the other hand. Learned advocate submitted that the evidence of PW-6, the aunt of the victim, and PW-9, the sister of the victim, would show that they have deposed before Court as if they had witnessed the incident. Learned advocate submitted that their evidence is not trustworthy and believable.

07] Learned advocate took me through the evidence of the victim and her 164 Cr.PC statement recorded by the learned Magistrate and pointed out that the victim, due to tutoring, has

improved her version before Court and stated that the accused had inserted his penis in her vagina. Learned advocate submitted that, in 164 Cr.PC statement, she is silent about it. Learned advocate took me through the evidence of the Medical Officer (PW-3) and pointed out that the Medical Officer did not notice any injury to the private part of the victim or any sign to indicate that she was subjected to penetrative sexual assault. Learned advocate submitted that the analysis of the samples forwarded to the CA reveals that neither semen nor blood was detected on the samples and the articles seized during the course of the investigation. Learned advocate, in short, submitted that the evidence of the witnesses *prima facie* indicates the ring of falsehood and therefore, it cannot be made the basis of conviction of the accused. Learned advocate further submitted that the oral evidence adduced by the prosecution, coupled with the medical evidence, is not sufficient to establish that the victim was subjected to penetrative sexual assault. Learned advocate submitted that the learned Additional Sessions Judge has failed to appreciate the evidence on record in proper perspective.

08] Learned APP, in short, supported the judgment and order passed by the learned Additional Sessions Judge. Learned

APP submitted that the parents had no reason to put the future of the victim and the reputation of the family at stake. Learned APP submitted that the accused has not established that there was enmity between him and the parents of the accused. Learned APP submitted that minor omissions and inconsistencies are bound to occur in the deposition of the witnesses. Learned APP submitted that the omissions and inconsistencies are not material to cause a dent to the very core of the evidence of the prosecution witnesses. In the submission of the learned APP the absence of injuries to the private part or on the body of the victim by itself would not be sufficient to discard the oral evidence with regard to the occurrence of the incident and the involvement of the accused in the incident.

09] I have minutely perused the oral and documentary evidence adduced by the prosecution. As far as the medical evidence is concerned, it does not support the case of prosecution. The victim was examined on the next day i.e. on 12th January, 2017 at 10:00 am. The Medical Officer (PW-3) did not notice any injury to the private part. The Medical Officer did not notice swelling of any abnormality to the private part. It is the case of prosecution that the accused had inserted his finger in the vagina of the victim. The victim has stated before Court that the accused has inserted his

penis in her vagina. PW-1 has stated that the victim complained of pain during the night. In my opinion, if there was pain as stated, then the doctor (PW-3) at the time of the examination would have noticed some signs of either insertion of fingers or penis into the vagina. The medical evidence would show that her genital parts were intact. It is stated that the accused had touched his penis to her private part. As far as the medical evidence is concerned, it does not support the case of prosecution. In my view, if the act had been committed by the accused as stated by PW-1 and other witnesses, then the same would have caused some injuries or swelling to the private part of the victim. The evidence of the Medical Officer is, therefore, required to be kept in mind while appreciating the case of prosecution and the evidence of the prosecution witnesses. At this stage, it is necessary to mention that the CA reports are not corroborating the case of prosecution in any manner. The learned Additional Sessions Judge has taken the oral evidence into account and based on the said evidence held the accused guilty.

10] At the outset, it needs to be stated that the crime against the children is required to be viewed seriously. The perpetrator of the crime does not deserve any leniency. The lawmakers have provided for presumption in such a crime under Section 29 of the

POCSO Act with regard to the guilt of the accused in certain circumstances. However, the basic principle of criminal jurisprudence that the guilt of the accused has to be proved beyond reasonable doubt cannot be done away with completely. Initial burden is on the prosecution to prove the charge against the accused. The presumption under Section 29 of the POCSO Act is not an absolute presumption. The presumption can be triggered only in case the prosecution is able to establish the foundational facts. The foundational facts as to the charge must be proved to the satisfaction of the Court by leading cogent, concrete and trustworthy evidence. The foundation has to be laid on the basis of the trustworthy evidence. Once the foundation is laid to the charge, then the presumption would get attracted. In this backdrop, it would be necessary to appreciate the evidence adduced by the prosecution.

11] It is not out of place to mention that, considering the involvement of child in the crime, the approach of the Court has to be guarded. The Court has to take care and see that, consistent with the object of the POCSO Act, justice is done to the child. The evidence led by the prosecution must be sufficient to prove the guilt of the accused beyond a reasonable doubt. It is not out of

place to mention that, in such a crime, the sympathy of the Court is bound to be with the victim. However, the sympathy shall not be a misplaced one. The conviction must always rest on the credible evidence adduced by the prosecution and not on moral considerations. Any misplaced sympathy to the victim of a crime can cause a miscarriage of justice. Such sympathy can send an innocent man to suffer the sentence which he does not deserve.

12] Learned advocate Mr. Patwardhan took me through the oral evidence. Learned advocate has heavily criticized the evidence adduced by the prosecution. Learned advocate pointed out the major omissions and inconsistencies in their evidence as to the actual occurrence of the incident and the involvement of the accused in the commission of the crime. On careful perusal of the evidence, I am satisfied that there is substance in the submissions advanced by learned advocate Mr. Patwardhan. As far as the occurrence of the incident is concerned, there is variance in the evidence of the victim and other witnesses. The victim, as per the case of prosecution, had narrated to her mother that the accused had inserted his finger in her vagina. She told her mother that the accused had touched her vagina. PW-1 has not stated in her evidence that the victim told her that the accused had inserted his

finger in her vagina. The victim in her substantive evidence before Court has stated that when she went in the house of the accused, the accused removed her knickers and unzipped his pant and inserted his penis into her vagina. The victim in her evidence before Court has not stated that the accused had inserted his finger into her vagina. She has also not stated that the accused rolled over his penis upon her vagina. It is the case of prosecution that immediately after the incident, she went to the house and narrated the incident to her aunt (PW-6) and her sister (PW-9).

13] It would be appropriate at this stage to appreciate their evidence. PW-6 has deposed that she had gone to the house of her sister. She has stated that three children of her sister were playing outside. She has stated that thereafter, the accused, who is the uncle of the victim, had called the victim in his house and made her sit on his lap and moved his hand on her private part. PW-6 has narrated the incident before Court as if she were an eyewitness to the incident. In her evidence before Court, she has not stated that the victim had narrated the incident to her. In her evidence, she has not stated that the accused had either inserted his finger or his private part into the vagina of the victim. She has stated that she saw that the victim was weeping and irritated. It needs to be stated

that the material part of her examination-in-chief has been proved to be an omission. It clearly shows that she has improved her version before Court as to the incident. In any case, her evidence as to the actual role played by the accused in the incident is inconsistent with the version of the victim as well as the version of her mother. The mother of the victim was not at house. The incident was narrated to her mother by PW-6 when she came back from her field.

14] PW-9 is the sister of the victim. She has stated that, on the date of the incident, PW-6, her aunt, had come to their house. She has stated that they were playing in the courtyard, and at that time, the accused called the victim into his house. She has narrated the incident before Court in her evidence as if she had witnessed the incident. She has further stated that the incident was narrated to her by the victim. She has stated that the victim told her that the accused, after removing the zip of his pant, inserted his penis into her vagina. She has not stated that the accused had inserted his finger into the vagina of the victim.

15] The mother of the victim has stated that PW-9 told her that the accused had removed the knickers of the victim and

inserted his finger into her vagina. In my view, the learned Additional Sessions Judge was required to take note of all these major improvements and inconsistencies in their evidence. The evidence, if appreciated in proper perspective, would show that it is not consistent as to the occurrence of the incident and the actual act committed by the accused.

16] It is the defence of the accused that, on account of the household property, there is a dispute between him and the parents of the victim. It is his defence that, on account of that, he was falsely implicated in this crime. It is true that the suggestions put forth in the cross-examination of the witnesses consistent with his defence of enmity have been denied by the witnesses. However, the fact remains that the evidence adduced by the prosecution does not inspire confidence. There are material omissions and inconsistencies in their evidence on the vital aspect of the case of prosecution. Their statements recorded by the learned Magistrate under Section 164 of the Cr.PC are also inconsistent as to the occurrence of the incident and the actual act committed by the accused. In my view, the prosecution, in this case, has failed to prove the guilt of the accused beyond reasonable doubt. The inconsistent evidence of the witnesses on material aspects is

sufficient to doubt the credibility and trustworthiness of the witnesses. In such a crime, the Court has sympathy with the child. However, in the decision-making process, the Court should not get carried away by sympathy. The Court has to ensure that the evidence on record is sufficient to prove the charge.

17] In this case, on minute perusal of the evidence of the prosecution witnesses, I am satisfied that it leaves a scope to doubt their credibility and trustworthiness. The accused has been sentenced to suffer rigorous imprisonment for ten years on the basis of such evidence. In my view, the learned Additional Sessions Judge has not taken proper care. The oral evidence is not corroborated by the medical evidence. In the ordinary circumstances, if the accused had committed the act as alleged by the witnesses, then the Medical Officer ought to have noticed some injuries or at least swelling to the genital of the victim. In my view, therefore, the evidence is not sufficient to prove the charge. The accused, in the teeth of such doubtful evidence, cannot be held guilty of the charge. As such, I conclude that the prosecution has failed to prove the guilt of the accused. The accused, therefore, is entitled to get the benefit of doubt. The appeal, therefore, deserves to be allowed. Hence, the following order:

ORDER

i] The Criminal Appeal is **allowed**.

ii] The judgment and order dated 17.12.2019, passed by the learned Additional Sessions Judge-2, Amravati, in Special (POCSO) Case No.67/2017, convicting the appellant for the offences punishable under Section 376(2)(i)(j) of the Indian Penal Code, 1860, and under Section 6 of the Protection of Children from Sexual Offences Act, 2012, is set aside.

iii] The appellant/accused – Pravin Ruprao Harde is acquitted of the offences punishable under Section 376(2)(i)(j) of the IPC and under Section 6 of the POCSO Act.

iv] The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.

v] The High Court Legal Services Sub-Committee, Nagpur, is directed to pay the fees to the learned advocate appointed for the appellant, as per Rules.

vi] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

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