IN THE HIGH COURT OF JUDICATURE AT BOMBAY		
BENCH AT AURANGABAD		
CRIMINAL APPEAL NO. 508 OF 2015		
Gautam Chandrakant Khairnar Age: 35 years, Occ. Service/Agriculturist. R/o. Jiradi, Tq. Parola, Dist. Jalgaon.	...	Appellant.
V/s.		
1) The State of Maharashtra, Through Inspector, Parola Police Station, Parola, Dist. Jalgaon. 2) Priya D/o. Rajaram Kadhare, Age 18 years, Occ. Student, R/o. Choubari, Tq. Amalner, At. Present Waghadi, Tq. Shirpur, Dist. Dhule.	...	Respondents.
WITH **CRIMINAL APPEAL NO. 509 OF 2015**		
Bhaiyya @ Sharad S/o. Chandrakant Khairnar.Age: 29 years, Occ. Service/Agriculturist.R/o. Jiradi, Tq. Parola, Dist. Jalgaon.	...	Appellant.
V/s.		
1) The State of Maharashtra, Through Inspector, Parola Police Station, Parola, Dist. Jalgaon. 2) Priya D/o. Rajaram Kadhare, Age 18 years, Occ. Student, R/o. Choubari, Tq. Amalner, At. Present Waghadi, Tq. Shirpur, Dist. Dhule.	...	Respondents.

Mr. R.N. Dhorde, Sr. Counsel a/w. Mr. B.R. Warma, advocate for appellants.		

Smt. R.P. Gour, APP for State.		
Mr. Vivek M. Lomte, Advocate for respondent No. 2.		

CORAM	:	SMT. SADHANA S. JADHAV & S.G. DIGE, JJ.
RESERVED ON	:	MARCH 15, 2022.
PRONOUNCED ON	:	MAY 6, 2022.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellant in Cr. Appeal No. 509 of 2015 is convicted for the offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012(in short "POCSO Act") and sentenced to suffer Imprisonment for life and to pay fine of Rs. 1,00,000/-(Rs.One Lakh) in default to suffer R.I. for 3 years. He is also convicted for the offence punishable under section 506 of the Indian Penal Code and sentenced to suffer R.I. for 2 years. The appellant in Cr. Appeal No. 508 of 2015 is convicted for the offence punishable under section 12 of POCSO Act and sentenced to suffer R.I. for 3 years and to pay fine of Rs. 50,000/-(Rs. Fifty thousand) i.d. R.I. for one year by Additional Sessions Judge, Amalner in Sessions Case No. 15 of 2014 vide Judgment and Order dated 17/6/2015. Hence, these appeals.

2 Such of the facts necessary for the decision of these appeals are as follows:

(i) On 12th May, 2014 one Ms. X aged about 17 years lodged the report at Parola police station contending therein that she has no parents, but she has two sisters besides her and one brother. One of her sisters namely, Sunita is married and resides at Bhiwandi, Thane; the second sister is also married and resides in her matrimonial home at Waghadi, Taluka Shirpur, Dist. Dhule, whereas her brother Vijay resides at Virar, Mumbai. That till she completed her 7th standard, she was residing with her sister at Waghadi. Thereafter, her maternal cousin and her husband(the present appellant Gautam Chandrakant Khairnar) had taken her alongwith them to pursue further education. That Gautam Khairnar himself was a school teacher and therefore, they trusted him. That she had started residing with them.

(ii) That whenever her cousin was not at home, Gautam started making ill-intended advances. That one day when she was sleeping in kitchen room, he had ravished her against her wish. She expressed that she would inform about it to her sister. He threatened her by saying that he would see that she would fail in her exam in the eventuality that she would disclose the same to anyone. She started sleeping with her sister. However, he continued to molest her. That her cousin sister had gone to her maternal home for maternity and at that time, her husband continued to molest her.

(iii) When she was in 9th standard she had missed her menses. She had

informed about it to her sister who just turned a deaf ear to her complaint. That after about 2 weeks she had got cold and cough. Gautam took her to Dhule on motorcycle. They visited one Bhaiya doctor who advised them to go to Amalner. The doctor was not available and therefore, they visited a relative. They then visited Dr. Sameer Patil at Ajinkya Hospital. She had undergone sonography test. Gautam had taken the report to Bhaiya doctor and informed everybody that she was normal. He then brought some medicinal pills for her and told her that she should not worry, after consuming the pills she would get her menses. After three weeks she had got her menses.

(iv) She then called upon her real sister at Waghadi and expressed her desire to return to Waghadi. After the examinations were over, when her elder brother came to fetch her, Gautam had threatened her that she should not inform anything to anyone or he would kill sister and her husband.

(v) She took admission for 10th standard at Waghadi. She had health issues such as severe abdominal pain. Her sister wanted to take her for sonography. At that juncture she told her sister that she knew what was sonography test. Her sister suspected that something was wrong and therefore, enquired with her and at that time, she disclosed the trauma which she had undergone at the house of her cousin sister.

(vi) She has also alleged that the brother of Gautam namely, Sharad was

aware of the activities of Gautam and yet he also solicited sexual favours from her and hence, molested her.

(vii) On the basis of the said statement, Crime No. 120 of 2014 was registered at Parola Police Station against the accused for the offences punishable under section 376 (2) (f)(i)(n), 354, 509, 506, 114 of the Indian Penal Code and section 4, 5 (l) (n), 6, 8, 9(n), 10, 12, 17 and 18 of the Protection of Children from Sexual Offences Act.

(viii) The accused were arrested on 12/5/2014. After completion of investigation, chargesheet was filed on 7/8/2014 and the case was registered as Special Case No. 55 of 2014. At the trial, the prosecution examined as many as 7 witnesses to bring home the guilt of the accused, whereas the accused examined two witnesses in defence.

3 The prosecution mainly rests on the evidence of the survivor, her sister(P.W.2), P.W. 5 Dr. Rati Attarde, P.W. 6 Dr. Hira Damle, who examined the accused and P.W. 7 Vilas Kulkarni-Investigating officer.

4 P.W. 1 the survivor has initially deposed before the court as per the FIR. In the examination-in-chief, she has stated before the court that the accused Gautam had threatened her that she would fail in the examination if she would inform about his activities and character to anyone. Since, she was

willing to pursue further education, she did not disclose this fact to anybody. She is consistent that Dr. Sameer Patil had performed sonography. That she had also visited Dr. Bhaiya at Bahadurpur, who after seeing the sonography report, told her that everything was normal. On one occasion, when the accused Sharad had solicited sexual favour she had immediately approached cousin sister, where she was sleeping and disclosed to her the act of accused Sharad. Her maternal sister reacted by giving him two to three slaps. The accused No. 1 had again maintained sexual relations with her and since she was suffering from abdominal pain, she called upon her sister telephonically. Her sister asked their maternal brother to fetch her to village Waghadi. Her sister was surprised when she realised that P.W. 1 knew about the sonographic test and therefore, she was constrained to spill the beans and disclose everything. She has proved the contents of the FIR which is marked at Exh. 22.

5 In the cross-examination, it is elicited that her brother Vijay who was about 40 years of age at the time of incident was working in Bombay and was residing in Virar, Bombay. Her brother has two sons who are in 7th and 5th standard respectively. Her another sister Sunita resides at Bhiwandi, Thane and her husband is a veterinary doctor. That after demise of her parents her

brother had maintained her i.e. she was residing at Bombay alongwith her brother. She has taken education for the classes 8th and 9th standard at village Jirali in the school named as Madhyamik Vidyalay Jirali. It was a co-education school. The school was at a stone's throw from her house.

6 She was confronted with the scene of offence map and she admitted that only one room in the house which is adjacent to the hall has a door whereas the room of the accused and another room had no doors. There are residential houses near her school. All the rooms are adjacent to each other. There are total 9 to 10 members residing in the house of the accused. The son of the maternal uncle of the accused was also residing in the same house and was doing agricultural work. He used to sleep in the courtyard. She used to sleep with the parents of the accused in the hall. Accused No. 2 along with his wife and children used to sleep in the rear room.

7 She used to engage herself in household work. There were girls of the same age residing in the neighbourhood. In May, 2013 she completed her 9th Standard and in June, 2013 she took admission at village -Waghadi. That was also a co-education school. She has denied to have stated that the wife of accused No. 1 had delivered the child at Jirali and not in her maternal house. She has admitted in her cross-examination that after 9th standard her brother-

in-law Sanjay Agale had been to fetch her. Her maternal brother had also reached there to fetch there.

8 That she used to talk to her brothers, sisters and brother-in-law on phone but during period of two years she had not disclosed the incident to anyone. She disclosed the incident to her sister after one year after she started residing at Waghadi. That at village Waghadi she had neither visited doctor nor undergone sonography since she was not suffering from pains and therefore, she had not visited the doctor.

9 She has also admitted in the cross-examination that prior to lodging of the report, all of them i.e. brothers, sisters and brother-in-law had assembled at Bombay and from Bombay they directly came to Parola Police Station. That at Parola police station her two brother in laws, two sisters and brother accompanied her. That her brothers, sisters and brother in laws were interrogated by the police and their statements were also recorded on that day. They had halted at Amalner at the house of her maternal aunt(the mother-in-law of accused Gautam). Even after her medical examination, she had stayed at the house of maternal aunt for two to three days and thereafter, her statement was recorded under section 164 of the CR.P.C. At the time of recording of 164 statement, a lady constable and her sister were present in the

court till completion of her statement under section 164 of Cr. P.C.. Fifteen days prior to lodging of the report, both the accused and their wives had visited the village Waghadi and stayed at the house of her sister and celebrated the village fair.

10 P.W.2 Vandana Agale happens to be the real sister of the survivor and she resides at village Waghadi. According to her, her sister has taken education of 8th and 9th standard at village Jirali in the house of her maternal cousin sister and in 10th standard she took admission at village Waghadi. That when she was staying at village Waghadi, she was nervous and suffering from stomach ache. She got temporary relief after medication. That P.W. 2 advised her sister to go to Shripur for having sonography test and at that time, the survivor asked her whether sonography means to move the machine on stomach. Upon enquiry, she disclosed the whole episode to her sister. She had also stated that the accused used to ravish her after every four days. According to her, the wife of the accused had gone for delivery to village Waghadi and thereafter, the accused started having sexual intercourse with the survivor more frequently. That the menstruation had started after she consumed the pills given by the accused and therefore, she was not willing to reside at village Jirali. After learning about the same, she asked her brother to

fetch the survivor back. And then she disclosed them the whole episode. Thereafter, all the family members decided to lodge the report.

11 It is elicited in the cross-examination that the qualification of P.W. 2 is D.Ed. Her husband is veterinary doctor. The survivor had studied at Waghadi only upto 7th standard and 10th standard. The survivor is 13 years younger to her. The accused No. 1 is a teacher. Her maternal cousin had requested her to send the survivor to her house so that she would also perform the daily domestic chores. After completing 9th standard she came to village Waghadi. When she was studying in 10th standard, she never complained against the accused. She had neither confronted her cousin after learning about the incident from the survivor. They had consulted Dr. Tushar Marathe for giving treatment to survivor but the survivor had not undergone any sonography test. That all the sisters, their husbands and the brother had assembled at Mumbai and then decided to lodge report. The survivor was sent to Mumbai. The entire disclosure statement by the survivor is in the form omission in the evidence of P.W. 2. Her statement was recorded by Parola Police station only once. That neither she, her husband or her bother had visited village Jirali. **While studying in 8th and 9th standards in the vacations the survivor used to visit village Waghadi and stay with P.W. 2**.

12 The date of birth of survivor is 4th September, 1996 as per the school leaving certificate issued by Madhyamik Vidyalay, Jirali. It also shows that she left the school while studying in 10th standard in June, 2013. The said school leaving certificate is at Exh. 27.

13 P.W.5 Dr. Rati was working as CMO at hospital at Jalgaon. She had examined the victim on 13/5/2015, in which the survivor disclosed that she was raped by known person. That the accused had taken her for sonography and given medicine due to which she was suffering from bleeding for about 3 weeks. P.W. 5 has obtained diploma in Dermatology and Venerology. She had examined the survivor in the presence of a Gynaecologist rather the Gynaecologist examined her and P.W. 5 filled the form. She had not given her final opinion about rape committed on the victim. She had further deposed as follows :

> "In Exh. 42 I have not mentioned the clockwise rupture of hymen. If rape is committed time to time, at the begin fourchette may sustain damage, but later on not sustain damages. I did not find damages sustained to the fourchette of victim. At the time of first sexual intercourse. Labia Majora and Labia Minora may cause damage. I did not find injury on the fourchette of victim."

She has further deposed that to ascertain whether rape was committed on the

victim, the examination by inserting finger in her vagina is essential. In Exh. 42 there is no specific reference in this regard.

14 P.W. 6 Dr. Heera Damle has clinically examined the accused. It would not be necessary to discuss her evidence.

15 P.W.7 Vilas Kulkarni, Investigating Officer was attached to Parola Police station as API. He has deposed before the court that on 12/5/2014 the statement of the victim was recorded by PSI Supriya Deshmukh and then the investigation was handed over to me. He arrested the accused on the same day at 9 p.m. He has referred to the steps taken by him in the course of investigation. He had also recorded a rough statement of the victim which does not form part of the chargesheet. Prior to lodging of FIR, he had not recorded the facts narrated by the victim. He has not recorded the statements of the family members of the accused or the teachers and the classmates of the victim. He has also not collected the sonography report from Dr. Sameer Patil. The witness has volunteered that the doctor had stated that the victim had never visited him for medical examination. He had not seized the sonographic machine of Dr. Sameer Patil. There is no investigation in respect of the medicines administered to the survivor by the accused. At the stage of interrogation, the accused had persisted that he had not committed any

offence. He had not requested the doctor to conduct ossification test of the victim. He had not recorded the statement of the employee who prepared the school leaving certificate and the bonafide certificate of the victim, but has collected the documents on the basis of which the school leaving certificate was prepared. That the statement of the relatives was not recorded on the day of the lodging of the report although they were present in the police station nor they volunteered to say anything.

16 The accused has examined Yogesh Nikam, Gram Sevak of Jirali Gram Panchayat to establish that the wife of the accused had given birth to the child in village Jirali itself on 27/9/2012 and not village Waghadi. It was a female child named Asmita. The name of the father of the child is shown as Gautam Chandrakant Khairnar i.e. accused No. 1. The entry is taken on 3/10/2012 at entry no. 23. At that time, the gram sevak was Arvind Patil who had affixed his signature on the birth register. The extract of the birth register is produced before the court and marked at Exh. 64. There is nothing significant in the cross-examination.

17 Defence witness No. 2 is Arvind Bhatu Patil, who was working as gram sevak of village Jirali from October, 2010 to 4th September, 2014, thereafter, he was transferred to Dhule district. He has stated that on

27/9/2012 Vandana, wife of Gautam Khairnar had given birth to a female child and the said entry was taken on 3/10/2012. The birth register is produced before the court and marked at Exh. 64. The information was given by the informant in his own handwriting. There is no dent created by the prosecution in cross-examination.

18 The learned Senior Counsel for the appellant has vehemently stated as follows :

(i) that the evidence of the victim does not inspire the confidence.

(ii) It is submitted that despite the fact that she was communicating with her sisters and brother on telephone, the survivor had not disclosed the act committed by the accused.

(iii) That silence on the part of the grown up girl for two years would speak volumes for itself.

(iv) That she had disclosed to the wife of the accused No. 1 about her molestation at the hands of accused No. 2, but no reason is assigned as to why the act of accused No. 1 was not disclosed to the wife of accused No. 1.

(v) The house of the accused is occupied by not less than 9 persons who were not only informed but they had not even seen the clandestine act of the accused No. 1.

(vi) That Exh. 64 would clearly establish that the wife of the accused No. 1 had delivered the child at village Jirali and not at village Waghadi and hence P.W. 1 and P.W. 2 would be falsified clearly.

(vii) P.W. 2 has categorically stated that both the accused and their wives had visited village Waghadi just 15 days prior to lodging of the report and they all stayed happily. That P.W. 1 and P.W. 2 have not stated -

(a) a single specific date either when the incident had taken place.

(b) when she has been examined by doctor.

(c) when she had disclosed the incident to P.W. 2.

(viii) That it cannot be believed that for simple abdominal pain, P.W. 2 would advise sonography to her sister without being suggested so by a general medical practitioner.

(ix) On the way to Parole for lodging complaint, the complainant and her relatives had stayed at Amalner in the house of mother-in-law of accused No. 1 who happens to be the maternal aunt of the survivor.

(x) The investigating agency has not called for the medical report of sonography or any other tests. The doctors who had examined the victim have not been examined by the prosecution

(xi) P.W. 7 had supposedly recorded the statement of doctor Sameer

Patil. Since he has deposed the court that Dr. Patil has stated that the survivor has never visited his hospital.

(xii) It is submitted by the learned Sr. counsel that in this backdrop the court cannot convict the accused with the aid of section 29 of the POCSO Act.

19 Per contra, the learned APP has submitted as follows :

(i) That the evidence of the victim in itself is sufficient to convict the accused for the offences alleged against him.

(ii) That survivor was a helpless child. The survivor had not divulged the incident to anyone since she was afraid that the accused No. 1 would fail her in the examination. That the survivor was threatened of dire consequences and therefore, she could not disclose the incident to anybody much less to her own sister.

(iii) It is also submitted that in the present case, the accused had taken the advantage of the minority of the victim, coupled with the fact that she had no parents surviving at the time of the incident and she was at the mercy of the relatives.

(iv) It is also submitted that by virtue of section 29 of the POCSO Act, there is a presumption against the accused that he is guilty of the offence with which he is charged and in the present case, the accused has not discharged

the said onus except by placing on record Exh. 64 which is the birth certificate of the child of the accused No. 1.

20 Learned Counsel for the respondent No. 2 has relied upon several judgments of the Apex Court and has stated vehemently that the Judgment of the trial court calls for no interference. The learned Counsel placed reliance upon the judgment of the Apex court in the case of **Independent Thought v/s. Union of India & anr.(AIR 2017 SC4904.),** in order to highlight the mandatory provisions of the POCSO Act and intention of the legislation in introducing the said act. The learned Counsel has also placed reliance on the judgment of the Supreme Court in the case of **Ganesan v/s. State represented by its Inspector of Police[(2020) 10 SCC 573]** and has further submitted that the evidence act nowhere says that evidence of the victim cannot be accepted unless it is corroborated in material particular. She is undoubtedly competent witness under section 118 of evidence act and her evidence must get same weightage as is attached to an injured in cases of physical violence.

21 The learned Counsel for the respondent No.2 has also placed reliance upon the judgment of Apex Court in the case of **Rai Sandeep v/s. State (NCT of Delhi)[(2012) 8 SCC 21]** and has drawn the attention to the paragraph 10.3 which reads as follows :

"In our considered opinion, the 'sterling witness' should be of a very high quality and caliber 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 everyone 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 similar such tests to be applied, it can 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."

22 With the aid of the respective counsel, we have meticulously gone through the evidence adduced by the prosecution and it is seen from the record that there is no doubt a delay in lodging of the FIR and the same may not be adverse to the prosecution because in a case of "rape" it is not very easy for a girl to approach the police station and lodge report and thereafter prosecute the case. The victim has to necessarily give a thought to social repercussions of lodging of FIR in a rape case as well as the effect on the reputation and social status of the family. It becomes all the more difficult when the accused and the victim are relatives. A victim cannot therefore be blamed for lodging of the FIR at a belated stage. Hence, in the present case, delay in lodging FIR by itself does not strike the prosecution case. What needs

to be considered by us as to whether the victim is a sterling witness and whether her evidence before the court is consistent with the evidence adduced by the prosecution. There could be various reasons for delay in lodging the FIR and the same may depend on the facts of each case. Reluctance to lodge immediate FIR could be viewed from several angles. Hence, delay in lodging FIR in a rape case, by itself cannot be fatal to prosecution. It cannot be said blatantly that the prosecution can discharge the onus only by examining the victim since the prosecution has to prove the case beyond reasonable doubt. And a conviction cannot be recorded by simplicitor application of section 29 of the POCSO act.

23 The admitted facts in the present case are as follows :

(i) That the accused No. 1 happens to be husband of the maternal cousin of the victim.

(ii) That the husband is a teacher working in Madhyamik School at Jirali.

(iii) The victim has taken education at village Jirali during the period when she was studying in 8th and 9th standards.

(iv) P.W. 2 happens to be the real sister of the victim. She has categorically stated that at the request of her maternal cousin sister, she had allowed the victim to pursue her educaiton and also work for the maternal

cousin.

(v) That the date of birth of the victim is 4th September, 1996 and hence, she was a minor at the time when FIR was lodged.

(vi) That the investigating officer has failed to record the statement of the doctors who had examined her. There is no x-ray, sonographic report or any prescription brought forth before the court.

(vii) The prosecution cannot always rely upon the defence of the accused persons.

(viii) That she was clinically examined by P.W. 5 and P.W. 6.

(ix) That her sister had given birth to a female child at Jirali itself.

(x) That the brother and sisters of the accused had stayed in the house of sister of the victim at Waghadi just 15 days before lodging of the report and at that time P.W. 2 had not confronted them with any accusation as levelled by the victim.

(xi) On the way to the police station also, the members of the family of the victim had actually stayed in the house of mother in law of accused no. 1 and yet there was no disclosure or confrontation.

(xii) She was residing in the family of 9 members in the house of the accused.

24 In the case of **Ganesan v/s. State (cited supra),** the Supreme Court has held that a victim of rape is a competent witness under section 118 of the evidence act and her evidence must get some weightage as is attached to the evidence of an injured witness. This aspect would come with a proviso that the evidence of the victim should be a sterling testimony, such that in the absence of any other evidence also her evidence would be sufficient to convict the accused. In short, it should be consistent with material particulars which need no corroboration.

25 In the present case, there is specific evidence that the victim was residing with her cousin sister to whom she did not disclose the activities of the accused who happened to be none other than the husband of maternal cousin sister although she could complain against accused No. 2 who happens to be the brother-in-law of her cousin. Besides that, she was in contact with her brother and sister over the telephone and yet there was no disclosure. That Waghadi and Jirali are the villages in Taluka Shirpur. It cannot be believed that the brother and sister of the victim did not visit her on a single occasion while she was studying in 8th and 9th standard. Moreover, in the vacations of 8th and 9th standard also the victim does not say that she did not visit her brother and sister. There is a categorical statement in the evidence of

P.W. 2 that while studying in 8th and 9th standard the survivor used to visit village Waghadi and stayed with P.W. 2. The contention of P.W. 2 that acts of the accused had come to light only after she had taken admission in 10th standard would not appeal to a prudent mind and hence, do not inspire the confidence of the court. The evidence of P.W. 2 would lead to an inference that there is some suppression of facts.

26 According to P.W. 2, the victim had missed her menstrual cycle when she was in 9th standard. That the menstruation had started after she consumed the pills given by the accused No. 1. This fact was disclosed to P.W. 2 by the victim telephonically which followed with a further request that she did not wish to reside the village at Jirali and therefore, P.W. 2 had asked her brother to fetch the survivor back to village Waghadi. In these circumstances, it is difficult to believe that P.W. 2 had learnt about the act committed by the accused only after she had asked victim to undergo the sonographic test. The sonographic test was not advised by any doctor and at the first blush P.W. 2 claims to have decided to send her sister for sonography.

27 Exh. 64 would clearly establish that in fact, the wife of the accused had given birth to a female child in Jirali which would falsify the contention of

the victim that she was sexually exploited continuously when the wife of the accused had gone for maternity to village Waghadi.

28 At this stage, it would be apt to refer to the Judgment of the Apex Court in the case of **State of Punjab v/s. Gurmitsingh and ors.[(1996) 2 SCC 384].** The Supreme Court has held as follows :

> "The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscious, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused."

The court has further held-

> "Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrx is not a requirement of law but a guidance of prudence under given circumstances.
>
> Inferences have to be drawn from a given set of facts and circumstances with realistic diversities and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyreny making justice a casuality."

29 In the present case, P.W. 5 Dr. Rati who examined the survivor has categorically stated that she had not given her final opinion about rape

committed on the victim. That in the present case, she did not find any injury on the fourchette of the victim. That she did not find any damages sustained on the fourchette of the victim and has also admitted that in Exh. 42 there is no specific reference to the conclusion that P.W. 1 is a victim of rape.

30 In these circumstances, the evidence of the prosecutrix also has to be tested on the touchstone of medical evidence since there is absolutely no evidence worth the name to show that she had undergone sonographic test, there is no evidence to show that her menstrual cycle had restarted only after the accused had administered any pills, there is no evidence even to lead to any inference that she had suffered from abdominal pain due to which her sister had suggested her sonographic test and at that juncture, P.W. 1 was constrained to divulge the trauma she had undergone at the hands of the accused No. 1.

31 As far as the accused No. 2 is concerned, the only indictment is that he had solicited sexual favours about which the prosecutrix had complained to her cousin sister. That cousin sister had slappbed accused No. 2. However, it is not the case of the prosecutrix that he continued to behave in a similar manner after he was slapped by the cousin sister of the prosecutrix. It is

pertinent to note that the cousin sister of the prosecutrix who happens to be wife of the accused No.1 has not been examined by the prosecution. At the same time, there is no plausible explanation by the prosecutrix as to why she has not disclosed about the continuous misdeeds of the accused No. 1 to his wife. That in the substantive evidence, the prosecutrix has stated that on one occasion she had made an attempt to divulge about the misdeeds of the accused no. 1 to his wife. However, she turned a deaf ear to the same. It is pertinent to note that this contention of the prosecutrix is a material omission which is brought on record and hence, the same cannot be considered.

32 There are several infirmities in the investigation. The investigating officer had not recorded statement of any of the doctors, had not investigated the medicinal pills that was administered to the victim nor the sonographic test on record. From the materials on record and the evidence adduced by the prosecution and the submissions made by the Counsel on both sides, this court is of the considered view that there are lacunas in the investigation which go to the root of the matter, due to which the court cannot simplicitor avert to section 29 of the POCSO Act. No clinching evidence has been placed before the court which would support the evidence of P.W. 1. The investigating agency has not recorded the statement of the teachers of

Madhyamik school nor placed on record the attendance register to show that the victim and the accused had absented from school on the same day. The Investigating Officer has not recorded the statements of the friends of the victim. The victim has nowhere stated the date and time of any incident that had taken place. There is lack of material which would enable us to take recourse to section 29 of the POCSO Act.

33 Section 29 of the POCSO Act reads as follows :

> **"Section 29. Presumption as to certain offences.** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

34 The Black's Law Dictitionary defines the word "Presume" as -

> "to assume before hand; to suppose to be true in the absence of proof."

The Black's Law Dictionary further defines the word "presumption" as -

> "Presumption - a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of fact-- most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it

with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."

35 A legal inference can be drawn only in the given facts i.e. only when legal and admissible evidence is adduced by the prosecution. The determinative question would be whether the presumption under sections 29 of the POCSO Act discharges the prosecution of proving its case beyond reasonable doubt ? We are constrained to hold that the prosecution cannot be discharged of proving its case by way of such admissible evidence which would appeal to a prudent and a logical mind and hence, judicial conscience.

36 It cannot be said that the presumption under section 29 of the POCSO Act is conclusive presumption which cannot be overcome by any additional evidence or argument. In legal terminology a presumption cannot be absolute presumption, as such, presumption would usually be mere fiction to disguise a rule of substantive law. A judgment in the court of law shall necessarily be governed by rule of evidence.

37 It is not sufficient to make an allegation, but it is incumbent upon the

prosecution to establish the charge indicted upon the accused beyond reasonable doubt. The omissions and contradictions in the evidence adduced by the prosecution are of such magnitute that it would be difficult to place implicit reliance upon the evidence of P.W. 1 and P.W. 2. The accusation levelled by the prosecutrix do not appeal to a prudent mind and hence, do not inspire the confidence of the court. Hence, we are of the opinion that the charges levelled against the appellants *are not proved beyond reasonable doubt.* As a Constitutional Court, it is incumbent upon us to look for admissible evidence in accordance with law and the same is missing in the present case.

38 In view of the above observations, the appeals deserve to be allowed and appellants deserve to be acquitted of the charges levelled against them. Hence, following order is passed :

ORDER

(i) The Criminal Appeals are allowed.

(ii) The conviction and sentence imposed upon the appellants vide Judgment and Order dated 17th June, 2015 passed by the learned Additional Sessions Judge, Amalner in Special Case (POCSO) No. 15 of 2014 is hereby quashed and set aside. The appellants are acquitted of

all the charges levelled against them.

(iii) The appellant Gautam Chandrakant Khainar be released forthwith in not required in any other offence. Fine amount if paid be refunded.

(iv) The bail bonds of the appellant Bhaiyya @ Sharad s/o Chandrakant Khairnar stands cancelled. Fine amount, if paid be refunded.

(v) The Criminal Appeals are disposed of accordingly.

(S.G. DIGE,J) **(SMT. SADHANA S. JADHAV,J)**