IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 524 OF 2020

Sanjay s/o Gowardhan Wakde,
Aged 30 years, Occupation:- Labour,
R/o Deloda Khurd, Tah.:- Armori, ... APPELLANT
District :- Gadchiroli (In jail)

// V E R S U S //

State of Maharashtra,
Through Police Station Officer,
Police Station -Armori,
Tah. Armori, Dist. Gadchiroli ... RESPONDENT

Mr A.C. Jaltare, Advocate for appellant.
Mrs. R.V. Sharma, APP for respondent/State.

CORAM : G. A. SANAP, J.
DATE : 20/07/2024

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

1. Heard finally with the consent of learned Advocates of the parties.

2. In this appeal, the challenge is to the judgment and order dated 16.10.2020 passed by the learned Special Judge, Gadchiroli, whereby the learned Judge held the accused guilty

of the offences punishable under Section 376(2)(l) of the Indian Penal Code (for short, "the I.P.C.") and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act") and sentenced him to suffer rigorous imprisonment for 15 years and to pay a fine of Rs.60,000/-, in default to suffer simple imprisonment for four months. A separate sentence has not been awarded for the offence punishable under Section 376 (2) (l) of the I.P.C.

3. Background facts:-

The informant is the mother of the victim. The victim on the date of the incident was 14 years old. The victim is handicapped as well as mentally retarded. The incident occurred on 02.09.2018. It is the case of the prosecution that the informant, the mother of the victim, had gone to the field of one Nagoji Narnawre for work. At about 01.00 p.m., Nagoji Narnaware went to the field and told the informant to go to her house immediately. Accordingly, the mother of the victim came

back to her house. The mother-in-law of the informant narrated the incident to her. The mother-in-law of the informant told her that she had gone to the house of Bhagwan Chaudhari for some time and when she came back she saw the accused in the house of the informant. The accused is a relative of Indubai of her village. She told that the victim was weeping and her clothes were lying on the ground. She told the informant that the accused had committed some mischief with the victim and therefore, she slapped him. She further told the informant that when she tried to close the door of her house, the accused pushed her and ran away.

4. The mother of the victim noticed that the slacks (paijama) and knickers of the victim were lying on the ground and the same were stained with blood. The mother examined private part of the victim and found that there was a bleeding injury. The informant on the basis of information received from her mother-in-law and her personal examination of the

victim was satisfied that the accused had committed rape on her mentally ill daughter. She therefore, went to the Police Station and lodged the report.

5. On the basis of the report, the crime bearing No.228/2018 was registered at Armori Police Station, District Gadchiroli, for the offences punishable under Section 376(2)(l) of the I.P.C. and under Sections 4 and 6 of the POCSO Act. PSI Shital Rane (PW-6) carried out the investigation. The victim was referred to the General Hospital, Gadchiroli, for medical examination. The samples were collected. The clothes of the victim were seized. On arrest of the accused, his clothes were seized. On completion of the investigation, PW-6 filed the charge-sheet in the Court.

6. Learned Judge framed the charge against the accused. The accused pleaded not guilty. Prosecution examined six witnesses. Learned Judge on consideration of the evidence,

found the said evidence sufficient to prove the charge and held the accused guilty and sentenced him, as above. Being aggrieved by the judgment and order, the appellant has come before this Court in appeal.

7. I have heard Mr. A.C. Jaltare, learned Advocate for the appellant and Mrs. Ritu Sharma, learned APP for the State. Perused the record and proceedings.

8. Learned Advocate for the appellant submitted that appellant is not a resident of village Deulgaon. Learned Advocate pointed out that the accused in that way was completely stranger to the victim, informant and her mother-in-law. In short, learned Advocate submitted that neither the informant nor PW-3, the grandmother of the victim, knew the accused prior to the incident. In the submission of learned Advocate for the accused in such a serious crime without conducting the test identification parade to establish the identity of the accused beyond doubt, the learned Judge ought

to have discarded the evidence of the prosecution against the accused. Learned Advocate submitted that PW-3, the grand mother of the victim, has categorically admitted that the prosecutor in-charge of the case had shown the accused to her. Learned Advocate submitted that this reflects on the credibility and trustworthiness of the witness. Learned Advocate submitted that in such a serious matter the dock identification of the accused cannot be accepted as a gospel truth. Learned Advocate submitted that the learned Judge has not properly appreciated this vital and important point in the proper perspective. In the submission of learned Advocate for the appellant, the identification of the accused being the perpetrator of the crime has not been fully established and therefore, the appellant deserves the benefit of the doubt. Learned Advocate submitted that on the point of identification of the accused learned Judge has accepted the statement of the informant (PW-1), Grand-mother of the victim (PW-3) and

Neighbour (PW-4) recorded under Section 164 of the Cr.P.C. as a substantive piece of evidence. Learned Advocate submitted that statement under Section 164 of the Cr.P.C. cannot be accepted as a substantive piece of evidence. It is submitted that the statement under Section 164 of the Cr.P.C. can be used for the purpose of corroboration as well as for contradiction of the witnesses. In order to seek support to this submission learned Advocate has placed reliance on the following four decisions:

i) *State of Karnataka Vs. P. Ravikumar Alias Ravi and others* reported at *(2018) 9 SCC 614*.

ii) *Ram Kishan Singh Vs. Harmit Kaur and Another* reported at *(1972) 3 SCC 280.*

iii) *Baij Nath Sah vs. State of Bihar* reported at *(2010) 6 SCC 736.*

iv) *Audumbar Digambar Jagdane and another Vs. State of Maharashtra* reported at *1998 SCC OnLine Bom 816.*

9. Learned APP submitted that identification of the

accused in the Court by witness is a substantive piece of evidence. Learned APP would submit that PW-3, the grandmother of the victim, had seen the accused on the spot and therefore, she identified him in the Court at the time of her evidence. In the submission of learned APP, the failure on the part of the investigating officer to conduct the test identification parade at the stage of investigation would not make the evidence of PW-3 and PW-4 inadmissible. Learned APP would submit that though the accused was not known to PW-3 prior to the occurrence of the incident, she had sufficient time to observe the accused at the time of the incident and based on her observation of the accused at the time of the occurrence she has properly identified him in the Court. Learned APP submitted that certain admissions given by PW-3 suggesting tutoring on this point are not at all relevant. Those admissions cannot be read out of context. Learned APP would submit that PW-4 is an independent witness. Learned APP pointed out that at the

time of his evidence he did not support the case of prosecution. However, his statement recorded by the Magistrate under Section 164 of the Cr.P.C. has been admitted in evidence. Learned APP took me through the evidence of PW-3 and PW-4 and reasons recorded by the learned Judge for accepting that evidence and submitted that it is sufficient to establish the identity of the appellant/accused being the perpetrator of the crime.

10. It is undisputed that the accused is resident of Deloda Khurd. The informant is a resident of Deulgaon. The victim is mentally retarded. She is also handicapped. She is not able to walk. In order to move from one place to another, she has to slide through. The victim could not speak. During the course of investigation her statement could not be recorded. Similarly, she has not been examined before the Court. At the time of the incident, she was 14 years old. Learned Judge has accepted the part of the statement of Dhanpal Wagh (PW-4)

recorded under Section 164 of the Cr.P.C. as a corroborative piece of evidence to the other evidence adduced by the prosecution.

11. In this case, the prosecution was duty bound to prove the identification of the accused being the perpetrator of the crime. Test Identification Parade was not conducted by the investigating officer. Investigating officer has categorically admitted that during the investigation, it was revealed to her that the accused was not known to the informant and PW-3 prior to the occurrence of the incident. Despite that the test identification parade was not conducted. Before proceeding to appreciate the evidence of PW-3, who has identified the accused in the Court for the first time, it would be appropriate to consider the settled legal position. In this background, useful reference can be made to the law laid down by the Hon'ble Apex Court in the case of ***Malkhansingh and others vs. State of Madhya Pradesh,*** reported at, ***(2003) 5 SCC 746***. In this

case, the Hon'ble Apex Court has held as follows:-

> *"The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. But failure to*

> *hold a test identification parade would not make inadmissible the evidence of identification in court. The identification parades belong to the stage of investigation, and there is no provision in the CrPC which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. These parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."*

12. The exposition of law as above is required to be borne in mind while appreciating the evidence to the prosecution witnesses. PW-1 is the mother of the victim. She

was not present at the house when the incident occurred. According to the prosecution, the incident of sexual assault on the victim occurred in the house of her uncle. PW-1 on the basis of the information provided to her about the incident by PW-3 had lodged a report at Exh.11 at Armori Police Station. PW-1 has reiterated the incident narrated to her by PW-3 in her report. At the time of her evidence, PW-1 could not identify the accused. She has categorically admitted that she had not seen the accused prior to the occurrence of the incident and at the time of the incident. As far as identification of the accused, being the perpetrator of the crime, is concerned, the evidence of PW-1 is of no help in any manner. PW-3 is the grandmother of the victim. She has stated that at the time of the incident she had gone to the house of one Chaudhari. She has stated that when she returned back to her house with her grandson she heard some noise from the house and therefore, she pushed the plank of the door. She has stated that she saw

the accused sleeping on the person of the victim. The handkerchief of the accused was crammed in the mouth of the victim. She has stated that the accused Sanjay, when she tried to close the door, pushed her aside and fled from the spot. She has further stated that at that time her son Ashok had come to the house from the field. She has further stated that Ashok went towards the accused and questioned him as to why he had committed such an act with victim. She has categorically stated that Ashok had slapped the accused and then the accused fled from the spot. She has stated that the victim was lying in the house. PW-1 as well as PW-3 has deposed about the condition of the victim and the condition of the clothes of the victim. They saw that the victim had sustained injury to her private part and blood was oozing from her private part.

13. PW-3 has stated that her son Ashok gave fist blows to the accused. Ashok has not been examined. The prosecution has not placed on record plausible reasons for non-examination

of Ashok. She has admitted that she was not knowing the accused at the relevant time. The accused was produced via-video conferencing. The accused was shown to the witness. She identified the accused being perpetrator of the crime. On this point, she has been thoroughly cross-examined. She has admitted in her cross-examination that at the time of the incident, she was not knowing the name of the accused. She has admitted she had not stated the name of the accused while recording her statement by police as well as by Magistrate. She has admitted that public prosecutor had shown the accused to her by describing him by his name as a Sanjay Wakde and therefore, she identified him. In my view, this admission is very vital for deciding the fate of the case of the prosecution. In her cross-examination, she has stated that police had called her for identifying the accused in the identification parade. She has denied the suggestion that she did not identify the accused at the relevant time. Undisputedly, the test identification parade

was not conducted. In my view, in this case, the investigating officer was required to conduct the test identification parade to lend an assurance to the case of a prosecution and the evidence of prosecution witnesses. PW-3 has categorically admitted that the prosecutor conducting the matter had shown the accused to her by describing his name as Sanjay Wakde and therefore, she identified him. In my view, the identification of the accused by PW-3 in the Court appears to be on the basis of the lead role played by the prosecutor. In this backdrop, the evidence of PW-3 identifying the accused at the time of evidence is surrounded by doubtful circumstances. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The prior to test identification is to test and strengthen the trustworthiness of that evidence. The evidence of identification of the accused in the Court is a substantive piece of evidence. In the absence of a test identification parade, the evidence of identification of the

accused in the Court would not be inadmissible. The weight to be attached to such evidence of the identification in a Court is a matter for the Courts of a fact to examine. The evidence of identification of the accused for the first time in the Court, in the absence of identification of the accused must be of stellar quality. In this case, PW-1 and PW-3 were total strangers to the accused. PW-3 had a fleeting glimpse of the accused. She has not stated any particular reason to remember the face of the accused. The prosecution was required to lead such evidence. On minute appreciation of the evidence of PW-3, I am satisfied that her evidence on the point of identification of the accused for the first time in the Court does not inspire confidence. She has not stated the reasons to remember the accused person in the Court. Except PW-3 no other witness has deposed about the identification of the accused. In my view, sufficient doubt has been created with regard to the identification of the accused being perpetrator of the crime in this case. The accused was not

known to the PW-3 and informant. In this case the victim girl being mentally retarded and handicapped, the problem of the prosecution has been further compounded. In this case, it would not be possible to place implicit reliance on the evidence of PW-3 on the point of the identification of the accused.

14. Learned Judge has made use of the statement of PW-4 recorded by the learned Magistrate under Section 164 of the Cr.P.C. as a corroborative piece of evidence. PW-4 has not supported the case of the prosecution. PW-4 has resiled from his statement recorded before the Magistrate. He has not identified the accused. It is the case of the prosecution that before the occurrence of incident, he had seen the accused carrying the victim girl to the house of her grandmother. It is further case of prosecution that he was knowing the accused before the incident. He has stated that police had pressurized him to make a statement before the Magistrate. This answer was given by him in his examination-in-chief itself. The

statement of the witness under Section 164 of the Cr.P.C. is marked as Exh.25. Learned Judge has made use of the statements of these PW-4, PW-1 and PW-3 recorded under Section 164 of the Cr.P.C. as corroborative piece of evidence. The question is whether the statement of the witnesses can be used as a corroborative piece of evidence when the witness has resiled from the said statement before Court. At this stage, it would be appropriate to consider the law laid down in the decisions cited supra by the learned Advocate for the appellant.

15. In the case of ***Ram Kishan Singh (supra)*** the Apex Court has held that a statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. The Apex Court in the case of ***Baij Nath Sah (supra)*** has considered the decision in the case of ***Ram Kishan Singh (supra),*** and has approved the view taken by the Apex Court in the case of ***Ram Kishan (supra)***. It needs to be

stated that in the case of ***Baij Nath Sah (supra)*** the Apex Court has held that such statement can be used only as a previous statement and nothing more. The Apex Court in the case of ***State of Karnataka vs. P. Ravikumar Alias Ravi (supra)*** has again reiterated this legal position. In this case, the Magistrate who had recorded the statement was examined. The witness had turned hostile. The Apex Court has held that when a witness resiles from his earlier statement, his statement recorded by Judicial Magistrate under Section 164 may not be of any relevance; nor can it be considered as substantive evidence to base conviction solely thereupon. The Division Bench of Bombay High Court had an occasion to consider the decision in the case of Ram Kishan Singh in the case of ***Audumbar Digambar Jagdane and another vs. State of Maharashtra (supra).*** In the case before the Division Bench the Magistrate who had recorded the statement was examined. The statement was proved. However, the witness who had made the statement,

resiled from his statement. The Division Bench relying upon the decision in the case of ***Ram Kishan Singh (supra)*** has held that such a statement cannot be used even for the purpose of corroboration when the witness does not support the case of prosecution.

16. In the backdrop of the above stated legal position, I am constrained to observe that the learned Judge was not right in placing reliance on the statement of PW-4 recorded under Section 164 of the Cr.P.C. PW-4 did not identify the accused before the Court. He has categorically stated that on account of pressure applied by the Police, he made a statement before the Magistrate. In my view, this statement made by PW-4 will loose the sanctity of the statement of PW-4 recorded under Section 164 of the Cr.P.C. In my view, the learned Judge was not right in placing reliance on the said statement. It therefore, goes without saying that the evidence of PW-3 on the point of identification of the accused is not sufficient. It cannot be

believed. It has been shaken. The credibility of PW-3 has been shaken in her cross-examination. The cross-examination of PW-3 would clearly demonstrate that on the basis of tutoring at the behest of Public Prosecutor-in-charge of the case she identified the accused before the Court. In my view, therefore, the evidence of identification of the accused being the perpetrator of the crime is doubtful. He was a stranger to PW-3 on the date of the commission of crime. The son of PW-3, Ashok has not been examined. PW-4 has not supported the case of the prosecution. The investigating officer in the fact situation was required to conduct the test identification parade in such a serious crime. The investigating officer has stated that during the investigation it was transpired that the accused was not a resident of Deulgaon. She has further admitted that during the investigation it was transpired to her that PW-3 grandmother of the victim was not acquainted with the accused. She has stated that in this factual situation it was essential to

subject the accused to take identification parade. But the identification parade was not conducted. In my view, the evidence of the investigating officer clearly suggests that there was a complete lack of seriousness on her part. In such a serious crime, the test identification parade in such a fact situation was a rudimentary step while conducting the investigation. The investigating officer has to conduct test identification of the accused as the accused is not known to the witnesses prior to the incident. Such conduct in my view is nothing short of dereliction of duty on the part of a responsible police officer. The approach of the investigating officer cannot be appreciated. Rather, it deserves to be condemned. The above admissions given by the investigating officer clearly suggest that she was aware that test identification parade was necessary. She has admitted about it in her cross-examination. The investigating officer due to her negligence and careless approach, has left such a drawback and lacuna in the case of the prosecution.

17. As far as the incident of sexual assault on the victim is concerned, the prosecution has examined number of witnesses including a medical officer. The date of birth of the victim has been proved. The prosecution has produced the birth certificate of the victim on record at Exh.13. The birth date of the victim is 22.04.2004. The accused has not seriously challenged this evidence. The incident occurred on 02.09.2018. The victim on the date of incident was about 14 years old and as such, a child as defined under Section 2(d) of the POCSO Act.

18. Learned Advocate for the accused submitted that injury to the fourchette of the victim could be possible due to contact with a rough surface while sliding through the ground. Learned Advocate submitted that rupture to the hymen could not be said to be conclusive proof of penetrative sexual assault. It has been proved on the basis of the medical certificate at Exh.14 that the victim was mentally ill and handicapped. In

this context, it would be necessary to consider the evidence of the medical officer. Shweta Jinde (PW-5) is the Medical Officer. She has stated that the history of assault was narrated by the mother of the victim. The victim was deaf and dumb. The victim was handicapped. It needs to be stated that the mother of the victim PW-1 narrated the history of the assault on the basis of information of the incident received from PW-3, her mother-in-law. On her examination, she found following injuries:-

a) No external injury was found on her person

b) Her hymen was found to be ruptured.

c) Tear was present at fourchette

d) Bleeding was coming through that tear

19. On the basis of her observations, she opined that there was a possibility of sexual assault. She has admitted in her cross-examination that the victim was able to move from one place to another by sliding through. She has admitted that the

fourchette is situated between anal and vaginal portion. She has denied the suggestion that while moving from one place to another by sliding through the injury to fourchette could be possible due to a hard object. She has admitted that there was no bleeding from the hymen portion. She has stated that from the circle/portion of the hymen it is possible to know whether the hymen rupture was fresh or old. She has denied that it was old hymen rupture. The clothes of the victim particularly knickers was not shown to her. The mother of the victim has stated that knickers was torn on the back side. An attempt has been made in the cross-examination to rebut the opinion of the medical officer. On appreciation of the evidence of medical officer coupled with injuries sustained by the victim it is not possible to discard or disbelieve her evidence. The evidence of medical officer fully corroborates the evidence of PW-1 and PW-3 on the point of penetrative sexual assault on the victim. However, the identification of the perpetrator of the crime has

not been established.

20. The prosecution has relied upon C.A. reports at Exh.48, 49 and 50 to seek a corroboration to the case of prosecution on the point of sexual assault on the victim by the accused. In my view, the CA reports are not sufficient to corroborate the case of the prosecution to establish the appellant/accused being the perpetrator of the crime. During the course of the investigation, the full pant and underwear of the accused were seized and sent for analysis. The CA report at Exh.48 shows that human blood was detected on the underwear of the accused. However, it has been stated in the CA report that the blood group detected on the underwear could not be determined as the result was inconclusive. The CA report at Exh.49 shows that the blood group of the victim is 'B'. This report would further show that the semen was not detected on pubic hair, vulval swab and vaginal swab of the victim. Exh.50 is the report of the analysis of the blood, penile

swab and penile washing of the accused. The semen was not detected in the penile swab or penile washing or pubic hair samples of the accused. The Blood group of the accused is 'A'. The accused was arrested by the police. If he had committed sexual intercourse, then the semen ought to have been detected on the clothes of the victim. Similarly, in the penile washing the semen could have been detected. In my view, therefore, this CA report is not sufficient to prove the involvement of the accused. The CA report therefore, cannot be used as a corroborative piece of evidence.

21. In the facts and circumstances, I conclude that prosecution has miserably failed to establish the identification of the accused, being the perpetrator of the crime. The evidence on the point of the identification of accused is not of sterling quality. In the absence of test identification parade, in the fact situation, implicit reliance cannot be placed on the evidence of PW-3 alone. Section 164 Cr.P.C. statement of PW-

4 cannot be used as a substantive piece of evidence. Learned Judge, in my view, has failed to properly appreciate the above stated facts and evidence properly. It is not out of place to mention that a crime of this kind needs to be condemned. It is a brutal and deplorable crime. In such a crime, the sympathy of the Court is bound to be with the victim. However, the conviction cannot be based on sympathy and moral consideration. However, the conviction cannot be based on sympathy. The accused is entitled to benefit of doubt. In this case, Section 29 of the POCSO Act was invoked by the learned Judge. In my view, learned Judge was not right in invoking the presumption provided under Section 29 of the POCSO Act. The presumption is not an absolute presumption. Even on the basis of such a presumption the prosecution cannot be relieved of its responsibility to lead the evidence and prove its case. In short, in order to invoke the presumption under Section 29 of the POCSO Act the foundational facts as to the crime must be

fully established to the satisfaction of the Court. In this case, the foundational facts with regard to the identification of the accused and the commission of the crime by the accused has not been proved. In this case, therefore, I conclude that the evidence falls short to prove the guilt of the accused. As such, the judgment and order cannot be sustained. The appeal is accordingly allowed.

22. The judgment and order dated 16.10.2020, passed by the learned Special Judge, Gadchiroli, in Special (POCSO) Case No.38/2018, convicting the appellant for the offences punishable under Section 376(2)(l) of the Indian Penal Code, 1860, and under Section 6 of the POCSO Act, is set aside.

23. The appellant/accused – Sanjay Gowardhan Wakde is acquitted of the offences punishable under Section 376(2)(l) of the IPC and under Section 6 of the POCSO Act.

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

25. The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

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