(2024) 11 BOM CK 0019

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 584 Of 20 22

Sikandar Somsing Chavhan		APPELLANT
	Vs	
State Of Maharashtra, Thr. Pso Ps Asegaon, Tq. Mangrulpir, Dist. Washim And Another		RESPONDENT

Date of Decision: Nov. 26, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 164
- Indian Penal Code, 1860 - Section 376(2)(l)
- Protection of Children from Sexual Offences Act, 2012 - Section 2(1)(d), 3, 4, 5(k), 6, 29

Hon'ble Judges: G. A. Sanap, J

Bench: Single Bench

Advocate: S. D. Chande, Ganesh Umale, Neerja G. Choubey

Final Decision: Disposed Of

Judgement

G. A. Sanap, J

1. In this appeal, challenge is to the judgment and order dated 25.05.2022, passed by the learned Additional Sessions Judge, Link Court, Mangrulpir, in

Special Child Case No. 28/2018, whereby the learned Judge held the appellant guilty for the offences punishable under Section 376(2)(l) of the Indian

Penal Code and under Sections 3, 4, 5(k) and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as â€œthe

POCSO Actâ€ for short). He is sentenced to suffer imprisonment for 10 (ten) years and to pay fine of Rs.5,000/- and in default to suffer RI for 6

(six) months for the offence punishable under Section 376(2)(l) of the IPC. No separate sentence is awarded for the offences under the POCSO Act.

2. BACKGROUND FACTS :

The informant (PW6) is the father of the victim girl (PW7). The case of the prosecution, which can be gathered from the report lodged by the

informant and other materials is that the victim is a deaf and dumb girl. The incident of rape on the victim occurred in the night of 18.04.2018. The

appellant and the victim are the residents of the same village. On 18.04.2018, on account of marriage of the son of the neighbour, namely, Suresh

Chavan, a pre-marriage function was arranged at his house. At about 8.30 p.m., the celebration started with the DJ band etc. In the procession of the

bridegroom, young boys were dancing to the tune of the songs played by the DJ band. The parents of the victim, being the relatives of Suresh

Chavhan, had gone to attend the function. The victim was sleeping on a cot (baz) in front of her house. It is stated that at about 8.30 p.m., the

appellant came there. The appellant gagged the mouth of the victim and lifted her. The appellant took the victim beside a cattle shed of one Premsingh

Rathod and committed forcible sexual intercourse with the victim. The victim came back from the spot after the incident and slept on the cot in the

night. The mother of the victim returned back and saw that the victim was lying on the cot. The victim made a gesture suggesting that there was pain

in her stomach. On the next day, at about 9.00 a.m., the informant went to attend the marriage of the son of neighbour Suresh Chavan to another

village. The victim narrated the incident to her mother in the morning by signs and gestures. The mother of the victim was shocked after hearing the

account of the incident from the victim.

3. It is stated that the informant (PW6) came back to the house after attending the marriage in the evening. On arrival, he saw that the victim and his

wife were weeping. He questioned them about the cause of their weeping. The mother of the victim narrated the entire incident to the informant. It is

stated that after hearing the account of the incident occurred with his daughter, he was shocked and mentally disturbed. They took time to recover

from this shock and ultimately they decided to lodge a report against the appellant. The informant (PW6) along with the victim and her mother went to

Asegaon Police Station and lodged the report (Exh.43).

4. On the basis of the report (Exh.43), a crime bearing No.76/2018 was registered against the appellant. PW15 carried out the investigation. He

referred the victim for medical examination. The appellant was arrested. He was also referred for medical examination. The Investigating Officer

recorded the statements of the witnesses, including the informant and the mother of the victim. The Investigating Officer drew the spot panchanama

(Exh.26) in presence of the panchas. The clothes of the victim and the clothes of the appellant were seized. The biological samples of the victim were

collected and seized. The blood sample of the appellant was also collected and seized. The samples were forwarded to the Regional Forensic Science

Laboratory (RFSL), Nagpur for analysis. The Investigating Officer obtained the birth certificate (Exh.67) of the victim from the office of Gram

Panchayat, Chikhalagad. The statement of the victim with the help of a special Teacher was recorded on 02.05.2018. On completion of the

investigation, charge-sheet was filed against the appellant in the Court of law.

5. Learned Additional Sessions Judge framed the charge (Exh. 13) against the appellant. The appellant pleaded not guilty. His defence is of false

implication to save the informant from the prosecution. According to the appellant, on 20.04.2018, the informant had gone to his house to demand

Rs.3,000/- (Rupees Three thousand) borrowed by his father. The informant demanded money from the mother of the appellant. The mother was alone

in the house. She had no money. At that time, the appellant caught hold her hand, embarrassed her and molested her modesty. The mother of the

appellant went to the Sarpanch of the village and informed the Sarpanch about the incident. She wanted to lodge a report of the said incident. The

husband of female Sarpanch assured her that he would give an understanding to the informant and if he did not agree, then on the next day, the report

would be lodged. The prosecution, in order to bring home the guilt of the appellant, examined 15 witnesses. Learned Judge, on consideration of the

evidence on record, held the appellant guilty of the charge and sentenced him as above. The appellant is, therefore, before this Court in appeal.

6. I have heard Mr. S. D. Chande, learned advocate for the appellant, Mr. Ganesh Umale, learned Additional Public Prosecutor for respondent

no.1/State and Ms. Neerja G. Choubey, learned advocate appointed to represent respondent no.2/victim. Perused the record and proceedings.

7. Mr. Chande, learned advocate for the appellant submitted that the prosecution has failed to prove beyond doubt that on the date of the incident, the

victim girl was below 18 years of age. In the submission of the learned advocate, the evidence adduced by the prosecution to prove the birth date of

the victim, is not cogent, concrete and reliable. Learned advocate took me through the documentary evidence and pointed out that there are number of

corrections in the name as well as the date in those documents and therefore, the documents cannot be relied upon. Learned advocate submitted that

in the report (Exh. 43), the informant did not state the date of birth of the victim. Similarly, while recording the statement of the victim with the help of

a special Teacher, the victim did not state her birth date. Learned advocate, therefore, submitted that the evidence on record is not sufficient to prove

the birth date of the victim and as such, the fact that the victim was below 18 years of age on the date of the alleged incident, has not been proved.

8. Learned Additional Public Prosecutor for the State and the learned advocate appointed to represent respondent no.2 submitted that the victim in her

substantive evidence before the Court has stated that her birth date is 02.02.2001. The prosecution has examined three independent witnesses to

prove the birth date of the victim. The documentary evidence on record is sufficient to prove the birth date of the victim. The father (PW6) and

mother (PW13) of the victim have categorically stated that the victim was born on 02.02.2001. Learned APP and the learned advocate for the victim

submitted that during investigation, the birth certificate of the victim was obtained from the Gram Panchayat, Chikhlagad by the Investigating Officer.

The documents produced by the witnesses are the primary evidence to prove the contents of the secondary evidence i.e. birth certificate issued by the

Gram Panchayat, Chikhlagad.

9. I have minutely perused the evidence. Perusal of the evidence would show that the Investigating Officer, during the course of the investigation had

obtained the birth certificate of the victim from Gram Panchayat, Chikhlagad. The birth certificate is at Exh.67. It was issued on 09.07.2018. Perusal

of the birth certificate would show that this certificate was issued on the basis of the record available with the Gram Panchayat, Chikhlagad with

regard to the entry of birth and birth date of the victim. The registration number of the entry is 01 (One). The birth of the victim was registered on

10.02.2001. It is to be noted that on the date of registration, the naming ceremony of the victim was not performed. The naming ceremony was

performed on the 12th day of the birth. PW8 is the Gram Sewak of Gram Panchayat, Chikhlagad. He was summoned to produce the original entry

from the record of the Gram Panchayat. He has deposed that the birth certificate Exh.67 was issued by him on the basis of the record maintained

with the Gram Panchayat. It was issued at the request of the Investigating Officer. On the date of his evidence, PW8 had produced the original

register and the certified extract of the relevant entry from the birth register. It is at Exh.68. This entry was challenged in the cross-examination by

suggesting that the name of the victim was added subsequently. Similarly, it was pointed out that in the month of February, there were only two entries

of registration of the birth from the village. PW8 admitted in his cross-examination that this entry was made on the basis of the certificate issued by an

Anganwadi Sewika of the village. PW8 has categorically stated that as per the entry in the register, the birth date of the victim is 02.02.2001.

10. In order to prove the entry of the birth of the victim made by Anganwadi Sewika, the Anganwadi Sewika was summoned with the relevant

register as PW14. PW14 has stated that since 1985, she has been working as Anganwadi Sewika at village Chikhlagad. She has stated that they make

entry of pregnant woman and birth of the child in the village. She has stated that the birth date of the victim as per the record is 02.02.2001. She has

stated that while making the initial entry, the pet name of the victim was entered as â€˜Baliâ€™ and the name of the victim after the naming

ceremony was corrected. PW14 has produced on record a certificate at Exh.93 with regard to the birth date of the victim. Similarly, she has produced

on record the certified extract of the register (Exh.95) maintained with the office of Ekatmik Bal Vikas Yojana. It is evident on perusal of Exh.95 that

the pet name of the victim was recorded as â€˜Baliâ€™ and later on, it was corrected and the real name was recorded. This entry was challenged on

the ground that the corrections were made in the document to suit the purpose of the prosecution. In my view, this submission cannot be accepted.

Perusal of Exh.95 would show that at the time of the entry of the birth of a child, the pet name has been mentioned. In case of some of the children,

after the naming ceremony the corrections have been made. Entry in the Gram Panchayat record was made on the basis of this record at Exh.95.

Exh.95 is primary evidence, on the basis of which, the birth entry and birth date of the victim was recorded in the office of the Gram Panchayat. The

prosecution has produced primary evidence to prove the contents of secondary evidence in the form of Birth Certificate at Exh.67, issued by PW8.

11. PW9 is the another witness examined by the prosecution to prove the birth date of the victim. PW9 is the Headmaster of the Deaf and Dumb

School at Ansing. This witness was summoned to produce the original Dakhal Kharij register, wherein an entry of the admission and birth date of the

victim was made. He has deposed that on 06.07.2009, the victim was admitted in the school and as per the school register, the birth date of the victim

is 02.02.2001. Entry in the Dakhal Kharij register is at serial No. 212. The certified extract of this entry from Dakhal Kharij Register is at Exh.70. In

his evidence, PW9 has stated that he does not know the basis for making the entry with regard to the birth date of the victim. In my view, the

suggestions given to this witness itself suggest that the entry with regard to the birth date of the victim was made on the say of the father of the

victim.

12. The prosecution has examined three witnesses to prove the birth date of the victim. The documentary evidence produced on record, as discussed

above, is a part of public record. The Anganwadi Sewika (PW14) took entry in Anganwadi register while discharging her official duty. Similarly, the

Gram Sewak (PW8) also recorded the birth date of the victim while discharging his duty as a public servant. It needs to be stated that the entry made

in the government record in 2001 is the reliable piece of evidence. Perusal of the evidence does not even remotely suggests that this record was

created to suit the prosecution after registration of the crime. It needs to be stated that the government servants had no reason to create a false record

after registration of the crime. Even this suggestion cannot be accepted in the teeth of the available evidence on record. The prosecution, on the basis

of cogent, concrete and reliable evidence has proved that the victim was below 18 years of age on the date of commission of the crime and as such a

â€œchildâ€ as defined in Section 2(1)(d) of the POCSO Act. In view above, I do not see any substance in the submissions advanced by the learned

advocate for the appellant about the birth date and age of the victim. The learned Judge has properly appreciated the available evidence and has come

to a right conclusion on this point.

13. Learned advocate for the appellant submitted that the prosecution has not examined an independent witness by name Dinesh Pawar, who

allegedly had seen the accused and the victim beside the cattle shed in the night of 18.04.2018. Learned advocate submitted that there was inordinate

delay in lodging the report. The victim is a deaf and dumb girl. The father and the mother of the victim have cooked up a false story and falsely

implicated the appellant to suppress the voice of the mother of the appellant, whose modesty was molested at the hands of the informant. Learned

advocate submitted that the evidence on record is not sufficient to prove the occurrence of the alleged incident, as narrated by the informant, the

victim and the mother of the victim. Learned advocate took me through the record to substantiate this contention. Learned advocate submitted that the

statement of the victim before the Judicial Magistrate First Class was not recorded. The statement of the victim was recorded on 02.05.2018 with the

help of a special Teacher. The victim was present with the informant while lodging the report at the police station. The victim at that time did not

narrate the incident to the police. Similarly, the police did not take the help of a special teacher to know the true facts through the victim. Learned

advocate submitted that the medical examination report of the victim is sufficient to conclude that the appellant has been falsely implicated. Learned

advocate pointed out that at the time of examination of the victim, the Medical Officer (PW11) found that hymen perineum was absent. Learned

advocate pointed out that the Doctor has admitted that if someone is habitual to sexual relations, then the hymen would be absent. Learned advocate

submitted that the Doctor did not notice the injuries on the body of the victim as well as on her genital parts. Learned advocate submitted that the

mother of the victim has stated before the Court that when the victim narrated the alleged incident to her, she noticed the injuries over her head and

hand, but it is not corroborated by the medical evidence. Learned advocate submitted that the victim was 17 years of age on the date of the incident

and therefore, the case of the prosecution that the appellant lifted her from the spot and carried her at some distance beside the cattle shed, is

unbelievable. Learned advocate submitted that the evidence on record proves beyond doubt that the number of people were present on the road at a

distance of about 50 feet from the house of the informant, enjoying the dance to the tune of the songs played by DJ band. Learned advocate submitted

that the material on record is not sufficient to prove the guilt of the appellant beyond reasonable doubt. It is submitted that the learned Judge has failed

to properly appreciate the evidence on record and has come to a wrong conclusion. Learned advocate submitted that there was inordinate delay in

lodging report to the police. In the submission of the learned advocate, the delayed report was lodged after due deliberation to implicate the appellant.

It is pointed out that there are major inconsistencies in the evidence and as such the evidence is suggestive of embellishment of the report.

14. Learned APP and learned advocate appointed to represent the victim made the following submissions :-

The offence of rape invites stigmatic consequences in case of a girl child. Such a matter is generally not reported by the parents of the victim,

inasmuch as the reputation of the family of the victim and future of the victim is always at stake. Reporting of such a matter would be sufficient to

conclude that the rape had been committed on the victim. Absence of the injuries on the person of the victim as well as on the person of the appellant

could not be said to be a ground to give clean chit to the appellant. In this case, the hymen of the victim was absent and therefore, it is a clear

indication that she was subjected to penetrative sexual assault. The parents, in the ordinary circumstances, would not have involved their daughter,

who was deaf and dumb, in such an incident. The defence witnesses examined by the appellant have not even remotely substantiated the defence of

the appellant. The testimony of the victim is cogent, concrete and reliable. The credibility and trustworthiness of the victim has not been shaken at all.

The evidence of the victim inspires confidence and as such it was rightly made the basis of the conviction and sentence of the appellant.

15. Learned APP, in support of his submission, relied upon a decision of the Honâ€™ble Apex Court in Bharwada Bhoginbhai Hirjibhai .vs. State

of Gujarat, reported at (1983) 3 SCC 217, and submitted that in the Indian setting, it is not possible that a girl or a woman will make false allegation

of sexual assault, whether she belongs to the urban or rural society or, sophisticated or not so sophisticated or unsophisticated society. It is observed

that since the offence invites stigmatic consequences and has direct bearing on the future of the girl, such a crime is not reported unless and until the

incident of rape has occurred. Learned advocate for respondent no.2/victim, in support of her submissions, relied upon a decision in Wahid Khan .vs.

State of Madhya Pradesh, reported at (2010) 2 SCC 9. In this case, the victim was a 12 years old girl. There were lacunas in the prosecution case.

There was no medical evidence to corroborate the testimony of the victim. The Honâ€™ble Apex Court has held that presence of the injury on the

person of the victim may not be necessary. The conviction can be based on concrete and cogent evidence. In this case, there was an independent

eye-witness, who was a police officer, who had caught the accused red-handed during rape. In the fact situation, it was held that the absence of

injuries and particularly, the rape being a social stigma, an inference against the prosecution cannot be drawn.

16. The appellant and the informant are from the same village. A submission is made by the learned advocate for the appellant that the appellant was

not previously known to the victim as well as to her parents. In my view, this line of defence has been completely demolished by DW2, who is none

other than the mother of the appellant. She has categorically stated in her evidence that for last 20 years, she along with her husband and children, has

been residing at village Chikhalagad. It is hard to believe that the villagers, who are residing in the village for years together, would not know each

other. It has come on record that on 19.04.2018, in the morning, after narrating the incident to her mother, the victim took her mother to the house of

the appellant. The victim pointed out the house of the appellant and by gestures and signs suggested that the appellant was the perpetrator of the

crime. It has come on record that this part of her statement recorded by the police has been proved to be an omission. The identification of the

appellant, being resident of the same village and not a stranger to the victim, could not be a disputed issue in this case. In the report, the name of the

appellant was stated being the perpetrator of the crime. The main question that needs to be addressed in this case is whether the genesis of the

incident or the incident itself has been proved or not ? In this case, the Court has to appreciate the evidence to ascertain whether the incident as

narrated had occurred or not.

17. The prosecution has not examined an independent witness namely, Dinesh Pawar. It has come on record in the evidence of the informant (PW6)

that on 25.04.2018, Dinesh disclosed to him that in the night of 18.04.2018, he had seen the victim and the appellant together beside the cattle shed,

when he woke up in the night for urination. PW13 is the mother of the victim. In her cross-examination, she has stated that her husband is doing the

work of pendal decoration during the marriage season. She has admitted that Dinesh Chavan is doing the work of sound system service with her

husband. It is to be noted that if Dinesh, who is very close to the informant/father of the victim, had seen the victim with the appellant in the night time

and knowing fully well that the victim is deaf and dumb, he would have inquired with the victim about her presence with the appellant at that time. It

has come on record that when Dinesh saw the appellant and the victim together, the appellant ran away from the spot. In my view, if such an incident

had occurred, then the same would have created grave suspicion in the mind of Dinesh and he would have at least made inquiry with the victim and

brought her back to the house. It seems that he did not bother to inquire. Similarly, he did not bother to go to the house of the informant on the next

day and inform him about the said incident. Dinesh has not been examined as a witness. The non-examination of Dinesh Chavan has left a vacuum in

the case of the prosecution. The question is whether this vacuum can be filled up by the evidence of the informant, the victim and the mother of the

victim.

18. It has come on record in the evidence of the informant (PW6), victim (PW7) and her mother (PW13) that in the night of 18.04.2018 at about 8.30

pm, pre-wedding celebration of the son of Suresh Chavan was going on. The music was played on DJ band. Nearly 20-30 young boys were dancing

to the tune of the DJ band. The parents of the victim being the relatives of Suresh Chavan had gone to the function. The mother of the victim has

deposed that she had gone to watch the procession and the celebration. It has come on record that the place where this function/celebration was going

on, is at a distance of 50 to 70 feet from the house of the informant. It is the case of the prosecution that the victim was sleeping on the cot outside the

house and from there she was lifted by the appellant by gagging her mouth. Admittedly, in the medical examination of the victim and the medical

examination of the appellant, not a single injury was noticed on their person by the Medical Officers. In my view, this aspect needs serious

consideration while appreciating the evidence of the informant as well as the victim and her mother.

19. The informant (PW6) was not witness to any part of the incident. Perusal of his examination-in-chief shows that he was informed about the

incident by his wife in the night of 19.04.2018. He has nowhere stated in his evidence that in order to cross-check this fact, he made an inquiry with

the victim and the victim narrated the incident to him. He has stated that the victim had narrated the entire incident by signs and gestures to his wife

and his wife narrated the same to him and on the basis of the same, after two days, he went to the police station and reported the matter to the police.

In his evidence, he has stated that when he came to know about this incident, he received a mental shock and therefore, till 21.04.2018, he did not

lodge report with the police. Perusal of his cross-examination would show that the very genesis of the incident has become doubtful.

20. The spot has been described in the panchanama (Exh.26). In his cross-examination, the informant (PW6) has deposed that on the northern side of

his house, there is the house of Premsing Rathod. The house of Shricharan Rathod is adjacent to the house of Premsing Rathod. The house of Nitesh

Chavan is by the side of the house of Shricharan Rathod. He has further stated that beside the house of Nitesh Chavan, there is the house of Suresh

Chavan. The house of Suresh Chavan is 100 feet away from the house of the informant (PW6). He has categorically stated that all the houses are

facing East and a road of 10 feet in width passes through these houses. PW6 has stated that in front of his house, there is the house of one Ram Hari

Rathod. He has stated that on the Northern side of the house of Ram Hari, there is the house of Rambhau Rathod and thereafter there is cattle shed

of Premsingh. He has categorically stated that one can go to the backside of the cattle shed of Premsing through the open space in front of the house

of Nitesh. The house of Nitesh and the house of Suresh Chavan are adjacent to each other. He has stated that the cattle shed of Premsingh is at a

distance of 40 feet from the house of Nitesh. He has stated that the cattle shed of Premsingh is at a distance of 70 feet from his house. In his further

cross-examination, he has stated that about 25 to 30 boys were dancing to the tune of DJ band. He has stated that about 100 people had gathered for

the marriage. He has stated that the DJ band was played up to 9.30 p.m.

21. PW13, the mother of the victim, has stated that she had gone to the house of Suresh Chavan to see the pre-wedding celebrations. She has stated

that near the house of Suresh Chavan, by standing on the road, they were enjoying the music and dance. The victim (PW7) in her cross-examination

has stated that in front of her house there was electric light. It has come on record that the celebration was going on in the light. PW13 has admitted

that the boys were dancing in the light. The light had spread up to their house. She has further stated that the boys, who had been dancing, were

roaming on the road up to her house. She has further stated that due to the noise of the DJ band, the people could not sleep. She has further stated

that the boys, who were dancing, had consumed liquor. In my view, all these facts go to the root of the genesis of the incident, as sought to be placed

on record by the informant (PW6), the victim (PW7) and the mother (PW13). There was light on the road up to the spot, where the victim was

sleeping. The people had gathered at a distance of 50 to 70 feet from the spot where the victim was sleeping. All the villagers had been enjoying the

music played on the DJ band. In this backdrop, it is very hard to believe that the appellant would come there in presence of all these people, lift the

victim and take her away.

22. It needs to be stated that this genesis of the incident is not probable for one more reason. The victim is deaf and dumb. She could not speak. It

does not mean that she could not scream. The appellant on the date of the incident was 20 to 21 years old. The victim was 17 years old. If the victim

had been lifted by the appellant as stated, then she would have resisted. She would have tried to free herself from the clutches of the appellant. She

would have scratched and notched the appellant. Considering the age difference between the appellant and the victim, it is not possible to believe that

the appellant would have lifted the victim from the spot as stated. In my view, the very genesis of the incident, in the backdrop of the evidence and the

admitted facts and circumstances, is doubtful.

23. The report of the incident was lodged by the father (PW6) on 21.04.2018. As stated above, it was on the basis of the narration of the incident to

him by the mother of the victim. PW6 did not make any inquiry with the victim before lodging the report. The statement of the victim was recorded for

the first time with the help of a special teacher, on 02.05.2018. It is at Exh.39. The police, on the date of the report itself, could have availed the

services of the special Teacher, recorded the statement of the victim and registered the crime on that basis. There was delay in recording the

statement of the victim by the police. The victim is admittedly a deaf and dumb girl. The Investigating Officer did not cause the statement of the victim

to be recorded by the Judicial Magistrate First Class under Section 164 of the Cr.P.C. In State of Karnataka .vs. Shivanna @ Tarkari Shivanna,

reported at 2014 All M.R. (Cri.) 4484, the Honâ€™ble Apex Court has issued a mandamus and directed all the police stations in the country to record

the statement of the victim under Section 164 of Cr.P.C. immediately upon receipt of information of the offence of rape. The police would have

availed the services of a special Teacher for the purpose of recording the statement of the victim before the Magistrate. In my view, this is an

apparent lacuna in the case of the prosecution. The incident occurred on 18.04.2018. The statement of the victim with the help of a special Teacher

was recorded on 02.05.2018. Thus, from 18.04.2018 to 02.05.2018, the police did not make any inquiry with the victim about the incident. In such a

crime, the Court has to keep in mind the interest of the child. Similarly, the accused also deserves fair trial. The parents of the victim very well knew

the signs and gesture language of the victim. They had no difficulty to communicate with the victim and vice-versa. The possibility of tutoring in such a

crime must be completely ruled out. The victim, on the date of the incident, was above 17 years of age. Keeping this fact in mind, failure on the part of

the police to record her statement immediately, is a serious lacuna. Similarly, failure on the part of the police to cause the statement of the victim

recorded by learned Magistrate under Section 164 of the Cr.P.C. is another lacuna. If the incident, as stated by the informant as well as the victim and

her mother, had occurred, then there ought to have been multiple injuries on the person of the victim as well as on the person of the appellant. The

evidence of the Medical Officers shows that there were no injuries either on the person of the victim or on the person of the appellant.

24. The victim is examined as PW7. At the time of recording her evidence, the trial Court availed the services of the Headmaster as an interpreter.

An oath was administered to the Headmaster. The Headmaster translated the signs and gestures of the victim before the Court. The victim, in her

evidence has reiterated the incident reported to the police in the report lodged by her father. Perusal of her evidence would show that she has stated

that when she was sleeping on the cot, the appellant lifted her and took her beside the cattle shed and committed rape on her. The victim is silent

about any protest or resistance made by her when the appellant lifted her. She is also silent about the protest and resistance made by her at the time of

actual occurrence of the incident. The victim has admitted in her cross-examination that there was enmity between her father and the appellant. In her

re-examination, she has stated that she was watching the dance and music from her house. It is, therefore, apparent that all the celebration at the

place of the function could be easily seen from the house of the informant. The victim in her evidence has narrated the incident. In my view, her

evidence needs appreciation keeping in mind the above stated proved and admitted circumstances and the medical evidence. The evidence of the

victim sans the above circumstances and the medical evidence cannot be accepted as gospel truth. In order to come to the truth, the Court has to

consider the entire evidence and the facts and circumstances in totality. It is true that in such a case, sympathy of the Court is always with the victim.

However, sympathy alone could not be the basis of conviction.

25. PW11 is the Medical Officer, who had examined the victim on 22.04.2018. PW11 has stated that she did not find any external injury on her body.

She has stated that on local examination of the victim, she found external genitalia part, urethral meatus and vestibule intact. Similarly, labia majora,

labia manora, fourchette and introits were intact. She has stated that hymen perineum was absent. She has categorically stated in her evidence that

she gave provisional opinion that there were no signs of use of force, however she reserved the final opinion subject to FSL reports. It is to be noted

that the CA reports had not been produced before the trial Court. The CA reports had not been sent to the Doctor for recording the final opinion. In

her cross-examination, the Medical Officer has stated that the victim was unable to speak and therefore, her mother narrated the history of assault

and the incident. She has stated that the word â€˜unconsciousnessâ€™ mentioned in column no. 15D at Exh.82 was narrated by the mother of the

victim. She has categorically stated that as per the history recorded by her, as narrated by the mother, the victim was unconscious at the time of her

rape. She has admitted that normally in forcible violent rape cases, injury on the person of the victim and the accused is possible. She has categorically

admitted that if someone is habitual to sexual intercourse, then the hymen will be absent. She has further categorically admitted that if any girl is virgin,

then her hymen will be ruptured and there would be injury to the labia majora.

25. In my view, the evidence of the Medical Officer (PW11) is not supporting the case of the prosecution. I have observed that the very genesis of

the incident is doubtful. If the incident, as narrated, had occurred, then there ought to have been multiple injuries on the person of the appellant as well

as on the body of the victim. The medical examination of the victim would show that her hymen was absent. It was, therefore, evident that the alleged

act of rape on her was not the first sexual intercourse by the victim in her life. This shows that prior to this incident, she had indulged in sex. The

prosecution is silent about it. The evidence of the Medical Officer, therefore, does not corroborate the testimony of the victim as to the occurrence of

the alleged incident. On appreciation of the evidence of the Medical Officer, more particularly, in the teeth of the above stated observations, the

absence of the injuries on the person of the victim as well as on her genitals, is a circumstance sufficient to create a doubt about occurrence of the

incident. It is in favour of the appellant. The incident as per the case of the prosecution occurred on 18.04.2018 in the night. The report was lodged on

21.04.2018 in the evening. It needs to be stated that the Doctor would have noticed the injuries and signs of penetrative sexual assault, though the

victim was examined after four days from the date of the alleged incident.

27. PW10 is the Medical Officer, who had examined the appellant on 23.04.2018. The Doctor did not notice any injury mark or scar over the body of

the appellant. In the opinion of the Doctor, the appellant was capable of performing sexual intercourse. The Doctor did not opine that in the recent

past, he had committed sexual intercourse. The Doctor has stated that the weight of the appellant was 57 Kgs. The Doctor, in his cross-examination,

has admitted that as per the Body Mass Index, the normal weight of a healthy person should be in accordance with his height. His height was 5â€™

8â€. The Doctor has stated that as per the standard BMI, his weight was less. The cross-examination of PW10 was conducted to demonstrate that

the case of the prosecution that the appellant had lifted the girl of 17 years age, was highly improbable. The evidence of PW10 also does not

corroborate the version of the victim and her parents.

28. In my view, in the above backdrop, the defence of the appellant and the delay in reporting the matter to the police need to be appreciated. The

cousin brothers and the relatives of the informant are residing in the same village. The informant (PW6) has stated that prior to reporting the matter to

the police, he did not narrate this incident to any of his relatives from the village. He has stated that after hearing about the incident from his wife, he

was mentally shocked and therefore, for two days, he did not report the matter to the police. PW13, the mother of the victim, is silent about the reason

for the delay in lodging report. It is to be noted that the incident of the nature stated in the report, by any standard, would shock the parents. The

incident, by applying any standard, was a serious incident. In such a case, if there is a reason for delay in reporting the matter to the police, it must be

explained to the satisfaction of the Court. There was two days delay in lodging the report. The delay in lodging the report is always a circumstance

against the case of the prosecution. It is to be noted that if the delay is not properly explained, then it is fatal to the case of the prosecution. It is a

settled position of law that the delay per se cannot be a ground to discard and disbelieve the otherwise cogent and concrete evidence. The delay, per

se, could not be a ground to discard the case of the prosecution, if the evidence adduced by the prosecution is sufficient to satisfy the Court that the

incident recorded in the report and the FIR indeed occur. In this context, it would be appropriate to make useful reference to the decision of the

Honâ€™ble Apex Court in State of Rajasthan .vs. Om Prakash, reported at (2002) 5 SCC 745. In this case, the Honâ€™ble Apex Court has held that

the first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence

adduced at the trial. The object of insisting upon prompt lodging of a report to the police in respect of the commission of an offence is to obtain early

information regarding the circumstances in which the crime was committed, the names of the culprits and the part played by them as well as the

names of eye-witnesses present at the scene of occurrence. It is held that the delay in lodging FIR quite often results in embellishment, which is a

creature of an afterthought. It is held that on account of delay, the report not only gets bereft of the advantage of spontaneity, but danger creeps in of

the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is held that the Courts

should adopt a sensitive approach in dealing with the cases of child rape. It is held that the reason for delay put forth by the prosecution has to be

appreciated keeping in mind all these factors.

29. In my view, in this case, the circumstances noticed by me and discussed above, clearly suggest that the genesis of the case of the prosecution is

not supported either by direct or circumstantial evidence. On the contrary, the circumstantial evidence clearly causes dent to the very genesis of the

case of the prosecution. The independent witness has not been examined. The appellant has examined three witnesses in support of his defence.

DW1 is the husband of the female Sarpanch, to whom the mother of the appellant had complained the incident of outraging her modesty by the

informant. The mother of the appellant, who is DW2, has deposed about the incident of molestation of the modesty. In my view, keeping in mind the

doubtful circumstances brought on record denting the very genesis of the alleged incident, this defence deserves proper consideration. In my view, in

this case, the delay in lodging the report, if appreciated in the backdrop of the totality of the circumstances, would show that the case of the

prosecution cannot be accepted as gospel truth. The evidence on record creates a doubt in the mind of the Court about the occurrence of the incident.

In view of this, I conclude that the learned Judge has failed to consider all these facts and circumstances.

30. In view of the above findings, on the basis of appreciation of the evidence, the judgments relied upon by the learned advocate for respondent no.2

and the learned APP in Bharwada Bhoginbhai Hirjibhai, (supra) and Wahid Khan (supra) are distinguishable and as such not applicable to the facts of

this case.

31. Though, there is a statutory presumption under Section 29 of the POCSO Act with respect to the guilt of an accused, this presumption will not

operate when the prosecution has failed to prove some foundational facts with respect to the case. The presumption under Section 29 of the POCSO

Act is not an absolute presumption. It is a rebuttable presumption. The presumption gets triggered only when the foundational facts are established by

the prosecution beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution and thereby support the

very foundation of the case of the prosecution. In this case, the very foundation of the case of the prosecution viz-a-viz the charge against the accused

has been shaken. In my view, therefore, the presumption under Section 29 of the POCSO Act would not get automatically attracted/triggered.

32. There are numerous lacunae in the case. The prosecution has failed to connect all the dots by leading cogent and concrete evidence. The evidence

of the victim is not sufficient to prove the complicity of the appellant in the commission of the offence. As such, the appellant deserves benefit of

doubt. The appeal, therefore, deserves to be allowed.

33. Before parting with the matter, it is necessary to acknowledge the able assistance rendered by Ms. Neeraja Choubey, learned advocate appointed

to represent respondent no.2/ victim. The valuable assistance rendered to this Court by them is appreciated.

34. Accordingly, the Criminal Appeal is allowed.

(i) The judgment and order of conviction and sentence, passed against the appellant by learned Additional Sessions Judge, Link Court, Mangrulpir, dated 25.05.2022

in Special Child Case No. 28/2018, is quashed and set aside.

(ii) Appellant â€" Sikandar Somsingh Chavhan is acquitted of the offence punishable under Section 376(2)(l) of the Indian Penal Code and under Sections 3, 4, 5(k)

and 6 of the Protection of Children from Sexual Offences Act, 2012.

Â (iii) The appellant is in jail. He be released forthwith, if not required in any other crime/case.

35. Ms. Neeraja Choubay, learned advocate appointed to represent respondent no.2/victim is entitled to get her fees. The High Court Legal Services

Sub Committee, Nagpur is directed to pay the fees to the learned appointed advocate, as per the Rules.

36. The appeal stands disposed of in the aforesaid terms.