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

CRIMINAL APPEAL (APEAL) NO. 506 OF 2023

Pradeep Gulabrao Choudhari
Aged about : 51 yrs, Occ: Private,
R/o. Plot No. 23, Satpute Layout,
Wanadongari, Hingana Road,
Police Station, MIDC, Nagpur
(Presently at Central Prison, Nagpur) .... APPELLANT

//VERSUS//

1. State of Maharashtra,
Through Police Station Officer,
Police Station MIDC,
Nagpur

2. XYZ in C.R. No. 429/2022,
registered at Police Station MIDC,
Nagpur ... RESPONDENTS

Mr R. M. Daga, Advocate for the appellant
Mr P. P. Pendke, APP for the respondent No.1/State
Mr A. Y. Sharma, Advocate (appointed) for respondent No.2

CORAM : G. A. SANAP, J.
DATE : 18/11/2024

ORAL JUDGMENT :

1. In this appeal, challenge is to the judgment and order dated 03.06.2023 passed by the learned Extra Joint District Judge and Additional Sessions Judge (Special Judge, POCSO Court), Nagpur (for short 'the learned Judge'), whereby the learned Judge convicted the appellant/accused for

the offence punishable under Sections 376-AB of the Indian Penal Code (for short 'the IPC') and sentenced him to suffer rigorous imprisonment for twenty (20) years and to pay a fine of Rs.10,000/- (Rupees Ten Thousand Only), in default of payment of the fine further directed to suffer rigorous imprisonment for one (01) year. The learned Judge has held the appellant guilty also for the offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'). However, no separate punishment has been awarded for these offences.

2. Background facts

The informant in this case is the mother of the victim. The crime was registered on the report of the informant PW-1 Premila Nagose. The case of the prosecution, which can be gathered from the report and other materials, is that on the date of the incident the victim girl was 10 years old. The incident occurred in the house of the appellant at Wanadongari, Hingana Road, Nagpur. The victim was studying in 6th

standard. On the date of the incident, the victim had gone to the house of her maternal uncle, who was residing as a tenant in the premises of the appellant. It is stated that the appellant requested the maternal aunt of the victim to prepare chapatis for him. He told the maternal aunt of the victim that he would give the wheat flour. He took the victim with him. In the house, the appellant told the victim to collect the wheat flour from the container. The appellant at that time caught hold the hand of the victim. He gagged her mouth and kissed her. He also inserted his finger in her vagina. He pressed her breasts. The victim raised the shout. The appellant released her. He threatened her not to disclose the incident to anybody. However, the victim, after coming back to the house of the maternal aunt, narrated the incident to her. The maternal aunt made a phone call to the informant. After receiving a phone call, the informant went to the house of her brother. The victim narrated the incident to her. Thereafter, the informant and her brother went to the house of the appellant and questioned him about the incident. The appellant gave an

evasive reply and denied the occurrence of the incident.

3. The informant, her brother and the victim went to the MIDC police station and lodged the report. On the basis of the report, crime bearing No. 429 of 2022 was registered against the appellant. PW-6 Santoshkumar Ramlod carried out the initial investigation. He arrested the appellant. He drew the spot panchanama. PW-7 Smt Kalyani Humane carried out further investigation. She referred the victim for medical examination. The accused/appellant was also referred for medical examination. The biological samples were collected and seized. The statement of the victim was recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.'). PW-7 filed the charge sheet against the appellant.

4. The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of false implication. The prosecution, in order to bring home the

guilt of the appellant, examined seven witnesses. Learned Judge, on consideration of the evidence, held the appellant guilty and sentenced him as above. The appellant is before this Court in appeal against the judgment and order.

5. I have heard the learned Advocate Mr R. M. Daga for the appellant, the learned APP Mr P. P. Pendke for the State and the learned Advocate Mr A. Y. Sharma appointed to represent respondent No.2. Perused the record & proceedings.

6. The learned Advocate for the appellant submitted that the main prosecution witnesses, namely the informant, the victim and the maternal aunt of the victim have not supported the case of the prosecution. All three witnesses have turned hostile. Their evidence is hardly of any use to prove the charge against the appellant. The learned Advocate submitted that relying upon the broken evidence of the above-stated three witnesses and the evidence of the medical officer, the learned Judge has handed down the sentence of twenty years rigorous

imprisonment to the appellant. The learned Advocate submitted that the medical evidence is not direct evidence as to the occurrence of the incident. The medical evidence could be used as strong corroborative evidence. It is pointed out that since the victim, her mother and her maternal aunt have not supported the case of the prosecution, the medical evidence is hardly of any use to take the case of the prosecution forward. The learned Advocate further pointed out that the statement of the victim recorded under Section 164 of the Cr.P.C. was used as a substantive evidence. In the submission of the learned Advocate the statement of the witness recorded under Section 164 of the Cr.P.C. can be used only for the purpose of contradicting the witness. It is submitted that the statement under Section 164 of the Cr.P.C cannot be used as a substantive piece of evidence.

7. The learned APP submitted that the victim, her mother and her maternal aunt have not totally denied the incident. It is submitted that the part of their evidence has

been rightly made use of by the learned Judge to hold the appellant guilty. The learned APP submitted that there was no delay in lodging the report. It is pointed out that at the time of examination of the victim by the medical officer, more than one injury had been found to her private part. Learned APP submitted that the victim, in her evidence, has categorically stated that her statement was recorded by the Magistrate in the Court. In short, learned APP supported the judgment and order passed by the learned Judge.

8. Learned advocate appointed to represent respondent No.2 has adopted the submissions advanced by the learned APP.

9. I have gone through the record and proceedings. Perusal of the evidence of the informant, victim and her maternal aunt would show that they have not supported the case of the prosecution. All three witnesses have turned hostile. The learned APP, with the permission of the Court, put to them

the questions of the nature to be put in the cross-examination. Perusal of their evidence in entirety would show that it is not of any use to take the case of the prosecution forward against the appellant.

10. The learned Judge mainly relied upon the evidence of the medical officer and the statement of the victim recorded under Section 164 of the Cr.P.C. It needs to be stated at the outset that the victim, in her evidence, has stated that she made a statement before the Magistrate on the say of the police who had accompanied her. She has admitted her signature on the statement. Perusal of her evidence would show that she was not asked any question with regard to the contents of the statement. She has stated that she had narrated the incident to the Magistrate. The nature of the incident has not been placed on record in her evidence. As far as the evidentiary value of the statement under Section 164 of the Cr.P.C. is concerned, I had an occasion to deal with the same in the case of ***Sanjay S/o. Gowardhan Wakde .v/s. State of Maharashtra (Criminal Appeal***

No. 524 of 2020 decided on 20.07.2024). Paragraph 15 of this judgment is relevant for addressing this issue. It is extracted below:

> *"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."*

11. In view of the above stated position, the statement recorded under Section 164 of the Cr.P.C. by the Magistrate cannot be considered as substantive evidence to form the basis of the conviction. The statement cannot be used as substantive evidence as well as for the purpose of corroboration when the witness does not support the case of the prosecution. In view of this settled position, the learned Judge was not right in making use of the said statement as substantive piece of evidence against the appellant. The statement of the victim recorded in this case is therefore required to be completely eschewed from consideration.

12. The learned Judge has recorded a finding that the evidence of the medical officer PW-3 Dr. Snehal Lede is sufficient to establish the charge against the appellant. In my

view, on this count also the learned Judge has gone wrong. It is undisputed that there was no delay in lodging the report. The victim was examined by PW-3. On examination of the victim, PW-3 found a fresh hymenal tear at 2, 6 and 11 o'clock position. It is also seen that the medical officer noticed other injuries on the person of the victim as well. The medical officer had conducted the examination of the victim at 2 a.m. on 05.01.2022. In the above backdrop, the CA reports are of no significance. The medical officer recorded the history of assault in the report at Exh. 17. The learned Judge has accepted this history of assault as an important piece of evidence. In my view, the learned Judge was not right in accepting the evidence of the medical officer as substantive piece of evidence to prove the charge against the appellant. The evidence of the medical officer can be used as corroborative evidence. In this case, the victim, the mother of the victim and the maternal aunt of the victim have not whispered about the incident of a penetrative sexual assault on the victim. They have turned their back to the prosecution. In the absence of substantive evidence as to the

occurrence of the incident it was not proper on the part of the learned Judge to place implicit reliance on the medical evidence to base the conviction of the appellant. Except for the evidence of the medical officer, there is no other substantive evidence to prove the charge against the appellant.

13. In this case, there is hardly any dispute about the age of the victim. The birth certificate is part of the record. It was collected by the investigating officer during the investigation. It is at Exh. 12. It is also apparent on perusal of the evidence that the appellant has not seriously disputed the age of the victim. Even if it is held that the victim was a child on the date of the commission of the offence, it would not be sufficient to hold the appellant guilty. In view of this, I conclude that the learned Judge has committed a patent mistake. The conviction has been recorded in the absence of the evidence. The learned Judge has handed down the sentence of 20 years to the appellant. The prosecution has miserably failed to prove the guilt of the appellant. The

appellant, therefore, deserves to be acquitted.

14. Accordingly, the Criminal Appeal is **allowed**.

15. The judgment and order of conviction and sentence passed against the appellant by the learned Additional Sessions Judge (Special Judge, POCSO Court), Nagpur, dated 03.06.2023, in Special Criminal (Child) Case No.370/2022, is quashed and set aside.

16. The appellant/accused – **Pradeep Gulabrao Choudhari** is acquitted of the offences punishable under Section 376-AB of the Indian Penal Code, 1860 and under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012.

17. The appellant/accused- **Pradeep Gulabrao Choudhari** is in jail. He be released forthwith, if not required in any other case/crime.

18. The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed to represent respondent No.2, as per Rules.

19. The criminal appeals stand disposed of, accordingly. Pending application if any, also stands disposed of.

(G. A. SANAP, J.)

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