IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 990 OF 2019

Deelip Tatoba Raje
Age : 54 Years, Occu. : Service (Teacher),
Residing at : Kate Bhogaon, Village Panhala,
District : Kolhapur. ...**Appellant**

Versus

1. **The State of Maharashtra**
Through : Ajara Police Station,
Bhadvan Village, Taluka : Ajara,
District : Kolhapur.

2. **XXX,**
R/at : Village Bhadvan,
Taluka : Ajara, District : Kolhapur. …**Respondents**

*****

Mr. Kedar J. Patil	Advocate for Appellant
Mr. S. R. Agarkar	APP for Respondent No.1 – State
Mr. Sushan Mhatre	Appointed Advocate for Respondent No.2

*****

CORAM : S. M. MODAK, J.

RESERVED ON : 14th DECEMBER 2023

PRONOUNCED ON : 09th MAY 2024

JUDGMENT :-

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1. The issue involved in this appeal is *"whether the trial court is justified in convicting the Appellant only on the basis of corroborative evidence particularly when there is no substantive evidence"?*

Substantive evidence consists of :--

oral evidence of two eye witnesses (who have resiled from their version stated before Police).

Corroborative evidence consists of :--

1. Unchallenged medical evidence and
2. Testimony of Judicial Magistrate First Class P.W. No. 5 (who recorded statement of victim under Section 164 of the Code of Criminal Procedure).

2. In the process of appreciation of evidence, trial Court :--

(a) considered part of evidence of victim and her relatives (who deposed after they were declared hostile relating to attending tuition class of the Appellant by the victim) and

(b) considered corroborative evidence in the form of :--

(i) medical case papers admitted by the accused.

(ii) observations made by this Court while rejecting bail application.

(iii) considered the evidence given by Judicial Magistrate First Class on the basis of statement of victim recorded u/s 164 of the Code and

then concluded about the guilt of the Appellant and convicted him for the offences charged.

➢ **About Trial Court Judgment**

3. Trial was conducted by Special Judge Gadhinglaj, Kolhapur in Special Case No. 12 of 2017 and present Appellant was convicted for the offence punishable under Sections 376 (2)(f) of the Indian Penal Code and under Section 3 read with Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act.

4. This judgment of conviction is challenged by way of this appeal at the instance of the accused. I have heard learned Advocate Shri Kedar Patil for the Appellant and learned Advocate Shri Sushan Mhatre for Respondent No. 2 and learned APP for the Respondent-State.

5. Trial Court while supporting its finding about the guilt of the Appellant followed the law laid down in following judgments :--

a. ***Imran Shamim Khan v/s. State of Maharashtra*** in Criminal Appeal No. 936 of 2014, dated 22.01.2019.

b. ***Rameshbhai Mohanbhai Koli and Another v/s. State of Gujarat*** *(2011) 11 SCC 111.*

I have read both the judgments. Amongst the facts of those judgments and facts involved in present appeal, only issue common is :--

'the material witnesses have not supported the prosecution case and on this background, the Courts have dealt with the evidentiary value of testimony of those witnesses'.

➢ **Wrong approach of trial Court**

6. There are two aspects why I say that the trial court was wrong in applying ratio in those judgments to the facts of present appeal. They are :--

a. No doubt, the evidence of hostile witness cannot be thrown out rightly but **there are various facets which are required to be considered prior to believing part of testimony of hostile witness.** But the trial Court has considered such a part which no where supports the prosecution case and no way takes further case of the prosecution.

b. **Evidentiary value of corroborative evidence needs to be considered** and depending upon the same, the guilt has to be ascertained. It has not been done by the trial court by

considering well recognized principles of appreciation of evidence.

➢ **Law on the point of hostile witness**

7. The principle on the point of considering the part of testimony of hostile witness comes into picture only when Court can separate:-

(a) the part which is deposed by the witness in favour of the prosecution and;

(b) the part which is not deposed in favour of the prosecution.

8. Furthermore, this principle will not come into picture, if the prosecution witness has totally resiled and not deposed a single fact thereby either implicating the accused or showing some connection with the accused. For e.g.- if the first informant/victim only admits signature on FIR but does not depose single fact in favour of the prosecution, then how the 'law on the point of hostile witness' will come into picture. **Trial Court has not at all gone into all these issues and erroneously concluded about the guilt of the accused.** I will deal with this principle *vis-a-vis* facts in latter part of my judgment.

➢ **Evidentiary value to be attached to corroborative materials**

9. Furthermore, there may be several types of materials corroborating the main foundation of the prosecution case. The inferences to be drawn on the basis of these several types of corroborative materials depend upon **what are types of corroborative materials, surrounding circumstances etc.** Trial court has not appreciated the corroborative evidence from this perspective. And it needs to be corrected. I will deal with those materials later on.

10. The approach of the trial court was totally wrong and what transpires to me is trial court has convicted the Appellant **on the ground of morality rather than** legal principles. I find it as totally wrong approach and I will give reasons therefore in later part of my judgment.

➢ **Prosecution case**

11. The First-Informant is the resident of village – Bhadvan, Taluka : Ajara, District : Kolhapur. She resides along with her family members consisting of the victim/daughter who is aged about 15 years. She was studying in 9th standard in Bhadvan High School. The

Appellant was working as a drawing teacher in that school. The victim used to attend the drawing class conducted by the Appellant (this was the only fact deposed by the victim excluding all other facts and it was considered by the trial court while concluding about the guilt of the Appellant).

12. On the pretext of going for morning walk, the victim left the house at 05.00 a.m. on 12th August, 2017 and the Appellant sexually abused her. It was witnessed by her paternal uncle Vijay Patil. Uncle informed this fact to the mother/first informant of the victim. And in turn, mother inquired about the same with the victim. Then the victim confirmed about the objectionable acts done by the Appellant. She has also admitted about the manner of sexual abuses including kissing, touching the chest etc. The mother informed about the incident to the Ajara Police Station on 12th August, 2017 and accordingly, the offence was registered against the Appellant under Sections 354(A)(1), 376(2)(f), 377 of the Indian Penal Code and under Sections 4, 8, 10 and 12 of the Protection of Children from Sexual Offences Act. Police have arrested the Appellant and charge-sheeted him. The Police have taken precaution in securing the

presence of the victim before the learned JMFC – Ajara, on 19th August 2017. She in her statement recorded under Section 164 of the Code of Criminal Procedure has stated all sorts of sexual abuses as narrated above including piercing his finger in her vagina.

13. The trial Court framed charges for the offences under Sections 376(2)(f), 377 of the Indian Penal Code and Sections 4, 8, 10 and 12 of Protection of Children from Sexual Offences Act. In the alternative, charge under Section 376(2)(f) of Indian Penal Code and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act was framed.

➢ Prosecution evidence

14. To bring home the guilt of the Appellant, the Prosecution in all examined six witnesses. Their details are as follows :-

PW No.1	Victim	XXX
PW No.2	First Informant - Mother of the victim	Vaishali Shridhar Patil
PW No.3	Uncle of the victim	Vijay Anant Patil
PW No.4	Father of the victim	Shridhar Bapu Patil
PW No.5	Judicial Magistrate	Keshav Krishna Khomane
PW No.6	Investigating Officer	Rizawana Gulab Nadaf

15. The documentary evidence consists of the medical examination papers and the spot panchnama. It is no doubt true that the victim P.W. No. 1 and three of her relatives have not supported the prosecution case. Trial court considered following circumstances while convicting the Appellant :--

Admissions given by PW No. 1, PW No. 2 and PW No.4	about attending class conducted by the Appellant;
PW No. 1 has admitted her signature on	statement recorded under Section 164 of the Criminal Procedure Code.
Evidence of PW No. 5-Judicial officer	on the point of recording by him about the statement of the victim
Medical evidence in the form of case papers	which is not disputed by the Appellant.

- **Oral evidence of PW No. 1 to PW No. 4**

16. With the assistance of both the sides, I have perused the evidence of the victim PW No. 1 and uncle – PW No. 3 of the victim. The uncle is also an eye-witness. It is true that the victim is aged about 16 years of age. Though the Judge presiding over that Court had

shown zeal in convicting the Appellant, learned Judge was not cautious in hiding the identity of the victim. Her name is also noted down in the deposition.

17. The victim is having a future. It seems that she was in dilemma, that is to say, whether to depose or not to depose facts before the Court which she has stated during investigation and which in turn may tarnish her image in future. It seems that the victim and her relatives have chosen the second path. The victim – PW No.1, PW No.2 – First Informant, PW No.3 – Uncle and PW No.4 – Father have not deposed anything as per the statements during the investigation. No doubt, she has stated about attending the drawing class conducted by the Appellant and signing on the statement but except these facts, she has not said anything about the sexual abuse levied on her. The relevant facts stated by the victim in her evidence are as follows :--

- **Facts deposed by the Victim/PW. No. 1**

(a) she was taking education in 9th standard in Bhadvan High school. Her date of birth is 18/1/2003.

(b) after school hours, **she was attending drawing class conducted by Kambale Sir (accused).**

(c) she neither remember incident nor the date.

(d) thereafter she has not stated anything about the incident that took place on 12/8/2017. She says she does not remember anything of the incident.

(e) A.P.P. in charge cross-examined her. He put all the questions on the basis of her police statement. But she has flatly denied them by saying ***'it had not happened'.***

(f) she was put questions be referring to **contents of statement before police dated 13/8/2017.** She admits her signature and of mother (page 51).

(g) Specifically her attention was also brought to question nos. 10 and 11. She has flatly denied that she has stated that portion. They were marked as portion 'A' and 'B'.

(h) It relates to sexual abuses by the Appellant and its narration by her to parents.

(i) She has not assigned any reason why police have recorded them.

18. She was also cross examined on the basis of **her statement given before Judicial Magistrate First Class.** She gave following answers :--

a. **she admits her signature but she does not remember the contents.**

b. before signing, she says she has not read it.

c. she admits about her medical examination after recording of her police statement.

d. she denied suggestion "***the matter is settled outside the court in between her parents and accused and hence gave false evidence***".

➢ <u>Evidence of mother/first informant/PW No.2</u>

<u>Mother of the victim/first informant P.W. No. 2 has also not supported the prosecution case. She has deposed following facts</u> :

(a) her daughter is taking education in 10th standard.

(b) her daughter did not state any indecent incident of 12/8/2017.

<u>A.P.P. has cross examined her. She stated following facts</u> :--

i) police have recorded her statement. She along with her husband went to police station on 12/8/2017.

ii) her daughter used to attend tuition class of Appellant.

iii) on 12/8/2017, her daughter went to accused for attending class.

iv) her brother-in-law Vijay PW No. 3 came to her house at 5 p.m., he did not told her about victim going for morning walk along with accused and happening of incident.

v) FIR and statement were shown to her. She admits signature and has not assigned any reason about the contents.

vi) She denied suggestion about settlement.

19. There is nothing important to cite from the evidence of PW No.3 uncle and PW No. 4 father of the victim. The prosecution examined investigating officer as P.W. No. 6. He has deposed following facts :--

- Evidence of I.O.-P.W. No.6.

(a) he recorded complaint of mother of the victim on 12/8/2017 and statement of victim on 13/8/2017.

(b) he admits portion marked as 'A' and 'B' from the statement of the victim. (there is a practice to give exhibit number to those portions. It seems learned trial judge has not done it).

(c) during cross examination, he was asked about the statement of the victim. He has drawn hash value. He produced memory card in an envelope.

(d) the following documents were marked exhibits :--

the envelope	Exhibit no 39
memory card	Exhibit no. 40
certificate under section 65-B Evidence Act about the process of recording on video with the help of camera	Exhibit 41
memory card hash value extract	Exhibit no. 41

20. He was also cross examined relating to memory card. It was new purchase. He verified about the memory card (whether empty or not) but it is not mentioned any where. It was revealed during investigation that accused worked in that school for the last 25 years and it was not revealed to him about any other incident involving the accused.

➢ Observations of trial Court

The findings of the trial court can be classified as follows :--

(a) about undisputed medical evidence.

(b) about observations in the bail order.

(c) about digital evidence.

(d) about oral evidence vis-s-vis weightage to be given to hostile witness.

(e) about evidence of Judicial Officer.

(f) about presumptions under POSCO Act.

➢ **Medical evidence admitted by accused**

21. It will be relevant to consider corroborative circumstances and their evidentiary value. There cannot be any dispute that if any document is admitted, it can be used as an evidence against the Appellant. The Appellant has admitted the medical case papers. They are as follows :-

(i) proforma for investigation of sexual offences Exh. 28/C.

(ii) physical examination female Exh. 28/C filled by medical officer.

Opinion given is–

> "*from the foregoing examination I find nothing to suggest that the said victim is incapable of performing the sexual intercourse*".

(iii) proforma for investigation of sexual offences Exh. 29/C.

22. Furthermore in Exh. 28/C, in the column '*hymen*' there is observation that '*it was ruptured*'. No doubt these documents are admitted by the Appellant. So that they can be read in evidence without examining the necessary witnesses. It is important to consider what inferences are drawn by the trial Court on the basis of these admitted medical papers.

- **Inferences drawn by trial Court**

Trial court in para no. 18 observed :--

> "*In this connection, Exh. 28 clearly corroborates facts stated by victim in Exh. 33. Medical examination of the victim which is undisputed clearly states that victim's vulva and vagina is well developed and it admits two fingers easily and that it further records that the hymen was ruptured*".

Trial Court further observed in Para No. 19 :-

> *"It can be seen that in fact, Exhibit 28 is undisputed,* ***doctrine of estoppel*** *arises in the matter …..".*

23. The inferences drawn by the trial Court cannot be faulted. These inferences are drawn on the basis of principle laid down in Evidence Act *"facts admitted need not be proved"*. But, the issue does

not rest there. **Ultimately, Court has to consider what is the evidence to show the involvement of the Accused.**

- **Observation in Bail Application No. 2931 of 2017**

(referred by trial Court)

24. In fact every judicial officer knows what is binding effect of observations made while passing bail order either allowing or rejecting. In fact judge who is acting as Additional Sessions Judge is having sufficient experience and maturity. Bail Application No.2931 of 2017 was filed by the present Appellant before this Court. While rejecting the same, there were certain observations. Trial Court referred those observations and reproduced them **in para no. 19** of the present impugned judgment. These are not the observations of the trial court but are of this Court. For ready reference they are reproduced thus :--

> *"Perused the statement of the victim. She has reiterated the allegations levelled in the First Information Report. She also also narrated the torture that was meted out to her the applicant. Victim was subjected to medical examination which reveals that hymen was ruptured"* (para no.19 page 135 of paper book).

25. For understanding the observations, I have read the entire order rejecting the bail application (downloaded from our website). There is nothing wrong by the Learned Trial Judge in referring the order. However, ***is it not the duty of the trial court to consider at what stage, the said order was passed***? While deciding the case finally, if the trial courts will continue to consider such observations as one of the factor for arriving at the guilt of the accused (made while deciding the bail application), it will amount to mockery of justice. Are such observations amount to evidence? Can they be treated as precedents having binding effect? The answer is certainly 'No'.

26. Even the learned Judge has not taken pains in going through further observations made by this Court while rejecting bail application. In **para no. 8**, this Court observed:--

> *"However, it is made clear that the observations made herein above are prima-facie in nature and restricted to the application under section 439 of the Code of Criminal Procedure, 1973 and the trial Court shall not be influenced by the same at the time of trial."*

In spite of these observations. trial Court observed :--

*"it can be seen that the said order passed by the Honourable High Court in said Cri. Bail Application is **undisputed** by the accused"* (Para No.20).

27. **Consider the logic applied by the Learned Trial Judge**. Whether the Appellant is required to dispute such bail order? What for? Because in fact there is a presumption that observations in bail order are prima-facie observations. If the trial court will conclude the trial by considering such observations as one of the parameter, **then why there is a need to conduct the trial**? The trial court has totally misdirected itself to the issue. This is totally wrong approach.

- **About digital evidence**

28. When entire judgment is perused, the trial court has not made any comment about the digital evidence produced in the form of memory card. It contains recording of statement done by the police. There are special provisions by way of **sub-section (4) to Section 26** of the Protection of Children from Sexual Offences Act about manner of

recording the statement of the child. It should with the help of not only audio but by video recording means.

- **Purpose of incorporating Section 26 (4) in the POCSO Act**

29. Why Learned Judge has overlooked these provisions when it was followed by the investigating officer? Learned Judge has totally overlooked them and also overlooked the evidence adduced. Learned Judge could have verified the fact 'the child has really stated the facts forming part of statement reduced into writing'. There is **definite purpose for inserting these provisions in the said Act.** It is for the purpose having transparency. In future, the child should not make a grievance 'she has not stated particular portion but still it is appearing in her police statement'. At the same time such provision is also incorporated **in order to have check on conduct of the victim in resiling from her police statement**. Even in a given case, the accused can make use of this audio-video recording in case of inconsistency in between oral testimony and contents of police statement. The legislatures have incorporated such provision for the protecting the interest of all the concerned persons. I want to emphasis on this provision in the Act. There are training conducted in Maharashtra

Judicial Academy on POCSO Act also. This Court expects the Judges be made aware of these provisions and let have **deliberation on this aspect**. When the trial Court Judges **start recognizing the purpose** of incorporating Section 25(6) in the said Act, **there will be check on the hostility of the victims**.

30. For all these reasons, the trial court ought to have made some comment on digital evidence. But it seems that this piece of evidence has slipped from the mind. There is reason to believe that the learned trial judge has only proceeded in the direction of convicting the Appellant.

- **About oral evidence**

31. It is important to ascertain what the trial court has said about oral evidence of these witnesses. The discussion about evidence of material witnesses finds place in Para No. 13 to Para No. 15 of the judgment.

In Para No.13, trial Court observed :-

"PW No.1 turned hostile. Even her parents, PW Nos. 2 and 4

turned hostile. Probably, to save reputation and honour of family. Also considering the fact that in villages now marriages take place at young age. Therefore, PW No.1 stated in chief-examination itself that she is not in a position to remember the incident. She has admitted that she was attending drawing class of accused person. She has clearly stated that she is not in a position to remember any incident."

Further it is observed

"Even she denied her statement because she was not in a position to remember anything about the incident. She has denied portion marked A and B appearing in her statement. Thus, evasive answers given by PW No.1 and that, probabilities the fact that she was under pressure to protect and maintain honour of her family in the village Bhadwan and nearby locality.

Trial Court further observed :-

About statement of the victim recorded on 13/8/2017, **I.O. P.W. No.6 admits** about not mentioning *'the place where this statement was recorded and the persons who were present*

(except mother)'. **He admits** *'timing of recording the statement'* is also not mentioned. Statement was not handwritten but it was typed one. **He admits** there is no mention '*who typed the statement and who narrated the contents of conversation'*. **He admits** 'there is no mention in the statement about '*reading of the statement by the victim prior to signing and timing of starting and finishing timing of that statement*".

- **About Approach of the Court**

32. There is every reason to believe that the victim on the say of her parents has chosen not to depose incriminating facts against the Appellant. It can be considered as hard reality of the life. **At this stage, question arises how should be the response of the Court to deal with such a situation?** That is to say whether the Court ---

'*should treat and accept what all these witnesses have stated before the police as piece of evidence'* ? (by overlooking the fact for some reason they have chosen '*not to depose those facts before the Court'*).

OR

Should adopt age old approach of deciding the case on the basis of what has come in the evidence?

33. The offences under provisions of Protection of Children from Sexual Offences Act are on rise. The Act is child centric. By passage of time, there are more and more methods innovated for commission of offence. The motive for the accused to commit these offences is predominantly lust i.e. sexual desire. Certainly there is effect of use of social media on the psychology of the offender and some time on the victim also. Earlier to the enactment of the Protection of Children from Sexual Offences Act in 2012, either these offences were undetected or the environment was not conducive for commission of these offences. So Court while dealing with such offences need to have such approach which will send a message in society that these violations of law will not be tolerated. At the same time Court should **recognize and respect the inbuilt mechanism** provided in the Act to guarantee giving evidence before the Court. Because if these provisions are overlooked, then it will amount to **overlooking the intent of legislatures** in incorporating those provisions in the Act.

34. Even though this is true, when the question of appreciation of evidence arises, to what extent '*Court should grant leverage to the prosecution'* is a question. That is to say '*whether to follow* ***pedantic & technical approach*** *– of scrutinizing the evidence minutely with every detail or to adopt* ***such liberal approach*** *– where the accepted and settled principles of interpretation of Evidence Act should be kept in cold storage'.* **There may several instances which will come across before the trial court to deal with different kinds of evidence adduced during trial.** So to say –

a. to deal with the **issue of one piece of evidence** corroborating **other piece of evidence** (for e.g. oral testimony and medical evidence, testimony of one witness with other witness),
b. **deciding the weightage** of prosecution evidence,
c. considering the **reliability** of an individual witness (eg. victim) and
d. even dealing with **total absence of corroboration** and then dealing with its value.

35. No doubt constitutional Courts have treated evidence of victim of sexual abuse just like an injured. Even Constitutional Courts have dispensed with rule of corroboration when evidence of victim is bereft

of omission/contradiction. This approach was the outcome of need to deal with such social sexual menace. **On this background, there is one more area wherein the Court's response to tackle with ever increasing '*child abuse offence*' is tested.** This is when Courts have to deal with evidence of hostile witnesses (including victim) on one hand and on other hand to deal with evidence of an independent witness (who is otherwise entrusted with the responsibility of adjudicating the *lis* but while recording the statement under Section 164 of the Criminal Procedure Code not acting in judicial capacity).

➢ **About view of this Court on hostile witness**

36. As said above, when the evidence of hostile witness is appreciated, there are various angles. They can be summarized as follows :--

➢ **Types of hostile witnesses**

a. A witness has turned **total hostile** mean to say that he has not deposed single fact in chief examination appearing in previous police statement.

b. A witness has deposed **few facts only** but omitted to depose remaining facts as per his police statement.

c. A witness has not deposed a single fact but when he is cross examined by A.P.P. in charge, then he has **admitted to suggestive questions** put to him.

d. A witness has supported the prosecution case in its entirety but he has **given answers damaging** the earlier answers, when he is **cross-examined** on behalf of the defence.

37. If such are the possibilities faced by the criminal court, how one can make general proposition that '*evidence of hostile witness cannot be brushed aside totally'?.* Ultimately it depends upon **the extent of resiling from previous statement while giving evidence before the Court.** The law laid down by Hon'ble Supreme Court on the point of '*evidentiary value to be attached to testimony of hostile witness*' need to be applied on the set of facts and circumstances of each case.

38. On this background, it needs to be ascertained whether the trial court has assessed the evidence adduced before it properly. When the four witnesses including victim and her relatives have resiled from their previous statement and they were cross examined by the local

prosecutor, **the facts deposed by them can be summarized as follows** :--

➢ **Summary of facts deposed**

(a)	victim has answered '*she was going to Kambale sir (accused) for drawing class prior to 12/8/2017 for two months*'.
(b)	Kambale sir used to go for morning walk as deposed by the victim.
(c)	statement dated 13/8/2017 recorded by police (in question answer form) bears her signature and of her mother.
(d)	she admits her signature on statement recorded by Judicial Magistrate First Class, Ajara. However she does not remember contents of said statement.
(e)	To one question, she replied 'her statement is recorded as per my narration'. In another answer she says 'I have not signed it after reading it'.
(f)	Whereas her mother P.W. No.2 admits her signature on the statement of the victim. About the contents she has not said anything.
(g)	P.W. No. 3 Vijay/uncle and P.W. No.4/father Shridhar of

	victim have not stated anything about the incident thereby involving the accused.

39. From the above reproduced references, what inference can be drawn? If we perused all the testimonies, one fact is very clear and that is-- all the witnesses have decided not to depose the facts stated by them before the police/Magistrate. Because otherwise why the police/Magistrate will mention all the facts in their statements unless those facts were stated to them. There is no reason for the police/Magistrate to state those facts on their own. **But the question is will it be sufficient to convict the accused** ? The Hon'ble Supreme Court has opined to apply the test of deciphering the facts supporting the prosecution case from the total facts deposed by the hostile witness. But what is important is after **deciphering those facts, ultimately the Court has to consider what remains and how much weightage can be attached to those facts**. The Court has to assess 'what inferences can be drawn'. **So it will be unjustified to consider those facts and to convict the accused, without assessing its evidentiary value.**

➢ **Inferences drawn by this Court**

40. We can only infer that :-

a) victim was knowing the accused and she was attending the class conducted by her.

b) Yes police and Learned Magistrate have recorded her statements and before them, she has stated certain facts.

But are these facts are sufficient to convict the Appellant?

41. On the basis of certain judgments and the evidence referred above, the trial court convicted the Appellant. That is why for knowing the ratio, I have read the judgments cited by the trial court in the judgment under appeal.

➢ **Ratio in Imran Shamim Khan v/s. State of Maharashtra**
(relied upon by trial Court)

42. Trial Court in para no. 17 reproduced the observations in case of *Imran Shamim* as follows :-

"14. Similarly in the case of Ashok Kumar Raut and another Versus State of Bihar reported in 2006 Cri. L.J.

3362, it is held that where a witness turning hostile before the Court, his previous statement made before the Magistrate at the earliest opportunity under Section 164 of the Code of Criminal Procedure, 1973 must get some credence ***if it is being corroborated on material points by other evidence****.*

15. In the present case, the prosecution has examined the Magistrate who recorded the statement of the victim under Section 164 of the Code of Criminal Procedure 1973 and has proved the contents of the document recorded under Section 164 of the Criminal Procedure Code. It is very easy to say that prosecution has failed to prove the guilt of the accused. However, in a case like the present one, the judicial approach necessarily has to see that justice is imparted to victim as well. This Court is therefore of the opinion that there would be no impediment in upholding the judgment of the trial Court and maintaining the conviction recorded by the trial Court".

43. Even though learned Single Judge had given those findings, I respectfully disagree. I will give reasons for my opinion.

➢ **Facts of Imran Shamim**

44. In the said case, the victim was minor and apart from other materials, her statement was recorded under Section 164 of the Code of Criminal Procedure. During trial she has not supported her version stated before the police and before JMFC. There was medical evidence suggesting of sexual assault. Even the Learned Magistrate has given evidence. Trial court convicted the accused and it was confirmed by learned judge of this Court (Coram: Smt. Sadhana S. Jadhav, J.). Learned Single Judge considered observations in two judgments delivered by the Hon'ble Supreme Court and one judgment by High Court of Patna. They are :--

45. Judgments referred in case of Imran Shamin Khan.

a.	Bhagwan Dass v/s. State (NCT) of Delhi [1] (Para 8).
b.	Kashmira Singh v/s State of Madhya Pradesh[2].
c.	Ashok Kumar Raut and Another v/s. State of Bihar[3]

1 AIR 2011 SC 1863
2 AIR 1952 SC 159
3 2006 Cr. L. J. 3362

➢ **Bhagwan Dass (supra)**

(relied upon by Single Judge)

(i) Learned single Judge has commented on law about evidentiary value of hostile witness. Learned Single Judge in that matter referred to the observations in case of ***Bhagwan Dass (supra)***.

The facts are -- there was murder and the case was based on circumstantial evidence. The accused confessed before his mother that he committed the murder. However when mother deposed before the Court, she has turned hostile. The issue was to *'what extent her evidence can be considered'*. On this background, this Court in para 8 reproduced certain observations from the said judgment:--

"her subsequent denial in the Court is not believable because she obviously had afterthoughts and wanted to save the accused from punishment".

46. But there were also other circumstances too. They cannot be overlooked. They are:--

a. motive.

b. death took place in the house of accused.

c. attempt made to dispose of the body prior to arrival of the police.

47. On this background, the Hon'ble Supreme Court dealt with the evidence of hostile witness-mother of the accused. So what is important is except the evidence of hostile witness which are the other evidence available and what inferences can be drawn?

What ratio we can decipher is :--

"the corroborating circumstances were of such nature that they are inconsistent with the innocence of guilt of the accused".

Whereas the circumstances existing in present case and relied upon by the trial court even **if considered to its fullest extent are not sufficient to hold the Appellant guilty of the offences charged**.

- **Ashok Kumar Raut (supra)**

(relied upon by Single Judge)

(ii) There was a gang rape and the witness PW. No.3 who had seen the gang rape has turned hostile. His statement was also recorded under Section 164 of the Code of Criminal Procedure. He narrated about the incident to the first informant and then in turn he lodged

the complaint. Whereas the victim was a lady of unsound mind and her statement was not recorded by the police but the Court examined her as a Court witness. Though she could not identify the accused before the Court, she admitted about rape being committed on her. There was corroboration by other evidence on material points including medical evidence and evidence of first informant to whom the incident of rape being narrated by the eye witness (who turned hostile). The Court considered the circumstances in which rape was committed on lady of unsound mind. **Whereas in the case involved in this appeal, the victim and her uncle eye witness have totally resiled from their version before the police. There is reason to believe that these witnesses do not want to depose before the Court the incidents narrated by them to the police**. Though medical case papers are admitted, there has to be link between the medical findings and author of crime being the Appellant.

- Kashmira Singh (supra)

(relied upon by Single Judge)

(iii) The Supreme Court has laid down the approach to be adopted by the Court while dealing with confession of one accused against co-

accused. Whether the Court should start with such confession first or whether other evidence should be considered first and then the confession. In short, the confession of co-accused is weak type of evidence.

If apply same analogy to the evidence in this appeal, in fact there is reason to infer that statement given under Section 164 of the Code if not supported by the maker before the Court cannot be considered at par with facts deposed before the Court. The test laid down in Kashmira Singh will be applicable when there is proved confession, other proved facts and then its applicability to co-accused.

- **Conclusion about ratio in Imran Shamin**

48. On this background, when we undertake the exercise in weighing the evidentiary value of variety of evidence that is to say primary/secondary or substantive/corroborative, direct/ indirect evidence, particular fact for which said evidence is adduced must be proved. Because then only question of weighing its evidentiary value can be considered. Whereas in this case, fact (sexually abusing the victim by the Appellant) is not deposed by the witnesses who were supposed to depose. Which facts were deposed/admitted before the

Court are 'medical evidence and facts stated by the victim before the Learned Magistrate. **So it will be improper to say that the ratio in case of Kashmira Singh will be applicable.**

49. **In none of the judgments** referred by learned Single Judge, **there are material observations** about the approach of court to deal *'with evidence of Learned Magistrate vis-a-vis the testimony of hostile witness'*.

50. For the above reasons, I do not agree to the observations of learned Single Judge in upholding the conviction in case of **Imran Shamin Khan (supra).** There is no need to refer the issue to larger bench. It is for the simple reason that there are observations of the Hon'ble Supreme Court on these issues (which is referred in later part of this Judgment). **Hence I conclude that the trial court was not right in applying the ratio in the said case. This Court has to deal with the appeal independently on the basis of evidence adduced on behalf of the prosecution.**

➢ Tendency to follow blindly

51. It is true that the learned trial Judge while convicting this Appellant has considered the observations of this Court in case of *Imran Shamim Khan (supra)*. What I find is **there is increasing tendency of considering the observations in some of the judgments** without taking pains in understanding what the facts are and what is the ratio. This has happened in this case also. That is why, I was required to consider the observations in case of *Imran Khan (supra)* and is further required to consider what are the observations from the judgments referred by learned Single Judge (Coram : Smt. Sadhana S, Jadhav J.) in case of *Imran Khan (supra)*.

52. The precedents are said to be tools in the hands of any judge which helps him to arrive at proper conclusion. They guide a judge. But according to me, while applying the ratio in those judgments, **the approach of the trial Court is totally wrong and against the interpretations given by the Constitutional Courts on the point of value of evidence of hostile witness**. It can be said to be far stretched extension of the principles laid down in various judgments.

➢ **Evidence of PW No. 5-Judicial officer**

53. With the assistance of both the sides, I have read his evidence given before the Court. He recorded the statement of the victim (Exh.33) on 19th August, 2017. This was as per request letter received from the Ajara Police Station. He has simply stated about recording of the statement and identifying that statement. ***In the Court, he has not reiterated what the witness has stated before him.*** He admits absence of remark :--

'said statement was read by the victim and it was written as per her say'.

The explanation offered by him is

'there was a certificate and therefore, he did not feel it necessary to mention about the same'.

➢ **Observations of trial court**

54. Trial Court discussed about this piece of evidence in Para Nos. 14, 15 and 17. It will be important to consider those observations :-

"However, PW No. 1 victim has clearly ***admitted the fact that her statement was recorded before learned Judicial Magistrate First Class, Ajara.*** *In this connection, she has*

admitted that her statement recorded by PW No.5 under Section 164 of the Code was firstly recorded by Police thereafter her medical examination was conducted and thereafter exhibit 33 was recorded." (Para 14).

The trial Court has drawn an inference :-

"Thus, the prosecution is successful while getting admission from PW No.1 that **her statement was voluntary statement**. In fact, during cross-examination conducted by accused persons, it can be noted that medical examination of the victim is undisputed."

Trial Court further observed :-

"In the light of admissions given by P.W.No.1 that her statement was recorded firstly by police and after her medical examination, her statement was also recorded before Judicial Magistrate, First Class, Ajara that the prosecution has proved Exh. 33 by examining the Learned Magistrate P.W. No.5…." (Para 15).

➢ Appreciating evidence of Judicial Officer

55. Learned Single Judge in case of *Imran Shamim Khan* also commented on the evidentiary value of statement recorded under Section 164 of the Code on the background that the said witness has turned hostile before the Court. Learned Single Judge referred to the observations in case of ***Ashok Kumar Raut and Another v/s. State of Bihar***[4]. :--

> *"It is held that where a witness turning hostile before the court, his previous statement made before the Magistrate at the earliest opportunity under Section 164 Criminal Procedure Code must get some credence if it is being corroborate on material points by other evidence" (para 14).*

56. It was a case of gang rape and the witness who had seen the gang rape has turned hostile before the Court. His statement was recorded under Section 164 of the Code. The High Court of Patna has observed in para no.22:--

> *"now the question is whether this person Mahesh Giri be*

4 2006 Cr. L. J. 3362

allowed to highjack justice by turning hostile before the court. In my opinion, he should not be allowed and his previous statement made before the Magistrate at the earliest opportunity under Section 164 Cr.P.C. must get some credence, **if it being corroborated on material points by other evidence***".*

- **Evidence in this appeal**

57. The Judicial Magistrate First Class while giving evidence deposed all the facts and official acts which were performed by him. He has also deposed about recording statement of the victim. I do not find any defect in the procedure followed by him while recording the statement. While giving evidence before the Court, he has not reiterated the facts stated to him by the victim. Whether '*they need to be deposed by him before the Court'* is disputable issue. It can be decided in some other matter. This is also true for this witness. Why this witness will depose untrue facts that is those facts which have not happened ? But can we attach such evidentiary value to his testimony which is not warranted ?

58. It will be also useful to consider the ratio laid down in the judgments referred by the trial court in the impugned judgment.

- **Observations in case of Rameshbhai Mohanbhai Koli and others v/s. State of Gujarat**
(referred by trial Court)

The learned trial judge in para no 21 of the impugned judgment quoted those observations.

- **Facts of Rameshbhai**

59. It was a case of murder involving several accused persons. Except accused no.8, all accused persons were convicted by the trial court for individual acts and on the principle of vicarious liability. Whereas High Court acquitted few of them. Conviction was maintained up to the Hon'ble Supreme Court for rest of the accused. All eye witnesses have turned hostile (**para 14**). Earlier enunciation of law on effect of hostile witness was reiterated in **para nos. 16 to 18.** It is on the point of value of evidence of hostile witness.

60. Following circumstances weigh the mind of the Hon'ble Supreme Court to confirm the conviction :-

a. evidence of hostile witnesses and answers during cross

examination.

b. earlier statements recorded u/s. 164 of the Code.

c. discovery at the instance of accused persons.

d. blood group of deceased found on the seized weapons.

e. the evidence of investigating officer.

61. The law laid down is

"It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether ***but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof****."(para no. 16).*

62. There cannot be dispute about this proposition. But this was not the case consisting of evidence of only hostile witnesses but corroborative evidence was available. Ultimately, the guilt of the accused was decided on the basis of corroborative piece of evidence and their nature. **The correct ratio laid down in Rameshbhai is:--**

"part of the evidence of hostile witness can be considered and if there are corroborative and clinching circumstances, guilt can be based on the same".

63. There was no *elaboration on evidentiary value of statement recorded under Section 164 of the Code vis-a-vis the said witness has turned on hostile*. In fact discussion on this issue finds place in the judgment delivered by Gujrat High Court in the same case '***Rameshbhai Mohanbhai Koli Vs .State of Gujrat***, in Criminal Appeal No. 1422/2005', dated 25/10/2007.

➢ **Observation of High Court in Rameshbhai**

64. The said High Court has considered number of judgments on this issue including the observations of Privy Council in case of *Brij Bhushan Singh vs. Emperor*[5] .

➢ **Ratio in Brij Bhushan Singh**
(referred in Rameshbhai)

65. The Appellant was charged for committing murder of one lady. She was found in a compromising position with his maid servant. The

5 AIR 1946 PC 38

Appellant was told of this fact when he returned home. The Appellant got annoyed and he beat the deceased. He with the help of others tried to dispose of the body. Prosecution relied upon Section 164 statement of two witnesses Mst. Haliman and one Mahabir. The Appellant was convicted for the offence punishable under Section 302 of Indian Penal Code by the Session Judge and it was confirmed by Chief Court. That is how the appeal came before the **Privy Council.** When the question came about the evidentiary value of such statements, it was observed :--

> *"those statements were inadmissible in evidence* ***for any purpose****. A statement under Section 164 can be used to check, corroborate or destroy* ***but it can never prove the facts stated.*** *The Court has no right to use a Section 164 statement which is repudiated by the witness" (Page No. 5).*

- **The Privy Council explained it by way of illustration:--**

66. If man goes to the witness box and says "*I carried that girl alive*", and is asked "did you make a statement under Section 164 "*that you carried her corpse?*" and he replies, "*yes but it was "not true"* then there is no evidence that he carried a corpse.

67. Finally the conviction was set aside. In fact this is the correct interpretation of law. The underline principle is '*what is stated before the Court on oath is important*'. **Even though this is the law, trial court in the impugned judgment quoted** the observations in Para No. 15 of *Imran Shamin Khan,* judgment as :--

> "*15. In the present case, the Prosecution has examined the Magistrate who recorded the statement of the victim under Section 164 of the Code Of Criminal Procedure and has proved the contents of the document recorded under Section 164 of the CRPC. It is very easy to say that prosecution has failed to prove the guilt of the accused. However, in a case like the present one, the judicial approach necessarily has to see that justice is imparted to victim as well. This court is therefore of the opinion that there would be no impediment in upholding the judgment of the Trial Court and maintaining the conviction recorded by the trial court*".

68. However when the trial court considered above said observation, **trial court has not considered the law on this issue laid down by Supreme Court**. Even after passage of time after Privy Council interpreted the evidentiary value of such statement in case of

Brij Bhushan (Supra), there is no change in interpretation on this topic. Even Supreme Court in case of ***Brij Nath Sah v. State of Bihar***[6] has reiterated same principles. The Hon'ble Apex Court has held that a statement under Section 164 is not substantive evidence and can be utilized only to corroborate or contradict the witness *vis-a-vis* statement made in court.

➢ **Difference in between two statements**

69. There is one more aspect wherein we can analyze the status of statement recorded under Section 164 of the Code. It will be relevant to see the difference in between the statement recorded under section 161 and statement recorded under Section 164 of the Code.

70. Trial Court was wrong in convicting the Appellant by taking recourse to statement under Section 164 of the Criminal Procedure Code. On the basis of the evidence of the learned Magistrate and the medical evidence, statement recorded under Section 164 of the Code can be treated as previous statement only. There are certain differences recognized by the legislatures in the statement under **Section 161** on

6 (2010) 6 SCC 736

one hand and statement under **Section 164** of the Code on the other hand. They can be summarized as follows :--

SECTION 161	SECTION 164
statement before the Police need not be signed	the statement before the Magistrate is signed.
However this is not so in statement before the Police.	Prior to recording the statement, learned Magistrate can administer the oath to the maker.
This is not the case herein.	the statement under Section 164 stands on higher pedestal

71. So if we look at the weightage and value of evidence of judicial officer from all the angles, we may find that **his evidence cannot be said direct on the point of happening of the incident.** Because he is not giving the evidence on the basis of facts seen by him. **His evidence is on the point of what he has heard through the mouth of the victim**.

72. So for what purpose this provision is included in the Code. The mechanism created by the Code is investigation carried out by the police including recording the statement of the witnesses. Recording statement through the Magistrate is also a part of investigation. **Such**

statement stands on higher pedestal than the police statement. Still we can not attach more value than recognized by the law. Such statement falls within the category of '**previous statement**' only. **Its use is permissible in the mode prescribed in the Evidence Act only**.

73. **Does it mean to say that this statement can be the basis for conviction just because it is recorded by judicial official and oath is administered? Answer is 'No'.** The reason is this statement is not recorded in the presence of the accused and there is no opportunity of the cross-examination to the maker of the statement when such statement is recorded by the Magistrate. **So ultimately, when Magistrate gives evidence, his evidence is not the evidence about the witnessing the incident but it is evidence of facts stated before him by the victim.**

- **Use of such statement**

74. If the victim reiterates what she has stated earlier, such statement can be used for ***corroboration*** under Section 157 of the Evidence Act. If there is variance in between the particulars stated in such statement and the oral evidence, that statement can be used for

the purpose of the **contradiction** by the defence. So also if the victim has resiled from the statement, it can be used for **cross-examination by prosecution**. In this case, prosecution has availed of this opportunity. The victim has disowned the contents.

75. For the above discussion, I conclude that you cannot rely upon the evidence of judicial officer to convict the accused as the witness has not supported the prosecution case on material particulars.

- **Other judgments referred by this Court on this issue**

76. There was an occasion for the Division bench of this Court to deal with such issue in case of ***Imran Shabbir Gauri Vs. The State of Maharashtra*** in Criminal Appeal No. 831 of 2015, decided on 31/03/2021, by this Court (Coram : **P. B. Varale, J. and S. M. Modak,** J.J.). There was prosecution for an offence punishable under Sections 376 (2)(i), 506 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act.

77. The trial Court convicted the accused whereas it was set aside by the Division bench. In para no. 21, the Division bench of this Court observed thus:-

> "*it is one thing to say that sole testimony without corroboration is sufficient" and other thing to say that "Section 164 Statement is not substantive evidence and it can be used for contradiction or corroboration". **We have to understand that the Court gives a verdict on the basis of evidence before the Court**. Whatever material is collected during investigation (either in the form of panchnamas or section 164 statement) can be converted into an evidence only when certain witness deposes before the Court. This can be same logic when the maker gives statement before the Magistrate that is the exercise involving the maker and the Magistrate only. **Persons against whom such statement is going to be used has no locus standi at that time.** Even in case of T. Diwakara (cited supra), the High Court at Karnataka has opined about institution of prosecution for forgery if the maker refuses to abide to section 164 Statement.*"

78. On the aspect of present existing law and the handicaps in dealing with evidence on such aspect, Division Bench further observed :--

> *47. "We are also cautious of the relationship in between the victim and the accused (though not real father and real daughter). It is difficult to opine what compelled the victim not to state those facts which she has stated before the police. Certainly this is not a case of filing the FIR by tutoring because there are no such materials. So the situation warrants that there are certain materials suggesting sexual intercourse but the hands of the Court are tied due to provisions of law. We have certain limitations as expressed by us in earlier part of the judgment.* ***Yet the statement of the victim recorded under section 164 of Cr.P.C. has not been given status of examination-in-chief in all circumstances (except in case of disability as provided in clause (b) to sub-section 5A to Section 164 of Cr.P.C.).*** *Though Hon'ble Supreme Court in case of Shivanna @ Tarkari Shivanna (cited supra) has expressed desire to consider the statement as examination-in-chief, amendment to*

that effect is not brought to our notice. So with all pains we have no alternative but to set aside conviction of the appellant for the offence punishable under Section 376(2)(i) of Indian Penal Code and under Section 506 of Indian Penal Code. We are maintaining conviction under section 67-B of the Information & Technology Act."

79. Even the Division Bench took that opportunity to recommend to the Government to amend the law. The opinion expressed is as follows :--

***48**. "We take this opportunity to opine that the concerned authorities of the State Government or Central Government will take some initiative in incorporating **certain amendments** under relevant laws so as to **give status to section 164 statement** as that of examination-in-chief in all eventualities. We hope that legislatures will also consider the practical realities of the life which the victim has to face. The trauma which victim has to undergo, after the incident does not stop there and when it comes to facing the real life issues, there may be occasion for the victim to forego all the trauma which she had undergone*

and to take U turn. We feel that similar thing has happened in this case. At the same time we have recognized the accepted principles of appreciation of evidence and in the zeal of protecting the interest of the victim, we cannot give go-bye to these accepted principles. In order to avoid similar situation in future we feel that appropriate authorities ***will speed up the process of making amendment*** *as mentioned above ------."*

80. Finally division bench gave following directions :--

e) *"Registrar Judicial-I is directed to send a copy of this judgment to the Secretary of Law and Justice Department, Government of Maharashtra and the Central Government for consideration and appropriate action about the views expressed above."*

81. Even the Hon'ble Supreme Court in case of ***State of Karnataka by Nonavinakere Police Vs. Shivanna @ Tarkari Shivanna,***[7] had a occasion to deal with similar situation and the Hon'ble Supreme

7 2014 (8) SCC 916

Court was pleased to give certain suggestions to the Legislatures. The relevant observations are as follows :

> *"What we wished to emphasize is that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that* ***if the evidence is recorded for the first time itself*** *before the Judicial Magistrate under Section 164 Criminal Procedure Code and the* ***same be kept in sealed cover*** *to be produced and treated as deposition of the witnesses and* ***hence admissible at the stage of trial with liberty to the defence to cross examine them with further liberty to the accused to lead his defence witness and other evidence*** *with a right to cross examination by the prosecution, it can surely cut short and curtail the protracted trial if its is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast track procedure to the Fast Track Court to resort to."*

82. On the aspect of need to change the law it is observed :--

*5. "Considering the consistent recurrence of the heinous crime of rape and gang rape all over the country including the metropolitan cities, we are of the view that **it is high time** such measures of reform in the Cr. P.C. be introduced after deliberation and debate by the legal fraternity as also all concerned".*

Uptill now, law is not amended to treat statement of the victim as examination in chief. Till the time it is effected, how the evidence of Judicial Magistrate can be considered as a proof when the witness has turned hostile ?

➢ **Presumption under POCSO Act**

83. It is true that the Court conducting the trial of offences under this Act can resort to the presumptions incorporated under the POSCO Act. They are contained in Sections 29 and 30 of the Protection of Children from Sexual Offences Act. Provisions says :--

(i) **Presumption u/s. 29** for the offence punishable under Sections 3, 5, 7 and 9 of the Protection of Children from Sexual Offences Act that **culprit has committed offence.**

(ii) **Presumption u/s 30** about **culpable mental state** in respect of only those offence wherein culpable mental state is one of the ingredient.

It is true that the word '***shall*** is used in the sections 29 and 30 *and not the word may'*. It indicates there is no option available to the Court but to draw presumption. However there in inbuilt mechanism provided in the section itself. This presumption continues till the time '***contrary is proved by the accused'***. *So* the issue is "**when the trial court can resort to this provision**?" The opening line said section 29 says *"**when a person is prosecuted for** :--*

a) committing or

b) abetting or

c) attempting

*to commit any offences mentioned in the section 29". So "**whether it is sufficient to resort to presumption** once any person is charge-sheeted and charged OR **whether apart from charge-sheet and framing of charge, some thing more is required," is a question.* ?**

84. While arriving at the guilt of the accused, after giving its findings about proof of statement under section 164 of the Code and undisputed medical papers about examination of victim, trial court resorted to presumption under **Section 29** of the said Act. Trial Court observed in para no. 17 :--

> *" Per contra, P.W. No.1 has turned hostile, yet accused could not establish his innocence in view of the presumption arising under section 29 of the POSCO ACT------".*

85. Similar question was posed before Learned Single Judge of this Court in case of ***Ramprasad v/s State of Maharashtra***[8]**.** Learned Single Judge was dealing with an appeal filed by the convicted accused. While interpreting the nature of presumption under Section 29 of the said Act, it is observed :--

> " Thus the presumption that operates under Section 29 of the Protection of Children from Sexual Offences Act is not absolute and it is triggered only when the prosecution **is able to prove the foundational facts** in the first place. The evidence placed on record by the

8 2018 SCC Online Bom 1315

prosecution is to be examined to first come to the conclusion that the foundational facts of the prosecution case have been established ---------" (para 29).

86. On facts it was observed :--

" *In fact for the presumption to operate, as observed earlier, it is necessary that the foundational facts are established by the prosecution, which in the present case, does not appear to have been done by the prosecution ----"* (para 27)

87. Recently three judges of the Hon'ble Supreme Court in case of ***Pappu v/s State of Uttar Pradesh***[9] while dealing with an appeal on facts observed thus :--

"*foundational facts of the offences are clearly established and the Appellant is liable to rebut the presumption*" On facts it is observed that *"he has failed discharge this burden and as such presumption would lead to the finding of guilt against the appellant"*(para 108).

9 (2022) 10 SCC 321

➢ **Conclusion**

88. In nutshell, the trial court simply cannot be convict the accused on the basis of the presumption. Because the Court cannot start with only on the basis of the presumption. **However presumption will come into picture only when foundational facts are established**. That is to say, age of the victim, either of the acts prescribed under Sections 3, 5, 7 and 9 of the POCSO Act are committed. One may not find such wordings in the section itself. But the Constitutional Courts have interpreted similar provisions relating '*presumptions*' en-grafted in various Acts. This interpretation of the provisions of relevant Acts is arrived at after **considering those provisions of Acts** on one hand and **presumption of innocence** on the other hand. It is interpreted presumption of innocence is human right though not a fundamental right.

89. In this case, **foundational facts are not proved**. I have already observed the evidence on the basis of statement under Section 164 of the Code can not be considered. So also on the basis of admitted medical case papers, we cannot draw an inference about involvement of the culprit/accused. **Hence trial court was wrong in taking recourse**

to the presumption under Section 29 of the Protection of Children from Sexual Offences Act.

90. It is true that learned trial Judge has considered the observation by learned Single Judge of this Court, in case of ***Imran Shamim Khan Vs. State of Maharashtra*** in Criminal Appeal No. 936 of 2014 : 22nd January, 2019. I have already observed observations in case of Imran Shamim Khan were not after considering the observations of the Hon'ble Supreme Court. I have also observed about findings of trial Court are wrong. It was decided by taking the assistance of the observations in case of ***Rameshbhai Mohanbhai Koli and Others Vs. State of Gujarat***[10]. But in Rameshbhai the Hon'ble Supreme Court discussed the law on the point of evidentiary value of hostile witness. Whereas High Court of Gujarat in Rameshbhai has elaborately dealt with law about evidentiary value of statement under Section 164 of the Code.

91. When the learned Single Judge has decided the appeal of the ***Imran Khan (supra)***, these observations of the Hon'ble Supreme

10 (2011) 11 SCC 111

Court were not pointed out. So even though this Court is cautious of the fact that there is tendency to resile from the earlier statement by the victim, we cannot convict the accused by treating such statement as corroborating piece of evidence. So I have no alternative but to set aside the conviction by allowing the appeal.

92. Considering the important points involved in this appeal, I have elaborately dealt with law as well as facts on the point of :--

a) evidentiary value of hostile witness

b) evidentiary value of testimony of judicial officer (on the background of witness not supporting the prosecution case),

c) binding effect of observations made in bail order

d) evidentiary value of admitted medical case papers

e) weightage to be every piece of evidence during the process of 'appreciation of evidence' and what should be the approach of the Court while appreciating such evidence adduced in an offence under POSCO Act.

So also I have made certain observations about tendency to blindly follow the observations in judgments delivered by the Constitutional

Courts without understanding the correct ratio and by overlooking the evidence.

93. At the same time I have also considered observations in two of the judgments thereby opining about necessity to amend the provisions of law (on the point of uplifting the status of the statement of the victim recorded by the Judicial Magistrate). Uptill now it is not pointed out to this Court as to whether any exercise 'to amend the provisions of POSCO Act or the Code of Criminal Procedure' is undertaken or not. I thought it necessary to send copy for the information of Joint Director Maharashtra Judicial Academy for bringing to the notice of judges who will be imparted training there.

94. The trial Courts are required to decide this issue every now and then. So I deem it fit to lay down certain guidelines about approach of the Court, while dealing with this issue.

➢ Guidelines

95. If victim has not supported, then first ascertain :-

a) if she has not at all supported or

b) partly supported,

c) If partly supported then find out:-

(i) facts supported and more importantly the evidentiary value.

d) Find out corroborative materials.

e) then assess, its evidentiary value,

f) then consider together, the portion supported plus the corroborative materials.

g) then come to conclusion about the guilt.

h) The presumption can be resorted only when foundational facts are proved and not otherwise.

96. Hence, Order :--

ORDER

(i) Appeal is allowed.

(ii) The judgment and order dated 20th June, 2019 passed by the learned Special Judge, Gadhinglaj, Kolhapur in Special Case (POCSO) No. 12 of 2017 convicting the Appellant under Sections 376(2)(f) of Indian Penal Code and Sections 4, 8 and 12 of Protection of Children from Sexual Offences Act is set aside.

(iii) The Appellant is acquitted for the offence punishable under Sections 376(2)(f), 377 of Indian Penal Code and Sections 4, 8, 10 and 12 of the Protection of Children from Sexual Offences Act

(iv) Fine paid, if any, be returned to the Appellant.

(v) Copy of this judgment be send to Joint Director Maharashtra Judicial Academy for information and necessary compliance.

97. Appeal is disposed of in the light of the above observations. Pending applications also disposed of.

[S. M. MODAK, J.]