

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 1042 of 2024****With****R/CRIMINAL APPEAL NO. 545 of 2024****With****CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO.
2 of 2026****In R/CRIMINAL APPEAL NO. 545 of 2024****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE S.V. PINTO: Sd/-**

Approved for Reporting	Yes	

SANJAYBHAI CHIMANBHAI MUCCHADIYA**Versus****STATE OF GUJARAT****Appearance:****MR ASHISH M DAGLI(2203) for the Appellant(s) No. 1****MR JAY B AMBANI(13896) for the Opponent(s)/Respondent(s) No. 1****MS. C.M. SHAH, APP for the Opponent(s)/Respondent(s) No. 1****CORAM: HONOURABLE MS. JUSTICE S.V. PINTO****Date : 07/05/2026****COMMON ORAL JUDGMENT**

1. These appeals have been filed by the appellants – original accused under Section 374 of Code of Criminal Procedure, 1973 against the judgement and order of conviction passed by the learned 5th Additional Sessions Judge & Special Judge (POCSO), Rajkot at Dhoraji (hereinafter referred to as “the learned Trial Court”) in Special (POCSO) Case No. 4/2022 on 25.01.2024, whereby, the learned Trial Court was pleased to convict the

appellants and sentence the appellants to simple imprisonment of 1 month and fine of Rs. 1000/- each and in default, simple imprisonment for 15 days for the offence punishable under Section 323 read with Section 34 of Indian Penal Code, 1860, rigorous imprisonment of 3 years and fine of Rs. 1000/- each and in default, simple imprisonment for 3 months for the offence punishable under Section 354A read with Section 34 of Indian Penal Code, 1860, rigorous imprisonment of 3 years and fine of Rs. 20,000/- each and in default, simple imprisonment for 6 months for the offence punishable under Section 8 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 (hereinafter referred to as the "POCSO Act" for short), rigorous imprisonment of 5 years and fine of Rs. 20,000/- each and in default, simple imprisonment for 1 year for the offence punishable under Section 10 of the POCSO Act. All the sentences were ordered to run concurrently.

1.1 Criminal Appeal No. 545 has been filed by the original accused no. 1 and Criminal Appeal No. 1042/2024 has been filed by the original accused no. 2 against the same

impugned judgement and order passed by the learned Trial Court in Special (POCSO) Case No. 4/2022 on 25.01.2024 and hence, both the appeals have been disposed of by this common judgement.

1.2 The appellant of Criminal Appeal No. 545/2024 and appellant of Criminal Appeal No. 1042/2024 are referred as the accused in the rank and file as they stood in the original case for the sake of convenience, clarity and brevity.

2. The brief facts that emerge from the record of the case are as under:

2.1 The complainant - the mother of the victim had a dispute with her husband and had taken a divorce from him. Out of their wedlock, they had two children, a son and a daughter and she left the son with her husband and brought the daughter, who was aged three years and three months at the time of the incident and came to reside with the accused no. 1 as she was in a relationship with him. On 06.02.2022, the accused no. 1, complainant and the minor daughter came to reside at the house of the accused no. 2 at

Patan Vav. On 07.02.2022, at around 10.00 am, both the accused started assaulting the victim and she started crying and the complainant intervened and took her away from the custody of both the accused. On 09.02.2022, at around 11.00 pm, the minor daughter was sleeping on the bed and she saw the accused no. 2 putting his hands in the leggings of the victim. The victim started crying and in the presence of the complainant, both the accused started beating the victim. She forcibly took the victim to the inner room and found that she had sustained injuries on her face, back portion and private part. She took the victim to various hospitals for treatment and a complaint under Sections 323, 354, 506, 114 of the Indian Penal Code, 1860 and Sections 8, 9(i)(m) and Section 10 of the POCSO Act was registered at the Patan Vav Police Station at C.R. no. 11213043220074/2022 on 18.02.2022.

2.2 The Investigating Officer recorded the statements of the connected witnesses and seized the necessary documents and after completion of investigation, a charge-sheet came to be filed before the Sessions Court, Rajkot and

the case was registered as Special (POCSO) Case No. 4/2022.

2.3 The accused were duly served with the summons and the accused appeared before the learned Trial Court and after the procedure under Section 207 of Code of Criminal Procedure, 1973 was followed the learned Trial Court heard the arguments of learned APP and learned advocate for the accused nos. 1 and 2 and passed an order below Exh. 6 to frame the charge under Section 323, 506(2) and 34 of the Indian Penal Code, 1860 against the accused no. 1 and a charge under Section 323, 506(2), 34 and 354(A) of the Indian Penal Code, 1860 and Sections 8, 9(i)(n)(m) and Section 10 of the POCSO Act against the accused no. 2. Accordingly, the charge was framed under the said sections against the accused at Exh. 7 and the statement of the accused were recorded at Exhs. 8 and 9 respectively. The accused denied all the contents of the charge and the entire evidence of the prosecution was taken on record.

2.4 The prosecution examined 15 witnesses and produced 27 documentary evidences on record in support of their

case and after the learned Additional Public Prosecutor filed the closing pursis, the further statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 were recorded. The accused denied the evidence and refused to step into the witness box or lead any evidence and stated that a false case has been filed against them. After the arguments of the learned APP and learned advocates for both the accused were heard, the learned Trial Court, by the impugned judgment and order dated 25.01.2024, was pleased to find the accused nos. 1 and 2 guilty and sentence them to simple imprisonment of 1 month and fine of Rs. 1000/- each and in default, simple imprisonment for 15 days for the offence punishable under Section 323 read with Section 34 of Indian Penal Code, 1860, rigorous imprisonment of 3 years and fine of Rs. 1000/- each and in default, simple imprisonment for 3 months for the offence punishable under Section 354A read with Section 34 of Indian Penal Code, 1860, rigorous imprisonment of 3 years and fine of Rs. 20,000/- each and in default, simple imprisonment for 6 months for the offence punishable

under Section 8 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 (hereinafter referred to as the “POCSO Act” for short), rigorous imprisonment of 5 years and fine of Rs. 20,000/- each and in default, simple imprisonment for 1 year for the offence punishable under Section 10 of the POCSO Act. All the sentences were ordered to run concurrently.

3. Being aggrieved and dissatisfied with the judgment and order of conviction, the appellant of Criminal Appeal No. 545/2024 who is the original accused no. 1 has filed the appeal mainly stating that the judgment and order of conviction and sentence is contrary to law, against the express provisions of statute and against the evidence on record and is unjust, improper, incorrect and against good conscience and is required to be quashed and set aside. The learned Trial Court has failed to appreciate that there is patent infirmity in the order of conviction which has rendered the order of conviction *prima facie* erroneous. From the deposition of the complainant, it is clear that the complainant had a marital discord with her husband and

she started staying with the appellant and initially they stayed at the house of the sister of the appellant with the minor child. The complainant has deposed that the appellant and the co-accused had assaulted the victim on her private part but has specifically deposed that the accused no. 2 had put his hands into the leggings of the victim and had pinched her on her private part and she had found visible marks on the thighs and private part of the victim. The allegations on the face of it are against the co-accused and the present appellant was staying with the victim as his father but no allegations are placed against him about the commission of offences punishable under Section 354(A) of the Indian Penal Code, 1860 or Section 8, 9(i)(m) and 10 of the POCSO Act. At the best, there is one episode of assault for which the sentence is imposed upon the appellant under Sections 323 and 34 of the Indian Penal Code, 1860. The learned Trial Court has not appreciated that the victim was taken to various Medical Officers and the history given by the complainant to the Medical Officer examined at Exh. 10 is about a fall while playing and the

Medical Officer did not examine the private part of the victim. The second Medical Officer noticed injuries on the body of the victim including the private part but in the history it was stated that she had dashed with a hard surface along with the fall from the bicycle. The history given before the third Medical Officer is regarding the manipulation done by the appellant and the co-accused on her private part and the Medical Officer has noticed swelling over the vulva of the victim and during the cross examination has admitted that the injury could be sustained as a result of a fall from a motorcycle. That in fact, even before the Medical Officer serving at Patan Vav, the history narrated was that the victim had a fall from a staircase. The learned Trial Court has failed to appreciate that the allegations are levelled against the co-accused and not against the present appellant and the assault was with no intention to outrage the modesty of the victim by manipulating her private parts. None of the charges would apply to the case of the appellant and the appellant is wrongly convicted for the charge of Section 8 of the POCSO

Act. The learned Trial Court has failed to appreciate the difference between a physical assault or a sexual assault and the prosecution has not proved the intention of the appellant behind the act. That in fact, the overall assessment of the entire evidence is lacking in *mens rea* which is the basic requirement of criminal jurisprudence. Moreover, for the incident taking place between 07.02.2022 to 09.02.2022, the FIR came to be lodged on 18.02.2022 and there is no plausible explanation regarding the late filing of the FIR which is fatal to the case of the prosecution, the way in which the overall case is an inter-se relationship between the parties. Even otherwise, the judgment and order of conviction and sentence is illegal, unjust, improper and bad in law and the same is required to be quashed and set aside.

3.1 The original accused no. 2 has filed Criminal Appeal No. 1042/2024 and has challenged the impugned judgment and order being aggrieved by the same mainly stating that the appellant is the friend of the co-accused with whom the complainant got married and was residing with. As per the

case of the prosecution, the complainant had a dispute between her husband and she developed a relationship with the co-accused and they stayed at Rajkot for about one and a half month and thereafter, resided for some days at the house of the appellant. The dispute between the complainant and the co-accused was on account of the daughter of the first marriage and it is vaguely alleged that the co-accused and the appellant had given kick and fist blows to the victim. At the time when the minor was taken to the hospital, an absolute different version was stated and in fact, the appellant who is a friend of the husband of the complainant is sought to be falsely implicated. The learned Trial Court has committed a serious error in relying upon the evidence of the complainant who is not believable and the evidence is not reliable so as to sustain the order of conviction. The complainant has given different history before the various doctors where the victim was taken and a tutored and contradictory version is submitted before each Medical Officer. The place of incident as projected is not proved and in the entire case of the prosecution, the

involvement of the appellant is not proved. No offence under the POCSO Act is made out and the entire conviction is based on moral conviction rather than a legal one and the learned Trial Court has committed a serious error of law in not appreciating the submissions made before the learned Trial Court in true and proper perspective. Hence, the judgment and order of conviction is liable to be quashed and set aside.

4. Heard learned advocate Mr. Pratik Barot for the appellant of Criminal Appeal No. 545/2024 and learned advocate Mr. Ashish Dagli for the appellant of Criminal Appeal No. 1042/2024, learned advocate Mr. Jay Ambani for the respondent no. 2 and learned APP Ms. C.M. Shah for the respondent State in both the appeals.

5. Learned advocate Mr. Pratik Barot for the appellant of Criminal Appeal no. 545 of 2024 has submitted that a failure of justice has occasioned and a serious prejudice is caused in particular convicting the appellant for the charges under Section 354(A) of the Indian Penal Code, 1860 and

Sections 8 and 10 of the POCSO Act mainly, as the appellant was charged with Section 323, 506(2) and 34 of the Indian Penal Code, 1860 yet the conviction and sentence was imposed upon him under Section 354(A) of the Indian Penal Code, 1860 and Section 8 and 10 of the POCSO Act with the reasoning that since, the appellant had assaulted the minor victim aged 3 years and 3 months on her private part, as deposed by the mother of the victim in her complaint and as recorded before a gynaecologist and her testimony on oath, so believing the case to be of collective assault, the appellant was also held accountable for the charges under Section 354(A) of the Indian Penal Code, 1860 and Sections 8 and 10 of the POCSO Act even though no charges under these sections were framed against the appellant and the same is a patent perversity in the eyes of law. Learned advocate submits that the non-framing of a charge under a particular penal provision has caused real prejudice for the reason that the appellant was not informed as to what was the real case against him and he could not defend himself properly. Hence, if the conviction order is to

be tested on the touchstone of prejudice theory, an expression failure of justice is present in a case where reading Sections 464 and 465 of the Code of Criminal Procedure, 1973 the appellant is taken by surprise on the day on which he is convicted and sentenced for offences for which he is not charged with. It is settled law that a mere discovery of an error, irregularity or omission in the framing of charge does not *ipso facto* render the decision of the court invalid unless a failure of justice has occasioned which will vitiate the decision and that is exactly what has happened in the present case. Learned advocate submits that it is not an error, irregularity or omission in framing of the charge but the learned Trial Court while framing the charge was conscious of a fact that the role inter se attributed to both the accused was not identical and framed a special charge against the present appellant. Learned advocate further submits that Section 222(1) of the Code of Criminal Procedure permits a Court of law to convict a person for a minor offence with which he is not originally charged with but Section 354(A) of the Indian Penal Code, 1860 and

Sections 8 and 10 of the POCSO Act are not minor offences in comparison to Sections 323, 506(2) and 34 of the Indian Penal Code, 1860 and hence, the conviction and sentence under Section 354(A) of the Indian Penal Code, 1860 and Sections 8 and 10 of the POCSO Act is bad in law. The learned Trial Court has believed an allegation that the appellant is a part of a collective assault made on the victim who was aged 3 years and 3 months on her private part and is an equally responsible accused in the company of original accused no. 2. That in fact, taking the case of the prosecution at its best, in the evidence of the mother of the victim, there is no specific overt act attributed to the appellant of having assaulted the victim on her private part but there is only an allegation of a collective assault by both the accused upon the victim. Hence, the assault on the private part of the victim by the present appellant is not even the case of the mother of the victim in her entire examination in chief. In fact, before none of the Medical Officers, there is a specific history given by the mother of the victim as to the present appellant having assaulted the

victim on her private part. The act of the present appellant participating in a collective assault in the company of the original accused no. 2 at best could bring the case against him for the offences punishable under Section 323, 34 the Indian Penal Code, 1860 for which he is already convicted and sentenced. That in fact, the action of the appellant was not motivated with sexual intent and the circumstances in which the touch or physical contact occurs would be determining of whether it is motivated by sexual intent and in order to convict and sentence the appellant under Section 8 of the POCSO Act would show that there was no sexual intent on the part of the appellant. That in fact, a failure of justice has occasioned and serious prejudice is caused to the appellant and there is patent infirmity, perversity and defect in the judgment of conviction and sentence going to the root of the case and hence, the conviction and sentence for the offences punishable under Section 354 of the Indian Penal Code, 1860 and Sections 8 and 10 of the POCSO Act may be quashed and set aside.

5.1 Learned advocate for the applicant has relied on the

following judgments:

1. Kalicharan Vs. State of Uttar Pradesh.
AIR 2023 SC 63
2. Bhimanna Vs. State of Karnataka
AIR 2012 SC 3026
3. Sushilkumar Tiwari Vs. Hare Ram Sah
AIR 2025 SC 4828
4. State of Uttar Pradesh Vs. Ram Swaroop @ Barkat
2026 (5) JT 292
5. Attorney General for India Vs. Satish
AIR 2022 SC 13
6. Shamsaheb M. Multtani Vs. State of Karnataka
AIR 2001 SC 921

6. Learned advocate Mr. Ashish Dagli for the appellant of Criminal Appeal No. 1042/2024 has submitted that the complainant had a relationship with the co-accused and they both were residing with the minor victim at the house of the present appellant. It is alleged that during this period the appellant and the co-accused subjected the victim to physical assault and the appellant inserted his hand inside the victim's leggings and touched her private parts. It is further alleged that the co-accused threatened the complainant not to disclose the incident to anyone.

However, it is on record that false history of accidental injuries were given to the Medical Officers and upon disclosure of the alleged incident, the complaint came to be registered on 18.02.2022 leading to investigation and eventual conviction of the appellant. The appellant has been convicted for the offence under Section 323, 354(A) and 34 of the Indian Penal Code, 1860 and under Sections 8 and 10 of the POCSO Act. However, considering the contradictions in the history given by the complainant to the various Medical Officers, there is no clear and cogent evidence that the appellant had, with any sexual intent, assaulted the minor victim. There are contradictions and improvements in the history and it was only subsequently that the involvement of the appellant was shown by the original complainant. Learned advocate further submits that there is patent irregularity in the appreciation of the evidence as the learned Trial Court has not considered the contradictions and the subsequent improvisation in the history given to the various Medical Officers and it has caused a serious prejudice to the appellant. The impugned judgement and

order of conviction is bad in law and against the settled principles of law and hence is required to be quashed and set aside.

7. Learned APP Ms. C.M. Shah for the respondent State and learned advocate Mr. Jay Ambani for the respondent no. 2 have jointly submitted that the learned Trial Court has appreciated the evidence and passed the impugned judgement and order and no interference is required hence, the appeal may be rejected.

8. Before appreciating the evidence of the prosecution on record, it is necessary to reiterate the cardinal principles of jurisprudence as settled by the Apex Court in a catena of decisions and the first cardinal principle is that the prosecution is required to prove their case beyond reasonable doubts. The prosecution cannot take any benefit of the weaknesses of the defense. The second cardinal principle is that in a criminal trial, the accused is presumed to be innocent until he/she is proved guilty by the evidence adduced by the prosecution on record beyond reasonable

doubts and the third cardinal principle is that the onus of burden never shifts from the prosecution.

9. As far as cases under POCSO Act are concerned, the Apex Court in **Nawabuddin Vs. State of Uttarakhand** reported in **AIR 2022 Supreme Court 910** has observed in para 10 as under:

10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.

Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable

position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas. As observed and held by this Court in the case of State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745, children need special care and protection and, in such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these children. In the case of Nipun Saxena v. Union of India, (2019) 2 SCC 703, it is observed by this Court that a minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no leniency can be shown to an accused who has committed the offences under the POCSO Act, 2012 and particularly when the same is proved by adequate evidence before a court of law.

10. As per the settled principles of law in conviction appeals, when the appellate Court finds that the findings of fact was based on a wholesome erroneous approach and the very basis of reasoning was not in the right perspective and the intrinsic merit of the evidence of the witness was not

considered and the trial was perversely disposed of permitting manifest errors and glaring infirmities, the appellate Court can interfere and exercise the powers in a conviction appeal and a finding on merits, after considering and meticulously dissecting the evidence on record, is imperative.

11. In the instant case, the accused no. 1 has been charged for the offence under Sections 323, 506(2) and 34 of Indian Penal Code, 1860 and accused no. 2 has been charged for the offence under Sections 323, 354(A) and 34 of Indian Penal Code and Sections 8, 9(i)(m) and 10 of the POCSO Act.

11.1 Learned advocate Mr. Pratik Barot for the accused no. 1 has vehemently argued that there is a serious prejudice caused in convicting the appellant for the charges punishable under Section 354 and Sections 8 and 10 of the POCSO Act as the appellant has been charged for the offence under Section 323, 506(2) and 34 of the Indian Penal Code, 1860 and has not been charged for the offence under Section 354(A) and Section 8 and 10 of the POCSO

Act. Learned advocate has submitted that as per Section 215 of the Code of Criminal Procedure, 1973, the accused was misled as no charge under Section 354(A) of Indian Penal Code, 1860 or under Section 8 and 10 of the POCSO Act were framed against him and it was only on the day of sentence, he realized that he has been convicted for these offences. The defect in framing of the charge has caused serious prejudice as the accused was informed what was the real case against him and he could not defend himself properly and a failure of justice has occurred.

12. As per the evidence on record, the accused no. 1 was residing with the complainant – the mother of the victim who was aged three years and three months at the time of the incident as she was embroiled in a matrimonial discord with her husband, which ultimately culminated in divorce. Thereafter, she entered into a relationship with the present appellant and started residing with him along with the victim, who was born from her previous marriage. The complainant has narrated the sequence of events alleged to have occurred on 06.02.2022, 07.02.2022, 09.02.2022,

16.02.2022, 17.02.2022 and 18.02.2022 during which period the victim was taken to various Medical Officers for examination and treatment.

12.1 The chronology of medical examination assumes considerable significance. Initially, the victim was taken to PW8 - Dr. Shantilal Nareshbhai Trambadiya, examined at Exh. 39 who deposed that on 26.01.2022 the minor child was brought to him with a history of having fallen from the stairs. She had sustained injuries on her backside and stomach, and reddish and blackish marks were noticed on her body. He prescribed painkillers and referred her to a paediatrician. The witness has categorically stated that he did not examine her private parts.

12.2 Thereafter, the victim was medically examined by PW1 - Dr. Aniruddhsinh Virabhai Rathod examined at Exh. 10 who stated that the history provided by her father disclosed that the child had fallen while playing. She complained of pain on her backside, there was a possibility of fracture in the spine, multiple greenish marks of uneven shape were present on her backside, swelling was noticed on the

forehead accompanied by pain, and bluish injury marks were found on her thighs and he referred her to a higher medical centre for further treatment. Notably, this witness was not cross-examined by accused no.1. In the cross-examination conducted on behalf of accused no.2, the witness stated that no names of any assailants were disclosed in the history and only an accidental fall while playing was narrated.

12.3 Subsequently, the victim was taken to PW4 - Dr. Nisarg Jamndas Patel examined at Exh. 19 who deposed that on 18.02.2022 the victim was brought for treatment and in the history furnished by the mother, it was stated that accused no.1 had assaulted the child on multiple occasions since 07.02.2022 and had also dashed her against the wall at their residence at Patan Vav. Upon examination, the following injuries were recorded:

(I) Swelling with tenderness over the dorsal and lumbar spine region over the back measuring approximately 8 cm × 4 cm with swelling in the sacral region suggestive of haematoma and vertebral fracture;

- (ii) Multiple large irregular yellowish bruises over the back, approximately 7 to 10 days old;
- (iii) Greenish-blue bruises over the lower abdomen, labia majora and perineal region, irregular and large in size, about 5 to 6 days old;
- (iv) Swelling with tear over the frontal forehead measuring about 5 cm × 4 cm with black eye haematoma; and
- (v) Irregular large brownish bruises over the anterior, medial, lateral and posterior aspects of both thighs, approximately 4 to 5 days old.

The victim was thereafter referred to Civil Hospital, Rajkot, for orthopaedic opinion. This witness was also not cross-examined by accused no.1. In the cross-examination on behalf of accused no.2, the witness stated that such injuries could also be sustained due to a fall from a motorcycle.

12.4 The victim was thereafter examined by PW2 - Dr. Hitesha Hirenbbhai Trivedi examined at Exh. 13 who stated that on 18.02.2022 at 10.51 hours, the victim was brought with a history of assault dated 07.02.2022 at about 10.00

hours by accused no.1. On examination, complaints of lower abdominal pain, pain over the left hip, bruises over the lower abdomen, back pain, bruising and swelling over the back, as well as bruising over the genital region were noticed. Since injuries were also found on the private parts of the victim, she was referred to a Gynecologist. This witness was not cross-examined by accused no.1 and in the cross-examination by accused no.2, he specifically stated that there was no history of assault attributed to accused no.2.

12.5 Thereafter, the victim was medically examined by PW3 - Dr. Jhalak Vinaybhai Karena examined at Exh. 17 who deposed that on 19.02.2022 at about 01.00 am, the mother disclosed that she had developed a relationship with accused no.1 and that the victim was her daughter from her previous marriage. It was stated that accused no.1 disliked the minor victim and had assaulted her on 07.02.2022. It was further alleged that on 09.02.2022 the accused no.2 had taken the child to his shop and she had seen him putting his hand in the leggings of victim. Upon

examination of the private parts of the victim, swelling over the vulva was found. The witness opined that the injuries on the body as well as the vulval injuries were suggestive of sexual assault. This witness was also not cross-examined by accused no.1. In the cross-examination by accused no.2, she stated that such injuries could also be caused by a fall from a motorcycle.

12.6 In the backdrop of the aforesaid evidence, the provisions of Section 464 of the Code of Criminal Procedure assume relevance. The said provision stipulates that where the Court of appeal, confirmation or revision forms an opinion that a failure of justice has in fact been occasioned by reason of omission to frame a charge, or by any error, omission or irregularity in the charge, it may order that a charge be framed and direct that the trial be recommenced from the stage immediately after the framing of the charge. However, the proviso further mandates that where the Court is of the opinion that, on the facts proved, no valid charge could have been framed against the accused in respect of the alleged offence, it shall quash the conviction.

12.7 Learned advocate for the accused no. 1 has strenuously contended that no charge was ever framed against the accused no. 1 for the offences punishable under Section 354(A) of the Indian Penal Code, 1860 and Sections 8 and 10 of the POCSO Act yet the learned Trial Court proceeded to record conviction and impose sentence for the said offences. It is vehemently submitted that such omission has occasioned a grave failure of justice, inasmuch as the accused no. 1 was never put to notice of the precise nature of accusations levelled against him and, consequently, was deprived of an effective opportunity to defend himself against those specific allegations. It is further argued that the learned Trial Court failed to inform the accused no. 1 of the real and substantive case sought to be established against him, thereby causing serious prejudice to his defence. According to the learned advocate, if the impugned judgment of conviction is tested on the touchstone of the doctrine of prejudice, it becomes evident that the omission to frame the requisite charges has resulted in manifest failure of justice, rendering the order of conviction

unsustainable in law. In support of the aforesaid submissions, reliance has been placed upon the decisions in *Kali Charan v. State of Uttar Pradesh*, *Vimanna v. State of Karnataka*, *Sushil Kumar Tiwari v. Hare Ram Shah*, and *Shamnsaheb M. Multtani v. State of Karnataka*, as well as the provisions contained in Sections 215, 464 and 465 of the Code of Criminal Procedure. It is submitted that mere omission or defect in framing a charge does not *ipso facto* vitiate the conviction; however, where the Appellate Court forms an opinion that such omission has in fact occasioned a failure of justice, the conviction cannot be sustained. In such circumstances, the order would stand vitiated and would be liable to be set aside in accordance with law.

13. Upon a careful examination of the entire evidence recorded during the course of trial, this Court finds that by no stretch of imagination can it be contended that accused no.1 was unaware of the nature of the allegations levelled against him. Throughout the trial, the accusations pertaining to the physical as well as sexual assault upon the minor victim by the accused no. 1 were consistently brought

on record, and accused no.1 was fully conscious of the case he was required to meet. It is not in dispute that accused no.1 was in a relationship with the mother of the minor victim and was residing with him along with the child. The prosecution case further establishes that the complainant, having separated from her husband, was residing with accused no.1 and during the relevant period the minor victim was also under his care and custody. The incidents in question occurred while the complainant and the victim were residing at the house connected with accused no.2 and the evidence reveals that accused no.1 exercised substantial control and influence over the complainant. Significantly, in the medical history recorded before three different Medical Officers, the complainant specifically named the accused no.1 as the person who had assaulted the minor victim and the depositions of these Medical Officers where the injuries were found on the private parts of the victim, have not been challenged by the accused no. 1. Such consistent attribution in the medical history clearly demonstrates that the allegations against accused no.1 were neither vague nor

uncertain but were sufficiently specific to put him on clear notice of the nature of the accusation. It is a settled principle of criminal jurisprudence that the primary object of framing a charge is to inform the accused with precision and certainty of the accusation against him so as to enable him to effectively defend himself. If the particulars relating to the time, place and nature of the alleged offence are not disclosed, prejudice may be caused to the defence.

13.1 At this juncture it would be appropriate to reproduce the provisions of Section 215 of the Cr.P.C which reads as under

215. Effect of errors.—

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

However, Section 215 of the Code of Criminal Procedure, 1973 expressly provides that any error or omission in stating the offence or the necessary particulars in the charge shall be regarded as material only if the accused has in fact been misled by such error or omission

and a consequent failure of justice has occurred. Therefore, the real test in the present case is whether the non-framing of a specific charge under Section 354(A) of the Indian Penal Code, 1860 and Sections 8 and 10 of the POCSO Act was sufficient to mislead the accused or resulted in prejudice so grave as to occasion failure of justice. Upon a thorough scrutiny of the entire evidence on record of the Trial Court, including the documentary evidence, exhibited medical papers, depositions of prosecution witnesses and more particularly, the statement of accused no.1 recorded under Section 313 of the Code of Criminal Procedure, 1973 it becomes evident that every material circumstance relating to the sexual assault upon the minor victim, including injuries on her private parts and the allegation of physical assault, was specifically put to the accused in clear terms. Despite being confronted with these incriminating circumstances in detail, accused no.1 did not raise any specific defence indicating lack of knowledge of the allegations or prejudice caused by absence of a formal charge. Except for a bald denial and a general assertion that

the allegations were false, nothing substantial was brought on record by way of defence. This clearly indicates that the accused no. 1 had full knowledge of the nature of accusations against him and was afforded complete opportunity to defend himself. In such circumstances, it cannot be said that the omission to frame a formal charge under the aforesaid provisions misled the accused or impaired his right to a fair trial. This Court is of the considered opinion that the absence of a specific charge, therefore, remains a mere curable irregularity and not a fatal illegality and since no actual failure of justice has been occasioned, the conviction cannot be invalidated solely on the ground of non-framing of a specific charge.

14. At this juncture, it would also be appropriate to refer to the provisions of Section 464 and Section 465 of the Cr.P.C

464. Effect of omission to frame, or absence of, or error in, charge.—

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or

irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision, is of opinion that a failure of justice has in fact been occasioned, it may,

(a) in the case of an omission to frame a charge, order that a charge be framed, and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

465. Finding or sentence when reversible by reason of error, omission or irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings

14.1 Sections 464 and 465 of the Code of Criminal Procedure, 1973 clearly provide that an omission or irregularity in framing of charge shall not, by itself, invalidate the finding or sentence unless the Court is satisfied that such omission has, in fact, occasioned a failure of justice. The Court is further required to consider whether such objection could and ought to have been raised at an earlier stage of the proceedings. Unless it is demonstrated that the accused was genuinely prejudiced in defending himself and that such omission resulted in a real miscarriage of justice, the conviction cannot be set aside on that ground alone. In the present case, accused no.1 cannot legitimately contend that he was unaware of the allegations levelled against him. It is not in dispute that accused no.1 was residing with the complainant, who is the mother of the minor victim and had assumed the position of a father

figure in the life of the child. Being in such a position, he was under a legal and moral obligation to protect the minor victim. However, the prosecution evidence clearly establishes that instead of safeguarding the child, he himself, along with the co-accused, subjected the minor victim to physical assault and was fully aware of the injuries sustained by her. The complainant, in the medical history recorded before the Medical Officers, specifically named accused no.1 as the person who had assaulted the minor victim. Even though she may not have described every individual act of assault in precise terms, the consistent version before the Medical Officers clearly implicated accused no.1 as the perpetrator of the assault. Upon medical examination, multiple injuries were found on the body of the minor victim, and these injuries were duly recorded by the Medical Officers. The medical evidence remained substantially unchallenged by the defence. The Gynecologist further opined that the injuries found on the private parts of the victim were suggestive of sexual assault. Thus, from the cumulative effect of the complaint, medical

evidence, depositions of the Medical Officers and the surrounding circumstances, it stands clearly established that accused no.1 was fully aware that allegations of assault upon the minor victim had been made against him. Throughout the trial, he was consistently named as the person responsible for causing injuries to the child. All incriminating circumstances were specifically put to him during his examination under Section 313 of the Code of Criminal Procedure, 1973. Despite being confronted with the allegations in detail, the accused did not raise any specific defence except a bald denial and did not demonstrate that he had suffered any prejudice on account of the absence of a formal charge under Section 354(A) Indian Penal Code, 1860 and Section 8 and 10 of the POCSO Act. Section 215 of the Code of Criminal Procedure further makes it clear that omission to state the offence or particulars in the charge becomes material only if the accused was in fact misled by such omission and a consequent failure of justice has occurred. In the present case, no such prejudice is either pleaded or established. No

objection regarding non-framing of charge was raised at the appropriate stage of trial, and the entire evidence unmistakably shows that the accused had full knowledge of the accusations and had adequate opportunity to defend himself. This Court is therefore of the firm view that no failure of justice has been occasioned by the non-framing of a specific charge under Section 354(A) of the Indian Penal Code, 1860 and Section 8 and 10 of the POCSO Act. The omission remains a curable irregularity and not a fatal illegality.

14.2 Upon a careful appraisal of the entire oral and documentary evidence on record, this Court is of the considered opinion that the mere absence of a specific charge under Section 354(A) of the Indian Penal Code, 1860 and Section 8 and 10 of the POCSO Act does not, in the facts of the present case, vitiate the conviction recorded by the learned Trial Court.

15. Learned advocate for the accused no. 1 has contended that the alleged act of the appellant namely, delivering kicks and fist blows on the abdomen, back, and forehead of the

victim cannot, by any stretch of interpretation, be said to have been actuated by sexual intent. It is submitted that the prosecution case itself attributes to the appellant participation in a collective assault upon the minor victim, along with the co-accused, and does not disclose any specific overt act indicative of sexual motivation. It is further urged that the victim, being a minor at the relevant time, was not examined before the learned Trial Court, and the case rests substantially upon the testimony of the mother, who has not deposed to any particularised act attributable to the present appellant, except a general allegation of joint assault. Even if the prosecution case is accepted in its entirety, at its highest, it would only establish that the appellant, in concert with the co-accused, caused physical injuries to the victim. Learned advocate submits that the determinative test for attracting the offence under Section 7 of the POCSO Act lies in the presence of sexual intent, which must be discerned from the nature of the act, the surrounding circumstances, the relationship between the parties, the duration and manner of contact, and the

purposiveness of such conduct. Applying these parameters, it is contended that the acts alleged being in the nature of physical assault devoid of any sexual overtones would not satisfy the statutory requirement of sexual intent. Consequently, it is argued that the appellant's liability, if any, would be confined to offences punishable under Sections 323 and 34 of the Indian Penal Code.

15.1 It would be fit to reproduce the provisions of Section 7 of the POCSO Act which is as under

7. Sexual assault.—

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault

Section 7 of the POCSO Act is broadly divided into two parts; the first part consisting of touching the vagina, penis, anus or breast of the child with sexual intent or makes the child touch the vagina, penis and or breast of such person or any other person. The second part refers to doing any other act with sexual intent, which involves physical contact without penetration. In both the parts, the expression

“touch” is common, and it would refer to putting the hand or any other part of the body on to the body parts of the victim as described in the Section.

15.2 With regard to sexual “intent” the Apex Court in **Attorney General of India Vs Satish** reported in **2021 (0) AIJEL – SC68010**. in para 36 has observed as under :

36. It may also be pertinent to note that having regard to the seriousness of the offences under the POCSO Act, the Legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. It may further be noted that though as per sub section (2) of Section 30, for the purposes of the said section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability, the Explanation to Section 30 clarifies that “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Sections 7, 11, 29 and 30, there remains no

shadow of doubt that though as per the Explanation to Section 11, “sexual intent” would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of “culpable mental state” on the part of the accused.

15.3 It would also be appropriate to reproduce the provisions of Section 29 and Section 30 of the POCSO Act which reads under:

29. Presumption as to certain offences.—

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

30. Presumption of culpable mental state.—

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Upon a comprehensive appraisal of the prosecution evidence, it emerges on record that the victim was admittedly a minor girl child aged three years and three months at the time of the incident, and the complainant has unequivocally deposed to having witnessed the appellant and the co-accused assaulting the victim. It is not in dispute that the complainant and the appellant were in a domestic relationship, and subsequent to her divorce, the complainant, along with the minor victim, had cohabited with the appellant at the residence of the co-accused. The sequence of events spanning from 07.02.2022 till the lodging of the complaint on 18.02.2022 reveals a pattern of repeated assaults inflicted upon the minor victim by the appellant and the co-accused, resulting in multiple bodily injuries including injuries to her private part and swelling in the vulva due to the act of pinching which proves the act of touching and assaulting the minor victim on the vagina and the prosecution has thus successfully established the foundational facts constituting sexual assault.

15.4 Having regard to the nature of the acts, the vulnerability of the minor victim, the domestic setting in which the incidents occurred, and the sustained pattern of conduct, the element of sexual intent, as contemplated under Section 7 of the Act, stands duly established. Accordingly, the contention of the appellant that the acts were devoid of sexual intent is devoid of merit, and the finding of the learned Trial Court with respect to the applicability of the provisions of the Act warrants no interference.

16. It is not in dispute that the complainant and the accused no. 1 were in a relationship and the complainant had interested herself and the minor victim to the care and protection of the accused no. 1, but the conduct of the accused no. 1 strikes at the very root of fiduciary confidence reposed in a quasi-parental relationship and constitutes a grave breach of trust. When the complainant and her minor child entered the household of the accused no. 1 on the representation or legitimate belief that he stands in the position of a father to the child, the law imputes to such

person a heightened duty of care, protection, and moral guardianship. This relationship is not merely cohabitative but is imbued with an expectation of safety, emotional security, and physical well-being. Any act of physical and sexual assault upon the child by such a person is not only an offence in the ordinary penal sense but is aggravated by the betrayal of that entrusted role. The abuse of proximity and authority, coupled with the exploitation of the child's vulnerability and dependence, renders the act particularly reprehensible, evidencing a conscious violation of the confidence reposed and a dereliction of the protective duty inherently attached to the assumed parental status. Such conduct, therefore, justifiably invites a sterner judicial scrutiny and condemnation.

16.1 The Apex Court in **Bhanei Prasad Vs State of Himachal Pradesh** reported in **2025 INSC 934**. In para 13 has observed as under :

13. When a father who is expected to be a shield, a guardian, a moral compass, becomes the source of the most severe violation of a child's bodily integrity and dignity, the betrayal is not only personal but institutional. The law does not, and cannot, condone

such acts under the guise of rehabilitation or reform. Incestuous sexual violence committed by a parent is a distinct category of offence that tears through the foundational fabric of familial trust and must invite the severest condemnation in both language and sentence. The home, which should be a sanctuary, cannot be permitted to become a site of unspeakable trauma, and the courts must send a clear signal that such offences will be met with an equally unsparing judicial response. To entertain a plea for leniency in a case of this nature would not merely be misplaced, it would constitute a betrayal of the Court's own constitutional duty to protect the vulnerable. When a child is forced to suffer at the hands of her own father, the law must speak in a voice that is resolute and uncompromising. There can be no mitigation in sentencing for crimes that subvert the very notion of family as a space of security.

17. As regards the allegations against accused no. 2, the record discloses cogent and reliable evidence establishing his culpability. The ocular testimony of the complainant is clear, consistent, and unambiguous, wherein she has categorically deposed that she witnessed accused no. 2 assaulting her minor daughter. Nothing material has been elicited in her cross-examination to discredit her version or to render it doubtful. On the contrary, her testimony finds due corroboration in the medical evidence on record, which substantiates the nature and situs of the injuries and lends

assurance to the prosecution case. The presence of accused no. 2 at the place of occurrence being his own residence stands firmly established. Further, PW-8 - Dr. Shantilal Nareshbhai Trambadia, the first Medical Officer who examined the victim, has deposed that accused no. 2 was known to him and had himself brought the complainant and the victim for medical treatment. This circumstance not only fortifies the prosecution case as to the presence of accused no. 2 but also connects him directly with the immediate aftermath of the incident. In the absence of any plausible explanation or effective rebuttal from the defence, and there being no material on record to suggest false implication or to probabalise an alternative hypothesis, the foundational facts constituting the offence stand duly proved by the prosecution.

18. Upon an anxious and comprehensive re-appreciation of the entire evidentiary record, this Court finds that the judgment of conviction rendered by the learned Trial Court does not suffer from any perversity, illegality, or misapplication of settled principles of criminal

jurisprudence. It is true that the prosecutrix herself has not been examined; however, the prosecution case does not rest in a vacuum. The testimony of the complainant who is the mother of the child victim stands unimpeached on material particulars and furnishes a coherent and credible account of the occurrence and its immediate aftermath. Her evidence is natural, trustworthy, and free from embellishment, and nothing substantial has been elicited in cross-examination to discredit her version. Significantly, the ocular account is fortified by medical evidence, which lends substantive assurance to the prosecution case and probabilises the occurrence of sexual assault in the manner alleged. It is well settled that conviction can be sustained on the basis of reliable circumstantial and corroborative evidence even in the absence of direct testimony of the victim, particularly where the surrounding circumstances form a complete and unbroken chain pointing to the guilt of the accused. The contention raised on behalf of the appellant that no specific charge for sexual assault was framed against him does not merit acceptance. The record reveals that all foundational

facts constituting the offence were duly put to the accused, and he was afforded full opportunity to defend himself. No failure of justice or prejudice is demonstrated as having been occasioned on account of any defect in the framing of charge, in view of the mandate embodied in Sections 464 and 465 of the Code of Criminal Procedure. Once the prosecution succeeded in establishing the foundational facts, the statutory presumptions under Sections 29 and 30 of the POCSO Act stood attracted. The accused have failed to rebut the said presumptions even on the touchstone of preponderance of probabilities. The defence taken is found to be a mere denial, unsupported by any cogent or plausible explanation, and is wholly insufficient to dislodge the prosecution case. The alleged discrepancies highlighted by the defence are trivial and do not strike at the root of the prosecution case. The overall evidence, when appreciated in its proper perspective, leads to the only irresistible conclusion that the guilt of the accused stands proved in accordance with law. The view adopted by the learned trial

Court is not only a possible view but a well-reasoned and legally sustainable one.

19. Accordingly, this Court finds no justifiable ground to interfere with the impugned judgment of conviction and order of sentence, which is hereby affirmed.

20. Consequently Criminal Appeal No. 545 of 2024 and Criminal Appeal No. 1042 of 2024 being devoid of merits stand dismissed.

21. R & P be sent back to the concerned Court forthwith.

ORDER IN CRIMINAL MISC. APPLICATION NO. 2/2026:

In view of the disposal of the captioned appeal being Criminal Appeal No. 545 of 2024, the present application does not survive and stands disposed off accordingly.

VASIM S. SAIYED

Sd/-
(S. V. PINTO,J)