



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.244 OF 2025
WITH
CRIMINAL APPLICATION NO.3756 OF 2026
IN APEAL/244/2025

Ganesh s/o Shrirang Shembde
Age: 32 years, Occu.: Mason,
R/o. Kehal, Tq. Jintur, Dist. Parbhani.
(Presently at Central Jail, Harsul,
At Chh. Sambhajnagar)

.. Appellant

Versus

1. The State of Maharashtra
Through Police Station Officer
Jintur, Tq. Jintur, Dist. Parbhani.
2. B. N. G. (Victim)
Through Natural Guardian
A.B.C. (Step-Mother)

.. Respondents

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Mr. Sudhir K. Chavan, Advocate for the appellant.
Mrs. Chaitali Chaudhari Kutti, APP for respondent No.1/State.
Mr. Shaikh Ashraf Patel, Advocate for respondent No.2.

...

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 09.09.2026

Pronounced on : 10.09.2026

JUDGMENT :-

1. The appellant/convict challenges the judgment and order of conviction dated 23.07.2024 passed by the learned Additional

Sessions Judge, Parbhani, in Special Case No. 82 of 2022, whereby the appellant has been held guilty of the offences punishable under Section 377 of the Indian Penal Code [IPC] and Section 4 of the Protection of Children from Sexual Offences Act [POCSO Act].

BRIEF FACTS OF THE PROSECUTION CASE

2. In short, case of prosecution in trial court is that, on 03.04.2022, the victim, who was stepson of informant, a minor and a mentally disabled child, had been to fetch his father at around 7.30 p.m. However, as he did not return and only his father came home, victim was searched for and he was finally spotted coming out from the bushes along with accused/appellant. On being questioned, the victim told informant that accused removed his clothes and inserted his penis in his private part and, thereafter, threatened to kill him. On next day, report regarding above occurrence was lodged by PW1, on the strength of which crime was registered, which was investigated by PW10 and PW11 and after gathering sufficient evidence, they charge-sheeted accused for above offence. Trial was conducted, which ended up in conviction for above offences. Said judgment and order of conviction is the subject matter of appeal before this Court.

SUBMISSIONS**On behalf of appellant/original accused :-**

3. Pleading innocence and false implication, learned Counsel for the appellant would submit that there is no convincing or legally accepted evidence. At the outset, he questions prosecution case on the minority of victim. He would submit that prosecution has failed to adduce conclusive proof on the age of victim, as according to him evidence adduced by prosecution in that regard is not as required and contemplated by law. He pointed out that there is no birth certificate issued by any local body, nor there is any ossification test done to prove the age of the victim. That, merely Transfer Certificate is placed on record, but according to him, the same cannot be relied on the point of age. He also took this Court through the document Exhibit-38 and would submit that the same is ambiguous and not clear.

4. His next contention is that though the prosecution claims that victim was mentally ill, according to him, there is no conclusive proof on that point. There is no certification by medical board, certifying mental retardation and according to him, whatever certificate is placed on record, is admittedly, as per the certificate itself, not valid for medico legal cases. He pointed out that author of the said

certificate was also not examined before Trial Court by the prosecution. On the point of age and its degree of proof, he seeks reliance on the judgment of Hon'ble Apex Court in the case of ***P. Yuvaprakash v. State Rep. By Inspector of Police, 2023 SCC OnLine SC 846.***

5. Learned Counsel took this Court through the cross-examination of the victim and pointed to the admissions given by the victim. That, he deposed whatever his mother told him to speak. Thus, according to him, child being tutored witness, his testimony is unworthy of credence. On this count, he relies on the judgment of Hon'ble Apex Court in the case of ***Pradeep v. State of Haryana, (2023) 19 SCC 221.***

6. It is also his submission that the forensic and scientific evidence itself falsifies the prosecution case regarding the alleged penetrative sexual assault. On this count, he has taken this Court through the evidence of PW4 and submitted that the said expert has admitted that the FSL report is negative and that neither semen nor blood of the appellant was detected on the anal swab, body smear or clothing. According to him, clothes were duly washed before its seizure. He also pointed out that even medico legal examination report on the point of opinion is blank and, therefore, according to him, no final opinion has been issued by the medical expert. He pointed out that

the abrasions noticed were admitted by the expert to be possible due to contact with a rough surface or friction. He further pointed out that no injuries were noticed on the person of the appellant and that PW6 has admitted the same.

7. He further submitted that there are no independent witnesses. Very father of the victim is not examined. Further, according to him, when the foundational facts of the case are not proved, provisions of Sections 29 and 30 of the POCSO Act do not come into play. Lastly, he submitted that there is no plausible explanation for delay caused in filing the report and as testimonies of prosecution witnesses are full of material omissions and contradictions, it is his submission that case of prosecution ought not to have been accepted, but it having been done by the learned Trial Court, he prays to set aside the same for above reasons.

8. In support of above his submissions, he seeks reliance on the judgments of Hon'ble Apex Court in the cases of *Alamelu and another v. State represented by Inspector of Police, (2011) 2 SCC 385* and *Ramdas and others v. State of Maharashtra, (2007) 2 SCC 170*.

On behalf of respondent No.1/State and respondent No.2 :-

9. In answer to above, learned APP for respondent No.1/State as well as learned Counsel for respondent No.2/victim both justified the

judgment and order of conviction. According to them, prosecution has proved that victim was below 18 years of age and, moreover, he was mentally disabled and there to be qua documentary evidence to that extent. They both submitted that victim's evidence itself inspiring confidence and on the point of occurrence, the same has remained unshaken or unshattered. They pointed out that there is evidence of mother/informant and other medical experts confirming the sexual assault on the minor. That, defence of implication due to political rivalry has no force and there being no cogent evidence in that regard, they both reiterated that prosecution has proved the charges beyond reasonable doubt.

EVIDENCE BEFORE THE TRIAL COURT AND ANALYSIS

10. After hearing above submissions, evidence adduced by prosecution before the Trial Court has been carefully scrutinized. There being conviction for offence under Section 4 of the POCSO Act, as usual, it is incumbent upon the prosecution to prove the minority of victim i.e. below 18 years of child, to hold him as a 'child' thereby attracting provisions of POCSO Act.

11. On the point of age, prosecution seems to have relied on the testimony of **PW3** i.e. Incharge Headmaster of a Residential School,

namely, Niwasi Matimand Shala, Jintur. After deposing regarding completing special education, he testified that their school admits mentally disabled students. About victim, he stated that he was admitted on 19.06.2016 and as per the record, date of birth of victim is 21.10.2007. He identified extract of admission register Exhibit-38. He further deposed that he was also carrying original register for verification and after it was duly verified by the Court, the original seems to have been returned. Exhibit-38 is the school admission extract and the same carries date of birth of victim as 21.10.2007. Though prosecution has gathered school leaving certificate, in view of the judgment of the Hon'ble Apex Court in the case of ***P. Yuvaprakash (Supra)***, school leaving certificate cannot be said to be the document conclusively proving the age. Likewise, even Exhibit-41, which seems to be *bona fide* certificate, does not qualify for consideration on the point of age. However, as the admission extract at Exhibit-38 is based on the original admission register and carries the date of birth of the victim, there is no hesitation in relying upon the same. Indeed, some of the columns are blank, but date of birth is specifically noted as 21.10.2007. Alleged occurrence is of 03.04.2022. On such date, apparently, the victim was below 18 years of age and hence, a 'child'.

12. Learned Counsel for the appellant would submit that there is no birth certificate. However, as the original admission record, on the basis of which Exhibit-38 was drawn, was produced before the Court, it constitutes sufficient proof of the age and, hence, can definitely be relied upon. PW1 Mother in her report Exhibit-24 has given age of her son as 14 years, though she did not give the date of birth. In the light of availability of Exhibit-38, it can be said that prosecution has discharged the burden of proving minority of the victim.

13. Now, as regards to offence of Section 377 of IPC and Section 4 of the POCSO Act is concerned, crucial evidence is firstly that of victim **PW2** followed by that of his mother **PW1**, **PW7** and **PW8** and that of medical expert **PW4**.

14. **PW2** Victim's evidence is at Exhibit-29, wherein he deposed that his father works in hotel. That, on that day he had gone to pick up his father beneath the Banyan tree. There accused took him to a thorny bushes and he inserted his private part in his private part. That, he reported incident to one Muktabai. That, he went to police station and hospital at Jintur and there doctor examined him. He identified accused in the Court.

. While under cross-examination, he answered that after going to school, he returned in the evening. He admitted his school teacher to

be present in the Court. He answered that he is able to understand that he is in Court. He stated that today there was no holiday. That, his mother dropped him to school from home. That, as he is unable to understand the root, therefore, he is asked to sit till his mother comes. He admitted that his mother told him what to speak here. He answered that he is unable to give name of another mother. That, he is unable to read. He denied knowing where accused resided in the village. He flatly denied that mother showed him accused. He gave name of his friend and that on the day of incident he was in school. He also admitted that due to giddiness, he is unable to understand and he takes medicine daily. He also admitted that he did not go to hospital for checkup. He deposed that if he does not take medicine, he suffer giddiness. Rest is all denial.

15. Prosecution has adduced evidence of **PW1** mother, who deposed in her evidence at Exhibit-23, that son is begotten from first wife of her husband and that he is not sound mind and he suffers from fits and he goes to school situated at Shivadi. That, her husband is also physically challenged both by foot as well as eyes, but he works in a hotel and he goes at 7.00 a.m. and returns by 7.30 p.m. She dropped her husband till the auto point. That, on that day, being *Padva* festival, school teacher dropped victim son at home and on that

day, said son had gone to bring his father at 7.30 p.m. i.e. near the Banyan tree, but he did not come. Her husband came, but as victim did not return home, she herself, her sister, mother and her maternal aunt went in his search. Accused and victim were seen coming out of thorny bushes and on inquiry, her son told that accused removed his clothes, inserted his penis in his private part and while her son was shouting, he threatened to kill him. That, accused also asked victim to wash his clothes in the river. She deposed that after reaching home, her son was hiding himself. On next day, they lodged complaint at police station.

. The mother is also cross-examined, wherein she admitted that accused resided in her neighbourhood. That, victim is son from first wife. That, prior to the incident there was no dispute with accused. She admitted her husband to be disabled and also admitted that victim goes to school of mentally retarded children and he suffers from epilepsy. In further cross-examination, she answered that as first wife of her husband does not take care of the victim, she takes care of the victim. She stated that he goes anywhere and is required to search. She denied the suggestion that victim was going in the house of accused and causing nuisance. Rest is all denial.

16. **PW7** in her evidence at Exhibit-61, after deposing that victim is mentally disabled and goes to school of mentally disabled children, stated that incident happened on festival of *Padva*. That, victim boy had gone to pick his father at 7.30 p.m., but he did not return and therefore, his mother, grandmother, were searching and she too joined them. Accused was seen in the company of victim and after seeing them, he ran away and victim boy came weeping with clothes in his hands and on being asked, he told that accused penetrated his penis in his anus. On next day, report was filed.

. Though this witness is extensively cross-examined about her own residence, about father of victim and she and accused are belonging to different castes, but thereafter all suggestions are denied by this witness.

17. **PW8** seems to be the grandmother and she in her evidence at Exhibit-62, in paragraph No.2, like PW1 and PW7 also stated that as the victim boy, who had been to fetch his father, had not returned. He was searched for and he was seen coming out of the bushes holding his clothes in his hand and accused behind him. The victim came weeping and stated that accused penetrated his penis in his anus and thereafter, they approached police.

. Even in her cross-examination, except minor omission on the point of the victim boy having a torch in his hand, nothing damaging has been brought on record. Rather, there is a confirmation from her that there were thick bushes at the spot. Even the manner of cross-examination in paragraph 11 virtually confirms the occurrence.

18. Apart from above oral account, prosecution has adduced evidence of medical expert i.e. **PW4**. In deposition at Exhibit-43, on 04.04.2022, after noting history, he deposed that on his inquiry, patient stated that there was penetration by penis in his anus. On examination, he noticed linear abrasion at inter scapula region admeasuring 1 x 0.2 cm and linear abrasion at anal region at 7.00 O’Clock position admeasuring 0.5 cm to 0.5 cm. In examination-in-chief, he stated that abrasion at the anus region is possible due to penetration by penis and he identified certificate Exhibit-45.

. During his cross-examination, he admitted that he had conducted medical examinations in 4–5 cases involving an offence under Section 376 of the IPC. He further admitted that Column No. 22 of the Medico-Legal Certificate was blank and that no opinion was expressed in Column Nos. 22 and 25. He also denied that the injury to the anus was possible due to scratching with a hand. Rest is all denial.

19. Referring to the above evidence of victim, his mother, his aunt and grandmother, learned Counsel for the appellant would submit that they have mere hearsay information. That, victim had admitted that he deposed whatever his mother asked him to speak and therefore, victim was tutored and hence, the same cannot be relied. He also criticized the medical evidence as the medical papers are blank and moreover, it is not proved that victim is mentally disabled and further as the FSL report is negative, charge of prosecution does not get proved.

20. On re-appreciation of above discussed evidence, here, it is noticed that informant, who is a stepmother, has categorically deposed in the Court that, as the victim's biological mother does not take care, she takes care of him. She has categorically stated that victim is mentally disabled. Here, there is evidence of school teacher PW3, who deposed about victim to be student of their school. Exhibit-42 is the certificate of mental retardation issued by the authorities like Civil Surgeon and two other members certifying victim to be having mild mental retardation. This witness PW3 while under cross-examination has answered that he is ready to place on record certificate of disability and in consequence to it, the same seems to have come on record and exhibited by the learned Trial Court.

Therefore, prosecution indeed has shown that victim was differently i.e. mentally disabled person.

21. As regards to offence of Section 377 of IPC and Section 4 of the POCSO Act is concerned, one has to fall back on the testimony of victim, which is discussed in aforesaid paragraph. Victim has categorically stated that the accused penetrated his private part in his private part. His such testimony is not rendered doubtful in spite of facing cross-examination. There is medical evidence in the form of PW4, who has conducted medical examination on 04.04.2022 i.e. on the very next day of the occurrence and he has noticed abrasion marks at anal region at 7.00 O'clock position. This witness has flatly denied said injury to be possible by hand scratching.

22. Consequently, there is corroboration to the victim's testimony from medical expert. Merely because some columns in medico legal examination report are left blank, itself is no good ground to discard the testimony of expert in the Trial Court.

23. Similarly, mere no injuries on the private part of the accused on examination by **PW6** also will not render victim's testimony before the Court doubtful. Apart from medical evidence, there is evidence of **PW8** and **PW9**, who were party to the search of the victim boy, as he

did not return after he had been to fetch his father. These witnesses as well as informant PW1, to whom there was disclosure by victim, all in unison, deposed that victim came out of the thick bushes weeping and narrating accused penetrating his penis in his anus. Informant has deposed about post occurrence conduct of victim at home like he to be hiding himself.

24. The defence set up before the Trial Court is that the appellant was implicated due to political rivalry; however, the said defence has not been probalilized in any manner so as to warrant its acceptance.

25. To sum up, here prosecution has proved that victim was below 18 years of age. He was differently abled child i.e. suffering from mild retardation. When he had been to fetch his father, he was spotted in the thorny bushes in the company of accused and it was witnessed by PW1, PW8 and PW9. Medical expert PW4 confirmed sexual assault i.e. anal coitus. Hence, offence of Section 377 IPC and Section 4 of POCSO act indeed get gravitated.

CONCLUSION

26. Perused the judgment and order under challenge. Learned Trial Court, on complete appreciation of evidence, has accepted the prosecution case as proved beyond reasonable doubt. There being no

patent perversity or illegality in the appreciation of the evidence available on record, there is no reason for interference at the hands of this Court. Hence, the following order is passed :-

ORDER

- I. The Criminal Appeal is **dismissed**.
- II. In view of dismissal of Criminal Appeal, Criminal Application No.3756 of 2026 also stands disposed of.

[ABHAY S. WAGHWASE, J.]

scm