



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO.781 OF 2024

Trayambak Ramkisan Dahiwal,
Age-50 years, Occu.: Agricultural
R/o. Laxminarayanpura, Jalna,
Tq. & Dist. Jalna

.. Appellant
(Orig. Accused)

Versus

1. The State of Maharashtra
Through Kadim Police Station
Jalna, Tq. & Dist. Jalna.

2. XYZ

... Respondents

.....

Shri. A. G. Dalal, Advocate for the Appellant (Appointed through
Legal Aid)

Shri. A. D. Wange, APP for the Respondent – State.

Shri. J. R. Shah, Advocate for the Respondent No.2 (Appointed through
Legal Aid)

.....

CORAM : NEERAJ P. DHOTE, J.

Reserved on : 18.12.2025

Pronounced on : 24.12.2025

JUDGMENT :-

. This Criminal Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') is directed against the Judgment and Order dated 12.06.2024 passed by the learned Special Judge, Jalna in Spl. Case No.203/2023, convicting and sentencing the Appellant as follows :-

“1. Accused Trayambak Ramkisan Dahiwal, is convicted under section 235(2) of Code of Criminal Procedure of the offence punishable under Section 10 of the POCSO Act and is sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer S.I. for one month.

2. Accused Trayambak Ramkisan Dahiwal, is convicted under section 235(2) of Code of Criminal Procedure of the offence punishable under Section 354 of the Indian Penal Code instead of section 376 read with section 511 and section 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer S.I for one month.

3. He is acquitted from the charges of commission of offence punishable under section 376 and section 376 read with section 511 of the Indian Penal Code.

4. Accused Trayambak Ramkisan Dahiwal, is convicted under section 235(2) of Code of Criminal Procedure of the offence punishable under Section 8 of the POCSO Act. In view of the conviction and sentence punishable under section 10 of the POCSO Act no separate sentence is passed.

5. Accused Trayambak Ramkisan Dahiwal, is acquitted under section 235(1) of Code Criminal Procedure of the offence punishable under Section 12 of the POCSO Act.

6. All sentences to run concurrently.

7, 8, 9 & 10.”

2. The Prosecutions case, in brief, as revealed from the Police Report is as under:

2.1. The Victim – a Child was residing with her parents at Jalna. From birth, the Victim was mentally challenged child. There is temple nearby the house of the Victim. Every Monday, the Grandmother of the Victim used to go to the temple. On 03.07.2023 she went to the temple with her grandchildren including the Victim. Around 08:30 p.m., when the prayer was going on in the temple and the grandchildren were

playing nearby, one person lifted the Victim and took her to the backside of the temple. The Grandmother heard the cry of the Victim and she went towards that direction. She saw that, the Victim was lying down and the Appellant was trying to rape her. The Grandmother caught hold of the Appellant and beat him. People gathered over there and they assaulted the Appellant. The Police were informed. The Appellant was taken into custody. On the Report lodged by the Grandmother, the Crime bearing No.300/2023 came to be registered with the Kadim Jalna Police Station for the offence punishable under Sections 376, 376(2)(i) of the Indian Penal Code (for short, 'I.P.C.') and for the offences punishable under Sections 8, 10, 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO').

2.2. During the course of the investigation, the Appellant came to be arrested as he was already apprehended, the Spot Panchanama came to be drawn, the Statement of the Witnesses were recorded, the clothes of the Victim and that of the Appellant came to be seized, the documents from the school where the Victim was staying were collected, the Victim was referred for medical examination in respect of her mental condition, the seized muddemal was referred to the chemical analysis and on completion of the investigation, the Appellant came to be Charge-sheeted. On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Section 376 r/w. Sec. 511 of the IPC and under Sections 7 p/u/Sec.8, 9(k)(m)

p/u/Sec.10, 11 p/u/Sec.12 of the POCSO below Exh.15, to which the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined the following witnesses :

- PW1** : Vasant Gangaram Urekar, who was the Headmaster of the school where the Victim was studying.
- PW2** : The Grandmother of the Victim and the Informant
- PW3** : Ramesh Haribhau Paithankar, the Panch for the Spot and seizure of clothes of the Victim.
- PW4** : Mahesh Ganesh Gadkari, the Panch for seizure of clothes of the Appellant
- PW5** : Dr. Nitin Somnath Pawar, who issued the Disability Certified for the Victim.
- PW6** : Balaji Ukandi Padmane, the Policeman who reached on the spot of incident and apprehended the Appellant
- PW7** : Digambar Parmeshwar Chaure, the Police Constable who carried the mudemal to the Chemical Laboratory
- PW8** : The Eye Witness to the Incident
- PW9** : Mangal Mahadev Sudake, the Investigating Officer.
- PW10** : Sachin Madhavrao Ingewad, the subsequent Investigating Officer
- PW11** : Sitakant Gopal Palaskar, the Assistant Chemical Analyzer
- PW12** : Victim (The learned Trial Court decided not to record her testimony for the reasons mentioned

in the note.)

3. In the evidence of the above referred witnesses, the relevant documents were brought on record by the Prosecution, such as, the Report, extract of the school record, panchanamas, Disability Certificate, the C.A. Reports etc. After the Prosecution submitted the evidence closure pursis, the learned Trial Court recorded the Statement of the Appellant under Section 313 (1)(b) of the Cr.P.C. After appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and order Convicting and the Sentencing the Appellant as above.

4. It is submitted by the learned Advocate for the Appellant that, there are contradictions and variance in the testimony of the Grandmother of the Victim and the Eye Witness examined by the Prosecution. It is highly improbable that, such incident would be committed in the public place. There was no medical examination of the Victim in respect of the incident. Though the Victim was put into the Witness box, her testimony was not recorded. The Son of the Victim's Grandmother had borrowed money from the Appellant and to avoid returning the same, false case was lodged. The Prosecution failed to establish that, the Appellant had the knowledge that, the Victim was mentally challenged and therefore the Conviction recorded by the learned Trial Court is not sustainable. Considering the nature of

offence, no inference can be drawn against the Appellant. As the Prosecution failed to establish the Charge, the presumption under the POCSO will come into play. He submitted that, the Appeal be allowed and the Appellant be acquitted.

5. It is submitted by the learned APP that, the evidence on record go to show that, the Appellant knew the family of the Child and he was known to the eye witnesses. The Spot Panchanama has proved the spot. The C.A. Reports are incriminating in nature. The learned Trial Court has rightly considered the evidence on record. The presumption under Section 29 of the POCSO comes into play. No interference was called in the impugned Judgment and the Appeal be dismissed.

6. It is submitted by the learned Advocate for the Respondent No.2 that, no explanation is given by the Appellant in 313(1)(b) Statement. The Charge was under the special enactment and needs to be viewed differently. He further submitted that, he adopts the submissions made by the learned APP and the Appeal be dismissed.

7. For the Charge and Conviction for the offences punishable under the provisions of POCSO, it is necessary for the Prosecution to establish that, the Victim was the Child as defined under Section 2(d) of

the POCSO. In the case at hand, to prove the age and date of birth of the Victim, the Prosecution examined PW1 - Vasant Gangaram Urekar who was the Headmaster of the school where the Victim was admitted for education. According to this witness, the Child was admitted by her Mother and Maternal Uncle and her date of birth was 15.07.2015. His cross-examination show that, though the contents of the admission form was in his handwriting, the other document Exh.P2 which is the extract of general register was not in his handwriting and it did not bear his signature or stamp. His evidence in the cross-examination show that, there was overwriting in the name of the student and there was no counter signature on the overwriting. Undisputedly, the learned Trial Court has discarded this evidence and recorded the finding that it is difficult to rely on the documents (P-1 and P-2) to ascertain the age of the Victim. However, by observing that the Court had opportunity to observe the Victim and ask some questions and observe that there is no specific evidence in respect of the age of Victim and by observing that judicial note can be taken of the fact that the Victim was Child under the 12 years of age and recorded that the Victim was the Child. It is needless to state that, the age and date of birth were the fact in issue in the trial which need to be proved by the Prosecution in accordance with law. The same is not done. Considering the above vital aspects in the evidence of PW1 – Vasant Gangaram Urekar, it is not possible to hold that, the Prosecution has not proved the age and date of birth of the

Victim on the basis of this evidence. Though PW2 - Grandmother of the Victim deposed that, on the day of the incident Victim was 8 years old, that cannot form the basis to hold that, the age of the Victim is proved. As the Prosecution has utterly failed to prove the age and date of birth of the Victim, it is not possible to hold that, the Victim was the Child as defined in the above referred provisions of the POCSO.

8. The material witnesses in respect of the incident are PW2 - the Grandmother of the Victim, and PW8-the Eye Witness. The testimony of the PW2 - Grandmother show that, on the 3rd day of the 7th Month she had gone along with her two Grandchildren to the village temple at 08:30 p.m. for Aarti. While she was sitting in the temple, the children were playing. PW8 one Vi Shi (name withheld) *(this is how which is shown in the recording of the evidence by the learned Trial Court)* who was sitting besides her told that, one person had taken her Granddaughter and so she went to the backside of the temple and she heard cry of the Victim and she went inside the hotel and saw that, the Appellant had removed the Victim's nicker and he was lying on her body and zip of his pant was open. She pulled the Appellant and slapped him. The people gathered and the Appellant was assaulted by the people. The Police came on the spot and the Appellant was handed over to the Police.

9. The cross-examination of this witness indicate that, it is the case of the Appellant that, he was the friend of the Son of this Witness and the Appellant helped him financially. Cross-examination of this witness show that, the place of incidence was open from all the sides and one could see what was happening inside the hotel and the hotel had no rooms. Though cross-examined at some length, nothing has come to discard the evidence of the Grandmother of the Victim. She being the resident of the same village, her presence with the Victim at the relevant time was natural. Her evidence is found to be consistent with her previous statement with the Report. There is no reason to discard the evidence of this witness - Informant.

10. The other evidence is that of PW8, who deposed that, he knew the Victim, Grandmother and the Appellant. His evidence do not show that, he witnessed any incident. What he deposed is that, on the 3rd July of the last year he had gone to the temple at 08:30 p.m. and the Victim was playing near the temple and her Grandmother was present. He deposed that, he saw the Appellant taking with him the Victim and so he informed Victim's Grandmother and she followed the Appellant. He deposed that he heard shout and cry, so he went to the hotel and saw the Accused was standing there and the Victim was in the arms of her Grandmother and was crying. Thus, the evidence of this

Witness only show that, the Appellant took with him the Victim and nothing else.

11. In view of the above evidence of the two (2) Prosecution witnesses, the Prosecution proved that, the Appellant took the Victim with him behind the temple and the evidence of the Victim's Grandmother show that, he outraged the modesty of the Victim. Undisputedly, the Appellant has been acquitted from the Charges of Rape and also attempt to Rape. The learned Trial Court has discarded the C.A. Reports.

12. The evidence of PW5 - Dr. Nitin Somnath Pawar that, he conducted the necessary tests to test the intellectual capacity of the Victim and he found that she had 75% temporary disability which was Moderate Intellectual Disability. Nothing has come in the cross-examination to discard his evidence. What his evidence show that, such persons do not remember the particulars which happened one or two days before.

13. The other evidence is that of the Panch Witnesses, muddemal carrier and the Investigating Officer. The Appellant was apprehended on the spot of the incident. The evidence of PW11 – Sitakant Gopal Palaskar, the Chemical Analyser in respect of DNA Report

will not be of any assistance to the Prosecution as there is no evidence in respect of the handling of the DNA samples from taking samples till examination of the same by the Chemical Analyser. It is needless to state that, under the settled position in law, it is the Prosecution's duty to prove that, the samples remained untampered throughout and for which there has to be evidence in respect of handling of the DNA samples, which is admittedly not there in the case at hand. The learned Trial Court has discarded the Chemical Analysis Report.

14. As the Prosecution failed to establish that, the Victim was the Child, the Conviction awarded by the learned Trial Court for the offence punishable under Sections 8 and 10 of the POCSO cannot be sustained. What is left is the Conviction for the offence punishable under Section 354 of the IPC. As it is observed that, from the testimony of the Grandmother of the Victim the offence of outraging the modesty of the Victim punishable under Section 354 of the IPC is made out, the Conviction and the Sentence recorded by the learned Trial Court for the offence punishable under Section 354 of the IPC is maintained. Hence, the following order.

ORDER

- (I) The Appeal is partly allowed.
- (II) The Conviction of the Appellant recorded by the learned Trial Court by the impugned Judgment and Order for the offence

punishable under Sections 10 and 8 of the POCSO is quashed and set aside and he is acquitted for the offence punishable under Sections 10 and 8 of the POCSO.

- (III) The Conviction and Sentence awarded by the learned Trial Court against the Appellant for the offence punishable under Section 354 of the IPC is maintained.
- (IV) Rest of the operative order remains intact.
- (V) Record and Proceedings be sent back to the learned Trial Court.
- (VI) The fees of the learned Advocates appointed through legal aid are quantified at Rs. 15,000/- (Rs.Fifteen Thousand) each, which shall be paid by the High Court Legal Services Sub-Committee, Aurangabad Bench.

(NEERAJ P. DHOTE, J.)

GGP