



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPEAL NO. 1051 OF 2023**

Binna S/o Baliram Dhumak,
Age: 30 years, Occupation :
R/o. Ghatewadi, Taluka Kaij,
District Beed.
(At present Central Prison Harsool)

.... Appellant
(Ori. Accused)

VERSUS

1. The State of Maharashtra,
Through : The Police Station Officer,
Kaij Police Station, Tq. Kaij,
District Beed.

2. XYZ
(Address provided in the pocket)

..... Respondents
(Ori. Complainant)

Appearance :

Mr. M. P. Kale, Advocate for the Appellant.

Ms. M. L. Sangit, APP for Respondent No.1 – State.

Mr. R. J. Nirmal, Advocate for Respondent No.2 (Appointed through Legal Aid)

CORAM : NEERAJ P. DHOTE, J.

Reserved On : 21st November, 2025

Pronounced On : 28th November, 2025

JUDGMENT :

1. This Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') is directed against the Judgment and Order dated 30/09/2023, passed by the learned Special Judge, Kaij, District Beed (hereinafter referred to as 'the learned Trial Court'), in Special (POCSO) Case No.03/2023, convicting the Appellant for the offence

punishable under Section 363 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act') and sentencing him to suffer Rigorous Imprisonment for five (05) years and fine of Rs.5000/-, in default to pay the fine, to undergo Rigorous Imprisonment for six (06) months AND to suffer Rigorous Imprisonment for twenty (20) years and fine of Rs.1,00,000/-, in default to pay the fine, to suffer Rigorous Imprisonment for one (01) year, respectively.

2. The Prosecution's case, as revealed from the Police Report, is as under :

[I] The minor Victim / child was residing with her parents at Village Ghatewadi, Taluka Kaij, District Beed. She knew the Appellant. The Appellant expressed his liking for her, however she refused to respond. The parents of the Victim had gone to the Village Dethewadi on the day of incident in the morning and returned home late in the night. The Victim was not at home. The parents searched for the Victim for two (02) days, however in vain. The report was lodged with the Police Station by the Victim's father. During investigation, the Appellant and the Victim were found. On inquiry with the Victim, it was revealed that, the Appellant forcibly took the Victim in a car at different places. They both resided in the house of the Appellant's brother-in-law. Thereafter, they went to Bhosri, where one room was taken on rent. The Appellant forcibly committed sexual intercourse with the Victim. When the Appellant came to know about the report lodged by Victim's father, they both came to the Kaij Police Station. The Victim's statement was recorded. The Victim was sent for

medical examination. The Spot Panchnama was conducted. The clothes of the Victim came to be seized. The Appellant was arrested and sent for medical examination. The statements of the witnesses were recorded. The seized articles were sent for Chemical Analysis. The Co-accused, who assisted the Appellant in commission of the Crime, were also added as Accused and came to be arrested. After completion of investigation, the Charge-sheet came to be filed.

[II] On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 363 and 376(i) of IPC and the offence punishable under Section 4 of the POCSO Act below Exhibit – 35. The Charge was also framed against the Co-accused. To prove the Charge, the Prosecution examined the following witnesses:-

- (i) The Victim as PW – 1 ;
- (ii) The Victim's father as PW – 2 ;
- (iii) The panch for Spot Panchnama and seizure of the clothes of the Victim as PW – 3 ;
- (iv) The Medical Officer, who examined the Victim, as PW – 4 ;
- (v) The Medical Officer, who performed the ossification test of the Victim, as PW – 5 ;
- (vi) The Investigating Officer as PW – 6 ;

[III] The Panchnamas, Medical Papers, CA reports etc. are brought on record in the evidence of the aforesaid witnesses. After filing of the evidence closure pursis by the Prosecution, the statements of the Appellant and the other

Accused were recorded under Section 313(1)(b) of Cr.P.C. On appreciation of the evidence on record, the learned Trial Court convicted the Appellant as mentioned above and acquitted the Co-accused, by the impugned Judgment and Order.

3. It is submitted by the learned Advocate for the Appellant that, the Prosecution failed to prove that, the Victim was a child. The ossification test is not the conclusive evidence to prove the age. The evidence on record indicate that, the Victim was about 20 years of age at the relevant time. The evidence on record further show that, the Victim eloped with the Appellant and she was the consenting party for everything. The Victim's father lodged the missing report after two (02) days. The panch witness was a relative of the Victim. The medical evidence do not show any injury on genitals or other parts of the body of the Victim. The CA reports are of no assistance for the Prosecution. The Appellant was falsely implicated and the learned Trial Court failed to appreciate the evidence in its right perspective. The Appeal be allowed and the Appellant be acquitted. In support of his submissions, he relied on the Judgments in (i) **Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh & Anr.; 2009 STPL 9831 SC**, (ii) **Jarnail Singh Vs. State of Haryana; 2013 STPL 16387 SC** and the Judgments of this Court in (iii) **Criminal Appeal No.404/2019 (Kawadu Madhukar Atram Vs. State of Maharashtra) dated 31/09/2019** and in (iv) **Criminal Appeal No.09/2021 (Maherban Hasan Babu Khan Vs. State of Maharashtra and Anr.) dated 02/05/2023**.

4. It is submitted by the learned APP for the Respondent – State that, the observations in the impugned Judgment and Order show that, the learned Trial Court has rightly appreciated the evidence available on record. The Prosecution proved the age of the Victim by way of ossification test, wherein, the Victim’s age was shown between 15 to 17 years. Though it has come in the evidence that, soon after the incident the Victim married, will not be sufficient to infer that the Victim was major at the time of incident. The Charge was established and the Appellant is rightly convicted and no interference is called for in the impugned Judgment and Order. In support of her submissions, she relied on the Judgments in (i) **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Others; (1982) 2 SCC 538**, (ii) **Wahid Khan Vs. State of Madhya Pradesh; (2010) 2 SCC 9**, (iii) **Abuzar Hossain Alias Gulam Hossain Vs. State of West Bengal; (2012) 10 SCC 489** and (iv) **Mangesh Damodhar Chandankhede Vs. State of Maharashtra; 2017 DGLS (Bom.) 1773**.

5. Heard both the sides. Scrutinized the evidence available on record.

6. For the Charge and conviction for the offences punishable under the provisions of POCSO Act, it is necessary to establish that, the Victim is a ‘child’ as defined under Section 2(d) of the POCSO Act, which reads as under :

“2. Definition. - (1) In this Act, unless the context otherwise requires, -

(a)

(b)

(c)

(d) “child” means any person below the age of eighteen years;”

7. To prove the age of the Victim, the Prosecution relied on the ossification test of the Victim. The relevant evidence in that regard is that of PW – 5 – Dr. Santosh Baburao Jain. He was the Medical Officer at the District Hospital, Beed. On 14/06/2017, the Victim was brought to the District Hospital for radiological examination by the Police. He took the x-ray of the Victim and gave the opinion that, the age of Victim was between 15 to 17 years. The report of the said radiological examination was brought on record at Exhibit – 93. The cross-examination show that, he did not handed over the x-ray plates to the Investigating Officer, though it has come that, he had brought the same at the time of the evidence. In the case of Jaya Mala (*Supra*), it is observed that, the margin of error in the age ascertained by radiological examination was 2 years on either side. In Ram Suresh Singh (*Supra*), it is observed that, it is now well known that an error of 2 years in determining the age is possible and the observations in the case of Jaya Mala (*Supra*) in respect of 2 years margin are referred. Considering the well settled position under the law that, the margin of error in age ascertained by radiological examination is 2 years on either side, the Victim's age is to be taken as 19 years by giving 2 years margin on the higher side. I see no merit in the submission of the learned APP that, the margin on the lower side of age of the Victim is to be considered for the reason that, the Charge is for penal Sections and benefit of doubt will go the convict and therefore, the margin on the higher side of age of the Victim will have to be considered. On this very aspect, useful reference can be made to the Judgment of Delhi High Court in

Court on Its Own Motion Vs. State of NCT of Delhi ; 2024 SCC Online DEL 4484, wherein, the question of law - (i) *Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test ?*, was considered and the same was answered as – *In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on ‘bone age ossification report’, the upper age given in ‘reference range’ be considered as age of the victim’.*

8. The evidence of PW – 6 – Investigating Officer show that, he did not find any documentary evidence about the date of birth of the Victim, and therefore, the Victim was sent for ossification test. The evidence of Victim’s father show that, he was unable to tell the date of birther of any of his children. The evidence of the Victim and that of her father show that, at the time of incident, the age of the elder sister of the Victim, i.e. elder daughter of PW – 2, was in between 31 to 33 years. The evidence of both the witnesses, i.e. the Victim and her father, show that, there was age difference of 2 years in between the siblings. The Victim’s evidence show that, her elder brother was 2 years younger than her elder sister and she was 2 to 3 years younger than her brother. This evidence on record clearly give rise to the inference that, at the time of incident, the Victim was major by age. In *Abuzar Hossain (Supra)*, wherein the issue was in respect of claim of

juvenility, the procedure to be followed in determination of age in the Juvenile Justice Rules, is considered, which provides as to what documents are to be considered for determining the age. Admittedly, no document is brought on record by the Prosecution to prove the date of birth of the Victim. The Prosecution miserably failed to prove the date of birth and the age of the Victim and consequently failed to prove that, the Victim was the child at the relevant time.

9. From the evidence of the Victim, it is clear that, she and the Appellant were known to each other, being the residents of the same Village. It is strange that, though the Victim claims that, the Appellant took her forcibly in the car in the night after coming to her house, which was situated in the Village, she didn't raise any alarm. Her evidence show that, the Appellant took her to many places. They also stayed in the house of the brother-in-law of the Appellant and also stayed at one rented room. This show that, the Victim had many opportunities to flee-away or to raise an alarm or complain against the Appellant, however nothing of that sought was done by her. This give rise to the inference that, the Victim willingly eloped with the Appellant. The medical evidence in the nature of testimony of PW – 4, who examined the Victim on 10/06/2017 show that, the Victim had given history that, she ran away from home with someone to Bhosari. This medical history, which is previous statement by the Victim, is inconsistent with her testimony that, the Appellant kidnapped her. The medical evidence show

that, there were no injuries on the person and genitals of the Victim. The Medical Officer deposed that, it cannot be predicted whether the hymen was intact or torn. His evidence show that, he was confronted with the CA report in respect of samples of the Victim i.e. blood, pubic hair, nail clippings, posterior and lateral vaginal swab and deposed that, in his opinion, they were not consistent with recent sexual intercourse or sexual assault. It has come in his cross-examination that, on the basis of medical findings of the Victim, it cannot be opined that, there was sexual assault. The medical evidence on record do not corroborate the testimony of the Victim.

10. There can be no dispute in respect of the observations in Wahid Khan (*Supra*) that, it is not necessary to insist for corroboration if the evidence of the Prosecutrix inspires confidence and appears to be credible. Further, there can be no dispute in respect of observations in the Judgments in Mangesh Damodhar Chandankhede (*Supra*) that, the absence of injury or mark of violence on the private part on the person of the Prosecutrix is of no consequence when the Prosecutrix is minor. In the case at hand, the testimony of the Victim is found not be consistent with the Prosecution's case. The Victim's testimony show that, she was not the witness of sterling quality. The above discussed evidence on record show that, the testimony of the Victim cannot form the basis to establish the Prosecution's case that, she was kidnapped and raped by the Appellant. The medical evidence completely rules out the sexual assault on the Victim. The re-appreciation of

the evidence on record indicate that, the Victim was consenting party for all the happenings. The other evidence that of the panch witness and the Investigating Officer do not take the case of Prosecution any further to establish the Charge. There is no need to burden the Judgment by referring to the other Judgments cited by the learned Advocate for the Appellant. On re-appreciation of the evidence on record, the conviction and sentence awarded by the learned Trial Court need interference, and the Appeal succeeds. Hence, the following order:-

ORDER

- [I] The Appeal is allowed.
- [II] The conviction and sentence recorded by the learned Trial Court against the Appellant, in Special (POCSO) Case No.03/2023 by Judgment and Order dated 30/09/2023, is quashed and set aside.
- [III] The Appellant is acquitted for the offence punishable under Section 4 of the POCSO Act and Section 363 of IPC.
- [IV] The Appellant is behind bars, he be released forthwith, if not required in any other offence.
- [V] The fine amount paid by the Appellant, if any, be refunded to him.
- [VI] The Muddemal articles be dealt with in accordance with law.
- [VII] The Record and Proceedings be sent back to the learned Trial Court.
- [VIII] The fees of Advocate Mr. R. J. Nirmal appointed for Respondent No.2 is quantified at Rs.10,000/- [Rupees Ten Thousand Only] to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[IX] Appeal stands disposed off accordingly.

[NEERAJ P. DHOTE, J.]

Sameer/November-2025