



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.136 OF 2024

Sachin s/o Vitthalrao More,
aged about 30 years, occupation labour,
r/o Mohli, tahsil Seloo,
district Wardha. **Appellant.**

:: VERSUS ::

The State of Maharashtra,
through Police Station Officer,
Police Station Seloo,
district Wardha. **Respondent.**

**Shri M.V.Rai, Counsel and Ms.Sonali Khobragade,
Advocate for the Appellant.
Shri C.A.Lokhande, Addition Public Prosecutor for the
Respondent/State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 11/02/2025

PRONOUNCED ON : 07/03/2025

JUDGMENT

1. By this appeal, the appellant (accused) has challenged judgment and order dated 9.3.2023 passed by learned Extra Joint Additional Sessions Judge, (Special

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Court), Wardha (learned Judge of the trial court) in Special (Ch.Act) Case No.53/2019.

2. By the said judgment and order impugned, the accused is convicted for offence punishable under Section 376(2)(n)(h) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years and to pay fine Rs.5000/-, in default, to undergo further simple imprisonment for six months.

He is further convicted for offence punishable under Section 363 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 3 years and to pay fine Rs.3000/-, in default, to undergo further simple imprisonment for three months.

He is further convicted for offence punishable under Section 366-A of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 5 years

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and to pay fine Rs.5000/-, in default, to undergo further simple imprisonment for five months.

3. Brief facts of the prosecution case which are necessary for disposal of the appeal are as under:

The victim girl, aged about 17 years, resident of Ghorad, tahsil Seloo, district Wardha, was residing in the farm house of one Sanjay Tadas with her parents and was studying in 11th Std. in “Yashwant College, Seloo. While attending the college, she got acquaintance with the accused who is a auto rickshaw driver. The accused expressed her that he loves her and also shown desire to marry with her. Allegedly, the accused took her at Ridora and Bordharan Dams and also was visiting her house in absence of her parents and the physical relationship was developed between them which resulted into her pregnancy. Despite the disclosure by her to the accused

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about her pregnancy, the accused has not paid any heed to it. He called her at Seloo on 27.2.2019. The victim left her house on a pretext that she is visiting her friend's house. As the victim did not return home, her father lodged report against the accused alleging that he had kidnapped his daughter. During investigation, the victim was found along with the accused. The victim and the accused are brought to the police station. The statement of victim was recorded. From the statement, it revealed that the accused took the victim at the house of his maternal aunt at Pandharabodi, Nagpur and kept her there and thereafter took her to Shegaon and Shirdi and again to Nagpur. He obtained a rented room. On the basis of the statement, the police registered the offence against the accused.

4. After registration of the crime, statement of the victim was recorded and from the said statement it

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revealed that she is pregnant of 24 weeks and six days. Her medical examination was carried out. The accused was arrested. After completing the necessary investigation, chargesheet was filed against the accused.

5. Learned Judge of the trial court framed the charge vide Exh.15. The accused pleaded not guilty and claimed to be tried. In support of the prosecution case, the prosecution has examined 11 witnesses, which are as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	Walmik Raut, pancha on spot panchanama	20
2	Purshottam Tembhare, father of the victim	28
3	Rajendra Warthi, pancha on various seizure panchanamas	34
4	The victim	42
5	Dr.Mariah Khatun Sultan Ahemad, Medical Officer	46
6	Dr.Sandip Akare, Medical Officer	53

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7	Pushpa Durugwar	66
8	Raju Vaidya	68
9	Sanjay Pawar	76
10	Saurabh Gharde, Investigating Officer	86
11	Vilas Thange, DNA Analyst	110

6. Besides the oral evidence, the prosecution placed reliance on spot panchanama Exh.21, report Exh.29, FIR Exh.30, seizure memo Exhs.35 and 36, seizure of clothes of the victim Exh.38, seizure of clothes of the accused Exh.39, spot panchanama Exh.40, Form-B Exh.49, Form-II Exh.50 obtained by the Medical Officer, identification form of the victim Exh.51, medical certificate Exh.48, requisition to the Medical Officer Exh.47, discharge card Exh.52, requisition to Medical Officer Exh.54, Medical Certificate of the accused Exh.55, OPD card of the accused Exhs.57 and 58, Form-B and Form-III of the accused Exhs.58 and Exh.59, identification form of Exh.60, CA Report Exhs.61 and 62, DNA Report Exh.63,

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extract of birth register Exh.78, birth certificate Exh.80, letter to the CA Exhs.87 to 89, letter to Magistrate Exh.90, letter circle officer Exh.91, letter to CA Exhs.111 and 113.

7. On the basis of the oral as well as the documentary evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt. All incriminating evidence is put to the accused in order to obtain his explanation by recording his statement under Section 313 of the CrPC. After appreciating the evidence, learned Judge of the trial court held the accused guilty as the aforesaid.

8. Heard learned counsel Shri M.V.Rai for the accused and learned Additional Public Prosecutor Shri C.A.Lokhande for the State.

9. Learned counsel for the accused submitted that there was a love affair between the victim and the

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accused. Out of the said love affair, the victim, who has already attained the age of majority, joined the company of the accused and the physical relationship was developed between them. There is no deception or promise of marriage by the accused to the victim. It is the love affair which was developed between the victim and the accused, out of which there was physical relationship and victim girl delivered a child and the accused and the victim concluded to be biological parents of the said child. The victim has also admitted during cross examination that there was love affair between her and the accused. Thus, the offence is not committed out of lust, but two teenager fall in love and physical relationship was developed between them. Learned Judge of the trial court has not considered the same and convicted the accused. The age of the victim is not proved. The evidence of the victim shows that she herself joined the

company of the accused. Thus, the offence of kidnapping of a minor girl for seducing her to illicit intercourse is also not established. For all above these reasons, the judgment impugned in the appeal deserves to be quashed and set aside.

10. *Per contra*, learned Additional Public Prosecutor for the State submitted that at the relevant time, the accused was married and having two children. He induced the victim girl and developed physical relationship with her. The victim girl was minor at the relevant time. Her consent is not relevant. The evidence of the victim sufficiently shows that she was promised for marriage and on the promise of marriage she was subjected for the physical relationship. The age of the victim is proved by the prosecution by examining PW9 Sanjay Pawar. The victim was taken by the accused and subjected for the sexual assault and thereby the accused has committed an

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offence. In view of that, the appeal is devoid of merits and liable to dismissed.

11. It has been submitted on behalf of the accused that the evidence of the victim would show that there was love affair between her and the accused and she herself went along with the accused. The accused is also charged for the offences under Sections 363 and 366-A of the Indian Penal Code. To prove the offence of kidnapping in view Section 363 of Indian Penal Code, the definition of kidnapping given under Section 361 of the Indian Penal Code requires to be looked into. Section 361 deals with kidnapping from lawful guardianship - Whoever takes or entices any minor under ¹[sixteen] years of age if a male, or under ²[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind,

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without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. First explanation to Section 361 states that The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

12. Thus, for proving the offence of kidnapping, it has to be established that the victim was below 18 years of age at the time of the incident and she was taken or enticed by the accused and, thereafter, taken from lawful guardianship of her father.

13. To prove the age of the victim girl, the prosecution has examined PW9 Sanjay Pawar vide Exh.76. He deposed that he was working as Gramsewak and Registrar at Gram Panchayat Kawadi, district Gondia. He has brought the original register and also filed extract of

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births register. As per the record, date of birth of the victim is 29.11.2001 and his office relieved information from the office of Gram Panchayat on 1.12.2001. Accordingly, entry was taken. When the child is named and the information is given to the Gram Panchayat, the same is transmitted through the Gram Panchayat and accordingly entry was taken. The name of the victim was recorded at Sr.No.18. As per the birth certificate Exh.80 date of birth of the victim is 29.11.2001.

During cross, he admitted that the letter issued by the Seloo Police Station was not received by the Gram Panchayat during his tenure. Exh.80 was also not forwarded in his presence. Exhs.78 and 80 were not entered in his regime. Entry at Exhs.78 and 80 shows that the name is entered as (due to the mandate of Section 228-A of the Indian Penal Code, the names of the victim and her relatives are not mentioned hereinafter)

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and the name of the father is also entered as (XXX). He further admitted that the person who furnished details whose status is not entered in the register. He further admitted that it is not mentioned in the register as to the addition of the name of the victim. In the year 2001, he was not posted at Kawadi Gram Panchayat, district Gondia. Exh.78 shows that the name of the child mentioned in the application is (XXX). Birth certificate also shows the name of the child in the application.

14. There is no variance as far as the name of the victim is concerned. The statement of the victim, birth certificate, and the information furnished show that the date of birth of the victim is 29.11.2001. The birth certificate is issued in view of the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 and Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules.

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15. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction.

That is how the certificate came to be issued by the Sub Registrar as per the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969.

16. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the

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Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, in fact, the extract of Birth Register in respect of entry of birth of the victim child and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be

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one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is a public document and it constitutes primary evidence. Proof of contents of a public document can be by production thereof as envisaged by Section of the Evidence Act. no formal proof of the Birth Certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and Rules framed thereunder is required.

17. Rule 12(3) deals with every case concerning a child or juvenile in conflict with law, the age determination

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inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining - (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

18. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within

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the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

19. The birth certificate is issued in the present case on the name of the victim. The birth date is 29.11.2001 and registered on 1.12.2001. The alleged incident occurred on 27.2.2019. On that day, the victim has left the house and not returned back. Thereafter, she was found along with the accused. She was pregnant of 24 weeks at the relevant time. On 27.2.2019, she was on the verge of attaining the age of majority. As per the evidence of the victim in the year 2019 she was studying in 11th Std.

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When she was studying in 11th std., she developed physical relationship with the accused. Thus, prior to the 27.2.2019 the physical relationship was developed between the victim and the accused. Thus, when she was on the verge of attaining the age of majority that is at the age of 17 physical relationship was developed between them.

20. The allegation of kidnapping is levelled against the accused and the incident of kidnapping is of 27.2.2019. On that date, the victim was on the verge of attaining the age of majority. Even accepting the contentions of the prosecution that she was below 18 years of age and the the accused has taken her along with him, the evidence of the victim shows that the accused called her at Vikas Chowk. Accordingly, she went there and thereafter he took her to Nagpur in the house of his paternal aunt at Pandharabodi and kept her along with him for 3-4 days

and, thereafter, they travelled to Shegaon-Shirdi. The evidence of the victim thus shows that she went along with the accused as the accused called her.

21. Perusal of the definition of kidnapping from lawful guardianship taking or enticing away a minor out of the keeping of lawful guardianship is an essential ingredients of the offence of kidnapping. This aspect is dealt with by the Hon'ble Apex Court in the case of **S.Varadarajan vs. State of Madras, reported in MANU/SC/0081/1964** wherein it is held that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 61 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been

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taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It is further held that it would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the

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minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

22. In the light of the above observations, if the evidence of the present case is taken into consideration, it shows that it was the victim who left the house and joined the company of the accused. There is an essential distinction between the words "taking" and "enticing." The word "take" means to cause to go, to escort or to get

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into possession. In the present case, the evidence as to the “taking” is absent. Thus, as far as the offence of kidnapping is concerned, there is no sufficient evidence to show that the accused has persuaded or done any act to take her from the lawful guardianship of her father and he committed the offence.

23. Thus, the prosecution failed to establish that the accused has kidnapped the victim by taking her or enticing from the lawful guardianship of her father.

24. The prosecution case further reveals that a minor girl was subjected for the sexual assault on the promise of marriage. Whereas, the defence of the accused is that there was love affair between him and the victim and victim on her own joined his company and there is no evidence that there was any threat to the victim to be in the company of the accused.

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25. Where there was forceful sexual assault on the victim or the relationship was developed out of love affair, is the point of consideration.

26. The evidence of the father of the victim is to the extent of missing of the victim from his house. He deposed that in his absence the victim left the house on a pretext of vising her friend's house and she did not return back. His cross examination shows that the victim was attending the school by travelling in auto rickshaw of the accused. The victim and the accused were on talking terms. He further admitted that the communication between the victim and the accused was in the knowledge of the wife of the accused and she had also communicated with them about the same. He further admitted that on enquiry with the victim, she denied the said relationship. He specifically admitted that when the victim returned home, she was pregnant of six months.

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27. Thus, the evidence of the father of the victim shows that after the victim has left the house and returned back to house, she was pregnant of six months. He further admitted that the wife of the accused disclosed to him that his daughter was in relationship with the accused.

28. The entire thrust of the prosecution is on the evidence of the victim. She testified during her evidence that she got acquaintance with the accused when she was in 11th Std.. She used to travel in auto rickshaw of the accused and the accused expressed his desire to marry with her. He came to her house in absence of her parents and subjected her for forceful sexual assault. Upto five months of her pregnancy, she resided at her parents house and, thereafter, she went along with the accused. She travelled with the accused from Dhantoli, district Wardha to Nagpur and stayed at his paternal aunt's house and,

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thereafter, at Shegaon-Shirdi. She delivered a male child. She further stated that her blood samples as well as blood samples of the newly born child were obtained by the Medical Officer. The cross examination shows that the material part of chief examination was not narrated by her while recording her statement. She specifically admitted that she was having love affair with the accused. Thus, her evidence shows that love relationship was developed between her and the accused.

29. The prosecution has also examined PW5 Dr.Mariah Khatun Sultan Ahemad who has conducted the medical examination of the victim. The requisition letter is issued to her Exh.47. On examination, she issued medical examination report. The history narrated by her to the Medical Officer is to the extent that she was having love affair with 30 years old accused around one year from March 2018 till the day of examination. She had physical

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relationship since October 2018. The said relationship was by her wish and willingness and she has agreed for it. The last relationship was on 24.4.2019. Her last menstrual period was 27.9.2018. On examination of the victim, it revealed to her that the victim is pregnant of 20-24 weeks. On ultra sound examination, it revealed that the victim was pregnant of 24 weeks and 6 days. She collected biological samples along with the Form-B and Form-II which are at Exhs.49 and 50. The identification form of the victim for the purpose of DNA Test is at Ehx.51. The cross examination of the Medical Officer shows that on the day of the examination of the victim, the victim was married. She has not witnessed any external or vaginal injury. Except this cross, nothing material is brought on record.

30. PW6 Dr.Sandip Akare, is also Medical Officer who had examined the accused. He issued the medical

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certificate Exh.55. He has also collected biological samples of the accused along with Form-B Exh.56 and form-II Exh.59. The identification form of the accused is at Exh.60.

31. PW8 Raju Vaidya, is the police constable who carried seized property for chemical analyzer and DNA profile. He issued duty pass Exh.69.

32. PW11 Vilas Thange, is the Analyzer who testified that their office received a letter on 26.3.2019 from the police station for providing 2 DNA Kits. The said letter is at Exh.111. Accordingly, DNA Kits were was provided to the Seloo Police Station. On 28.3.2019, their office received blood samples of the accused and the victim. On receipt of the blood samples, he extracted the DNA from the blood samples of the victim and the accused. The said report is at Exh.61. On 27.6.2019, they received another

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letter Exh.113 for providing DNA Kit. On 15.7.2019 their office received blood samples of the baby of the victim in a sealed condition. He extracted DNA from the blood of the baby. The DNA extracted from the blood samples of the victim, the accused and baby delivered by the victim by using 15 STR Loci and gender specific amelogenin locus using PCR amplification technique. On analyzing the said samples, it revealed to him that the accused in DNAn/253/2019 matched obligate paternal alleles in the child delivered and abandoned in Sant Gadge Maharaj Shishu Gruha at all 15 STR LOCI. Similarly, for all the 15 different genetic systems analyzed with PCR, the victim in DNAn/253/2019 matched the obligate maternal alleles in child abandoned in Sant Gadge Maharaj Shishu Gruha and the victim and the accused are concluded biological parents of the child

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delivered by the victim. Though this witness is cross examined, nothing incriminating is brought on record.

33. PW10 Saurabh Gharde, is the Investigating Officer whose evidence is formal in nature as to the investigation carried out by him. He narrated about the investigation. From his cross examination, it is brought on record that the accused and the victim were communicating with each other through telephonic call. It further came in his evidence that the wife of the accused narrated about love affair and conversation between the victim and the accused to the father of the victim.

34. PW1 Walmik Raut acted as a pancha on spot panchanama who has not supported the prosecution case.

35. PW7 Pushpa Durugwar, paternal aunt of the accused has not supported the prosecution case.

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36. PW3 Rajendra Warthi, acted as pancha on various seizure panchanamas, whose evidence shows that in his presence the police seized biological samples of the victim as well as the accused. Panchanamas are at Exhs.35 and 36. In his presence, clothes of the victim are also seized and the seizure panchanama is at Exh.38. Though this witness is cross examined, nothing incriminating to shatter the evidence of this witness is brought on record.

37. On appreciation of the evidence, it reveals that there was love affair between the victim and the accused. Out of the love affair, physical relationship was developed between them.

38. There is no dispute as to the fact that at the time of initial physical relationship, the victim was below 18 years of age, but she was on the verge of attaining the age of majority. Admittedly, the consent of the victim is not

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relevant, but on perusal of the entire evidence and the entire incident narrated by the victim and her cross examination shows that there was love affair between the victim and the accused and out that love affair the physical relationship was developed between them. Though the victim visited along with the accused at various places and travelled by the public transport, she did not resist the accused in any manner and not complained that she is enticed or forcefully taken by the accused. The evidence further shows the she stayed along with accused at rented premises also, but she never shown her displeasure as to such relationship. At every point of time, she had opportunity to resist the act of the accused and disclose the fact of forceful sexual assault by the accused, but she has not made any complaint. The prosecution raised a point that her consent is not relevant at all. However, the incident whichever happened is to be

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taken into consideration in the light of the fact that out of the love affair, the victim and the accused came together and developed physical relationship. The relationship was developed between them out of physical attraction about each other. It is not the case that the accused had subjected her for forceful sexual assault out of lust.

39. All the facts proved in this case clearly indicate that the victim went along with the accused out of love affair between them. The history narrated by her to the medical officer shows that as there was love affair between the victim and the accused and out of love affair the physical relationship was developed between them, resulted into pregnancy and she delivered a male child and they are concluded to be biological parents of that child. Thus, in other words, there was no forceful sexual assault by the accused with sexual intent. But, two teenagers came together out of the love affair and physical

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relationship was developed between them. Such type of cases are to be treated differently.

40. Learned Judge of the trial court has not considered the above aspect while convicting the accused. Learned Judge of the trial court considered the fact that the consent of the victim is not relevant, but at the same time the evidence shows that there was love affair between both of them and out that love affair, physical relationship was developed. It is nothing but the indication that out of the love affair between both of them they physically attracted with other and physical relationship was developed between them. Under such circumstances, the conviction awarded to the accused deserves to be set aside by allowing the appeal. Hence, I proceed to pass following order:

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ORDER

(1) The Criminal Appeal is **allowed**.

(2) The judgment and order dated 9.3.2023 passed by learned Extra Joint Additional Sessions Judge, (Special Court), Wardha in Special (Ch.Act) Case No.53/2019 is hereby quashed and set aside.

(3) The accused is acquitted for the offences for which he is charged and convicted.

(4) The fine amount deposited, if any, be refunded to the accused.

(5) The accused to execute the P.R.Bond in the sum of Rs.15000/- with one surety of the like amount for compliance of Section 437A of the Code and duration of the said Bond would be of six months.

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(6) The accused be set at liberty, if not required in any other case.

(7) The order of disposal of muddemal passed by learned Judge of the trial court is maintained.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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