



Judgment

388 apeal243.23

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

**CRIMINAL APPEAL NO.243 OF 2023**

Poshan s/o Domulal Sahu,  
aged 24 years, occupation- painter,  
r/o Nayapara, Balod, district Balod,  
Chhattisgarh. .... **Appellant.**

**:: V E R S U S ::**

1. State of Maharashtra,  
through Police Station Padoli,  
district Chandrapur, M.S.

2. Victim XYZ  
of crime No.61/2020  
of Police Station Padoli,  
district Chandrapur (M.S.)  
through Police Station Padoli,  
district Chandrapur, MS. .... **Respondents.**

**Shri S.S.Das, Counsel Appointed for the Appellant.**  
**Mrs.S.S.Dhote, Additional Public Prosecutor for**  
**Respondent No.1/State.**  
**Ms.Apurva Kolhe, Counsel Appointed for Respondent**  
**No.2/Victim.**

**CORAM : URMILA JOSHI-PHALKE, J.**

**CLOSED ON : 17/03/2025**

**PRONOUNCED ON : 15/04/2025**

JUDGMENT

1. By this appeal, the appellant (accused) has challenged judgment and order dated 19.9.2022 passed by learned Special Judge, Special Court (POCSO), Chandrapur (learned Judge of the trial court) in Special (POCSO) Case No.91/2021.

2. By the judgment impugned in the appeal, the accused is convicted for offence 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 rigorous imprisonment for 6 months.

The accused is further convicted for offence under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) read with Section 376(3)(n) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 20 years and to pay

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fine Rs.5000/-, in default, to undergo rigorous imprisonment for 12 months.

3. Brief facts of the prosecution case emerged from the police papers and recorded evidence are as under:

The father of the victim girl lodged report alleging that on 2.3.2020 at about 6:30 am, his daughter, the victim girl, had gone to attend her school at Janta Vidyalaya at Tadali. On that day, she has to appear for her examination and the examination paper was till 11:00 am. At about 9:30 am, the accused, who is brother of the informant, took his son along with him and went to Janta Vidyalaya and took the victim on the pretext that the informant met with an accident. He has sent brother of the victim back at the house and took the victim along with him. On the basis of the said report, the police registered the crime against the accused.

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4. After registration of the crime, the victim girl was searched, but she was not traced and subsequently after 3 months, the police came to know that the victim girl is at Balod in Chhattisgarh. They visited the same place and the victim girl was brought to the police station. On recording her statement, it revealed that she was taken by the accused at various places and subjected her for the forceful sexual assault on multiple occasions and brought her at Balod wherein she was found. After recording her statement, Section 376(2)(n) as well as Sections 4 and 10 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 (the POCSO Act) were added and the accused was arrested. The victim girl and the accused both were sent for medical examination. After completing formality of the investigation, chargesheet was submitted against the accused.

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5. Learned Judge of the trial court framed charge against the accused vide Exh.18. The contents of the charge are explained to the accused to which he pleaded not guilty. In support of the prosecution case, the prosecution has examined as many as 11 witnesses, as follows:

| PW Nos. | Names of Witnesses                      | Exh. Nos. |
|---------|-----------------------------------------|-----------|
| 1       | Sandip Bobade, pancha on spot           | 23        |
| 2       | Father of the victim girl               | 26        |
| 3       | The victim                              | 30        |
| 4       | Dr.Ananya Dixit                         | 33        |
| 5       | Sikandar Jabbar Khan, pancha on seizure | 39        |
| 6       | Prakash Evnathe                         | 43        |
| 7       | Sudha Umare, teacher of the victim      | 49        |
| 8       | The brother of the victim girl          | 51        |
| 9       | Bhadu Awale, pancha on seizure          | 53        |
| 10      | Dadarao Talvekar, Investigating Officer | 57        |
| 11      | Chanda Dandwate, Investigating Officer  | 65        |

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6. Besides the oral evidence, the prosecution placed reliance on spot panchanama Exh.24, report Exh.27, FIR Exh.28, medical certificate of the victim girl Exh.31, letter to the Medical Officer Exh.34, requisition to Chemical Analyzer Exh.37, seizure memo Exh.40, spot panchanama Exh.41, birth report Exh.45, birth certificate Exh.46, seizure panchanama Exhs.54 and 55, arrest panchanama Exh.63, requisition to Chemical Analyzer Exhs.67 and 72.

7. All the incriminating evidence is put to the accused in order to obtain his explanation as to the evidence appearing against him by recording his statement under Section 313 of the CrPC. Defence of the accused is of total denial and of false implication.

8. After recording the evidence and appreciating the same, learned Judge of the trial court held the accused guilty and sentenced him as the aforesaid.

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9. Being aggrieved and dissatisfied with the same, the present appeal is preferred on the ground that learned Judge of the trial court has not appreciated the fact that age of the victim girl is not proved by the prosecution as well as the evidence of the victim girl and other witnesses nowhere establishes that the victim girl was “enticed” or “taken by the accused from lawful guardianship of her father” and subjected her for the forceful sexual assault.

10. Heard learned counsel Shri S.S.Das appointed for the accused, learned Additional Public Prosecutor Mrs.S.S.Dhote for the State, and learned counsel Ms.Apurva Kolhe appointed for the victim girl

11. Learned counsel for the accused submitted that to prove the charge, the prosecution has examined as many as 11 witnesses. The birth certificate is not to be relied upon as the document placed on record is inconsistent

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with the birth certificate. The evidence of the victim girl is also not consistent and she is prone to shift her stand time to time. There is no independent corroboration to the evidence of the victim. The fact that she was subjected for sexual assault by the accused is also not established. The accused being brother of the informant is implicated falsely due to the family dispute. For all above these reasons, the evidence of prone to shift her stand time to time is to be discarded and the judgment and order of conviction impugned in the appeal deserves to be quashed and set aside.

12. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

**1. Surjit Biswas vs. State of Assam, reported in 2013 Cri LJ 3140;**

**2. Pramod Dattatraya Jadhav vs. The State of Maharashtra, reported in 2019 ALL MR (Cri) 1742,**

**3. Ravi Anandrao Gulpude vs. State of Maharashtra, reported in 2017 ALL MR (Cri) 1509.**

13. *Per contra*, learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal and submitted that the accused is the real uncle of the victim girl. The birth date of the victim girl is established by the prosecution by adducing the evidence by examining PW6 Prakash Evnathe. The birth date of the victim girl is also stated by PW2 father of the victim and PW3 victim. As to the age of the victim, no contrary evidence is brought on record. The evidence of the father of the victim, victim, PW8 brother of the victim, and PW7 Sudha Umare, teacher of the victim at the relevant time, consistently states that the victim was taken by the accused. After the incident, due to the covid pandemic, transportation facilities were restricted, the accused was

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in a dominant position over the victim is the reason that the victim could not disclose this fact to anybody. The evidence of the victim as to the fact that she was taken by the accused on a pretext that her father met with an accident and taken her at various places and subjected her for sexual assault is established. There is a corroboration by PW7 Sudha Umare, teacher of the victim, and PW8 brother of the victim to the fact that the victim was taken by the accused. The evidence of the investigating officer shows that the victim was taken into custody from Balod (Chhattisgarh). There is no reason come before the court to show that there was any ulterior motive for the victim to falsely implicate the accused. The independent corroboration to the evidence of the victim is not required as it inspires the confidence.

14. Learned counsel for the victim also supported the argument of learned Additional Public Prosecutor for the

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State and submitted that age of the victim is proved. There is compliance of Section 24 of the POCSO Act also. Thus, the consistent evidence on record sufficiently shows the involvement of the accused in the alleged crime and, therefore, the appeal being devoid of merits is liable to be dismissed.

15. Learned counsel appearing for respective parties also taken me through the entire evidence and the record.

16. The accused is charged of the offence under Section 363 of the IPC on an allegation that the victim is taken by the accused by enticing her and taking her from the lawful guardianship of her father.

17. Before entertaining into the merits of the case, it is necessary to refer the definition of “kidnapping” given under Section 361 of the IPC (137 (1)(b) of the BNS) which states that whoever takes or entices any minor

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under sixteen years of age if a male, or under 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, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation to the said Section states that words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

18. To establish the charge under Section 363 of the IPC, the prosecution mainly placed reliance on the evidence of the father of the victim, the victim, and PW6 Prakash Evnathe to prove the age of the victim.

19. The father of the victim deposed that date of birth of the victim is 7.3.2007. The victim also narrated her

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birth date as 7.3.2007. These both witnesses are cross examined on the aspect of birth date. The father of the victim admitted that he has not stated the date of birth of the victim while lodging the report. Except this cross examination, nothing is brought on record to falsify the version of the father as to the birth date of the victim. The victim is also not cross examined as to her birth date.

20. Thus, evidence as to the birth date is not challenged during the cross examination.

21. The material evidence is of PW6 Prakash Evnathe who is serving in Chandrapur Municipal Corporation. His evidence shows that the date of birth of the victim is 7.3.2007. The name of the victim is mentioned in the birth register. On the basis of the entry of the birth of the the victim in General Hospital at Chandrapur, he admitted that there are different dates of entries of the births as per

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Exhs.45 and 46. Except this cross examination, no material is brought on record to falsify his version. On appreciating Exh.45, which is report received from the hospital, it discloses the names of the parents wherein the names of the father and mother of the victim are mentioned. Birth date of the victim is mentioned as 7.3.2007. The birth certificate shows registration number as 2620 which is also mentioned in report Exh.45. As per the birth certificate also, the birth place of the victim is the Government Hospital, Chandrapur. As far as the submission of learned counsel for the accused is concerned, that two numbers are mentioned in the information and, therefore, the birth certificate is doubtful, he placed reliance on decision of this court in the case of **Pramod Dattatraya Jadhav** *supra* wherein it is held that in absence of link of the evidence to demonstrate that said birth certificate relates to female

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victim whose age sought to be proved, such birth certificate, therefore, would not be of any assistance to the prosecution.

22. On appreciating the evidence, it reveals that the evidence of the victim and her father is consistent as to her birth date as 7.3.2007. Though they are cross examined, nothing incriminating is brought on record. Exh.45 is the report forwarded by the hospital as to the information regarding the birth of the victim which also shows that birth date of the victim is 7.3.2007 and names of the parents are mentioned. The said information is received in the Chandrapur Municipal Corporation on 7.3.2007 itself. The registration number mentioned in Exh.45 and in the birth certificate Exh.47 is also the same. The registration date is 27.4.2007. It is vehemently submitted that the said report does not bear the signature of any person who informed the said information.

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23. The evidence of PW6 Prakash Evnathe specifically shows that on the basis of information received, the birth entry was taken. Merely because the report does not bear the signature of person who forwarded the information that by itself is not sufficient to create the doubt about the said entries in absence of any incriminating material to show that there was any reason for the parents of the victim to take false entry. The said entry was taken by the officials of the Municipal Corporation in view of the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969.

24. As per Rule 9 of the Maharashtra Births and Deaths Registration Rules 1976, this certificate is issued by the Sub Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969.

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25. Section 7 of the said Act thereof deals with appointment of registration for each local area comprising the area within the jurisdiction of a municipality, panchayat or other local authority or any other area or a combination of any two or more of them. It is duty of the Registrar to register every birth which took place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully.

26. Section 8 of the said Act mandates that each head of the house to report birth in the family to the Registrar.

27. As per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 the birth certificate as such is issued by the public officer and it is a document forming record of the acts of the public officer and, therefore, the same is a public document within the meaning of Section 74 of the Indian Evidence Act and the

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same is admissible in evidence in view of Section 77 of the Indian Evidence Act. Section 17 of the said Act provides for search of Birth Register and supply of extract thereof by certifying the same by the 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 makes it clear that if entry is made by public servant in the official book in discharge of his official duty, such entry becomes the relevant fact and admissible in evidence. Section 35 of the 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

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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 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.

28. It is, thus, clear that the birth certificate issued by the public officer or by the competent authority under the provisions of the Registration of Births and Death Act and the Rules framed thereunder is required. The birth certificate of the victim girl is issued in compliance with the above said provisions.

29. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads thus:

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**“Rule 12(3) :** In every case concerning a child or juvenile in conflict with law, the age determination 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 date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. the matriculation or equivalent certificates, if available;

(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.

30. The Hon’ble Apex Court in the case of **Jarnail Singh vs. State of Haryana**, reported in 2013 ALL MR (Cri) 2946 observed that even though Rule 12 is strictly applicable only to determine the age of a child in conflict

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with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available,

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would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat.

31. Thus, the birth certificate issued in the present case is in compliance with the provisions of the Registration of Births and Deaths Act and therefore the evidence is acceptable.

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32. The second ingredient to be proved to prove the offence of kidnapping is as to the person was taken or enticed without consent of such guardianship.

33. The evidence of the father of the victim and the victim is relevant which states that on the date of the incident, the accused who is brother of the informant, went to the school of the victim and she was taken on the pretext that her father met with an accident. The evidence of the victim shows that on the day of the incident, she was in her school. Her uncle (the accused) came to her school for taking her. Her teacher informed her that the accused had been to school as her father met with an accident and, therefore, she went along with her uncle at Padoli. Though she enquired as to whereabouts of her father, the accused has not disclosed and told her that her father is admitted at hospital at Nagpur and took her at Nagpur by bus. From Nagpur, she was taken at

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Railway Station and took her at Nandgaon (Chhattisgarh). From Nandgaon, she was taken at Dhamtari at the house of his friend. Though she asked him to drop her at her house, he took her from Dhamtari to Gundardehi and kept her in ward No.15 at Chenganj locality. He kept her in the house of one Sinha and subjected her for the forceful sexual assault on multiple occasions. Thereafter, he assured her to drop her at the house, but he brought her to Durg and asked her to work in utensil shop and threatened her not to disclose her identity. In Durg, she resided for 6 months. From Durg, she was brought at Balod. At Balod, she was kept in the house of Ravikant. He used to confine her in the house. In Balod, the accused committed theft in the house of one teacher and he was arrested in the said crime. During enquiry with him, his involvement in kidnapping the

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victim was revealed and, therefore, police came there and she was taken at the police station.

34. The evidence of PW8 the brother of the victim also discloses that the accused has taken him in school and dropped him in the school near the gate and he went inside the school and returned along with the victim and thereafter he boarded him in auto by holding the hands of the victim and went towards Chandrapur. His cross examination also shows that he witnessed the victim when she came out of the school. He also admitted that he did not go inside the school from the gate.

35. PW10 Dadara Talvekar and PW11 Chanda Dandwate are investigating officers. The evidence of PW10 Dadara Talvekar also shows that he received an information that the victim is at Balod and, therefore, he went there and the victim was brought to the police

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station. The history was also narrated by the victim to the Medical Officer that the accused has taken her.

36. These four witnesses though cross examined, nothing incriminating is brought on record to shatter their evidence as far as “taking” or “enticing” is concerned. “Taking” or “enticing” away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. The evidence on record sufficiently establishes that the accused solicited the victim to come along with him on the pretext that her father met with an accident. The evidence of PW7 Sudha Umare, teacher of the victim , PW8 brother of the victim, the victim, and the father of the victim categorically stated about the act of the accused that he has taken her at various places from the lawful guardianship of her father. The ingredients of “taking” or “enticing” are dealt with by the Hon’ble Apex Court in the case of **S.Varadarajan vs. State of Madras**,

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**reported in reported in 1965 SC 942** 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 361 of the Indian Penal Code. It is further held that "taking" or "enticing" away a minor is an essential ingredient of the offence of kidnapping.

37. Thus, the evidence on record sufficiently shows that the victim was taken by the accused without knowledge of the parents and thus the prosecution established the offence under Section 363 of the IPC.

38. Now, let us examine the evidence of the victim and whether corroboration to the evidence of the victim is required.

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39. The victim categorically narrated about the incident that the accused met her teacher and disclosed that her father met with an accident and took her along with him. She was taken initially at Padoli. On her enquiry about her father, he informed that her father is admitted in hospital at Nagpur and she was brought at Nagpur. After repeated enquiry by her, he has not disclosed anything and took her at railway station and thereafter at Nandgaon in Chhattisgarh by train. He carried her from Nandgaon to Dhamtari at the house of his friend. The victim was insisting him to drop her at her house on which he brought her at Gundardehi and took her in ward No.15 in Chenganj locality at the house of one Sinha wherein he subjected her for forceful sexual assault and, thereafter, on multiple occasions. He again brought her at Durg and asked her to work in utensil shop and also threatened her not to disclose her identity else

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he will kill her. She was not having money or other source. He kept her at Durg about 6 months and, thereafter, brought her at Balod and Dhamtari wherein she was kept in the house of one Ravikant. He used to confine her in that house. He was caught committing theft in the house of one teacher and he was arrested. After his arrest, he asked her to go to the house of one Thakur and, therefore, she was residing at the house of said Thakur wherein her parents and police approached and took her back. During her cross examination, it came on record that her school is at a distance of 10-15 kilometers from her house. Native place of the accused is Balod. Her father's place is also Balod. She further admitted that her elder brother is also residing at Balod. Her grandfather is staying at about 2 kilometers away from the house of her elder brother. It specifically came on record that she did not know the house of her

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grandfather as well as her elder brother. Her cross examination further shows that when the accused visited the school, her younger brother was with him. There was no talk by her with her younger brother. She did not enquire from her younger brother about the news of the accident. At the relevant time, her younger brother was of 10 years. She enquired about her mother to the accused as well as brother and they both told her that she is in the hospital. It was further informed to her that her younger sister is at Balod. As to the incident, it was brought on record that the police did not seize her clothes. The police did not ask her to submit her school books and bag to corroborate that the accused took her from her school. Her school teacher verified and told her that the accident had taken place. She further stated that the accused told her that her father is in another village and in village Nandgaon she found that her father is not

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admitted there which raised doubt in her mind. She has made an attempt to inform the passengers that the accused forcibly taken her to Dhamtari, but she has not informed the same to the bus conductor and driver. She also informed a person by name Golu who was friend of the accused. Her cross examination further shows that she never saw Mr.Sinha in the house wherein she was kept by the accused at Gundardehi. There were houses near the house of said Sinha. Her cross examination also shows that when she was taken by the accused at Chhattisgarh, after 15 days, lock-down was imposed and due to the lock-down, movements were restricted from the house. She denied the suggestions that some boys were teasing her in the school and, therefore, she informed her mother and her mother called the accused and, therefore, he visited her school.

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40. The evidence of the father of the victim also shows that the accused who is his brother took the victim and kept her in Chhattisgarh. His evidence shows that the accused was arrested in case of theft and during enquiry with the accused it revealed that the victim is with him at Chhattisgarh. As already observed, the evidence of PW7 Sudha Umare, teacher of the victim, also shows that the victim was taken by the accused from the school on the pretext that her father met with an accident. PW8 brother of the victim also deposed that the accused has taken the victim along with him.

41. Besides the oral evidence of the victim, the prosecution placed reliance on the medical evidence and PW4 Dr.Ananya Dixit was examine vide Exh.33 who testified that on 15.6.2021 she received requisition for examination of the victim. The victim has narrated the history. The hymen of the victim was ruptured. Her over

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all finding was consistent that there was a possibility of sexual intercourse with the victim. Accordingly, she issued certificate Exh.37. During cross examination, she admitted that during history, the victim stated that due to the physical abuse to her mother by her father, she wanted to escape from her house. She expressed her willingness to run away with the brother of her father and accordingly they eloped from the school. There was a sexual relationship without her consent from 5.3.2020 for further six months. She was physically abused and threatened. She further admitted that if a female accustomed of masturbabation or by any object, such type of rupture of hymen can be occurred. Thus, from her evidence, an attempt is made that she herself joined the company of the accused and thereafter there was a physical relationship.

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42. PW5 Sikandar Jabbar Khan, acted as pancha on seizure, testified that in his presence birth certificate of the victim was seized. Along with the police and father of the victim, he had been to Sikripara at the house of Ravikant Yadav wherein the victim was found. His cross examination shows that he is not acquainted with the parents of the victim. Rest of the cross examination is in denial form.

43. PW9 Bhadu Awale, is another pancha in whose presence the samples of the victim and the accused were seized. The seizure panchanamas are at Exhs.54 and 55.

44. PW10 Dadara Talvekar and PW11 Chanda Dandwate are investigating officers. Their evidence is as regards the investigation carried out by them.

PW10 Dadarao Talvekar has stated about various panchanamas he has drawn. His evidence also shows that

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after 15 days of the incident, due to corona, lock-down was imposed. He also admitted that he could not visit Balod village of the accused due to restrictions. He further admitted that due to lock-down, individual could not go from one place to another. He also admitted that he read the history given by the victim to Medical Officer.

PW11 Chanda Dandwate, narrated about the investigation carried out by him. His cross examination shows that he proved the omissions that the victim has not stated that whenever she used to go outside, she used to put lock on the entrance gate of the house. She has also not stated, while recording her statement, that she requested the accused to drop her in the house. The informant has also not stated as to birth date of the victim.

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Thus, on the basis of this cross examination, attempt was made to show that material omissions were there which affect the prosecution case and, therefore, the evidence of the victim and the entire prosecution case are to be thrown out.

45. On appreciation of the evidence, the question is, whether testimony of the victim can be relied upon for basing conviction.

46. The Hon'ble Apex Court in the case of **Radhey Shyam vs. State of Rajasthan**, reported in (2014)5 SCC 389 has laid down the law regarding appreciation of evidence of child witness. Paragraph No.12 of the said judgment reads as under:

“12. In **Panchhi and ors, National Commission for Women vs. State of UP and ors**, AIR 1998 SUPREME COURT 2726, after reiterating the same principles, this Court

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observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy pray to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence.

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If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles.

47. The victim as seen from her evidence appearing to be the witness on the actual incident. It is not defence of the accused that she is tutored witness. Even there is no suggestion that she is tutored witness. As a rule of prudence, let us find out whether the evidence of the victim is corroborated by other evidence. Admittedly, at the time of the incident, the victim was aged about 13 years and her age is proved by the prosecution. The victim has disclosed the incident to the friend of the accused. Even, if it is accepted that she went along with the accused, as per the history narrated by her, her consent is not relevant as she was below 18 years of age

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at the time of the incident. Whereas, the accused who is her uncle has attained the age of maturity. Even, if the evidence of the prosecution is accepted, that she joined the company of the accused, her evidence as to the sexual assault by the accused against her consent is consistent. It is not only corroborated by her father, brother, and school teacher on the aspect that she was taken by the accused on a pretext that her father met with an accident, but also it is corroborated by the medical evidence i.e. the evidence of PW4 Dr.Ananya Dixit who specifically stated that history was narrated before her that the victim was subjected for the sexual assault by the accused against her consent and continued for 6 months. Admittedly, she has exaggerated the version as to the fact that she was taken by the accused at various places. Generally, oral testimony in this context may be classified into three categories, namely (1) wholly reliable; (2)

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Wholly unreliable, and (3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way. It may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation.

In the second category, the court, equally has no difficulty in coming to its conclusion.

It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

48. The cross examination of the victim and the investigation officer shows that the victim has exaggerated the version that she was taken by the

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accused at various places. The evidence further shows that there were restrictions on the movements of public due to covid pandemic, but the evidence that she was taken by the accused from the school and she was subjected for sexual assault is not shattered during the cross examination.

49. It is well settled that the maxim "*falsus in uno, falsus in omnibus*" (false in one thing, false in every thing) is neither a sound rule of law nor a rule of practice. It is inapplicable to criminal cases in India, as witnesses may be partly truthful and partly false in their evidence. Many a time, evidence of any witness shows contents of untruth or some exaggeration or embellishment. This many a time happens due to fear in the mind of the witnesses that their testimony may be rejected. The court should not disbelieve evidence of such witnesses altogether if they are otherwise trustworthy.

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Discrepancies in depositions of witnesses are always there. Discrepancies caused due to normal error of observation, normally error of memory due to lapse of time, due to mental disposition, impaired mental faculty, due to impact or shock caused due to incident needs to be ignored. It is well settled that the prosecution case would fail only where inconsistencies in it goes to the root of the case, otherwise, the court has to sift truth from falsehood by culling out negate of truth from evidence of witnesses examined by the prosecution. If such exercise is possible, their evidence cannot be discarded wholly. At the most inconsistent part of the version of the witnesses may be discarded and rest of the testimony is to be accepted.

50. In the light of the above proposition, if the evidence of the victim is considered, the fact that the victim was taken by the accused and kept away from lawful guardianship of her parents and subjected for the

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forceful sexual assault is established by the prosecution. It is vehemently submitted that there were no injuries on the person of the victim.

51. It is now well settled that absence of the injuries on the person of the prosecutrix does not lead to any inference that the accused has not committed forcible sexual intercourse on the victim. Absence of mark of injuries on the person of the victim cannot be adopted as formula to disbelieve the version of the victim. It will all depend on the facts and circumstances of each case. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any

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injuries or that she had offered no resistance at the time of commission of the crime.

52. In **State of Tamil Nadu vs. Ravi @ Nehru, reported in 2006 (10) SCC 534** the Hon'ble Apex Court ruled that "rape" is crime and not a medical condition. "Rape" is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the "rape" has occurred or not is a legal conclusion, not a medical one. That is the reason why, even the opinion of the doctor that there was no evidence of sexual intercourse or rape is at times held to be not sufficient to disbelieve the accusation of the rape by victim.

53. In the light of the above discussion, in the present case, allegations made by the victim are against her

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uncle. There is no reason for false implication. Though it was suggested that the victim herself went along with the accused, the evidence is contrary which shows that it was the accused who has taken the victim on the pretext that her father met with an accident. The said fact is corroborated by PW7 Sudha Umare, teacher of the victim at the relevant time, with whose permission the accused has taken the victim. There is no other reason brought on record showing any motive for the victim or her parents to implicate the accused.

54. Though learned counsel for the accused placed reliance on the decisions in the cases of **Pramod Dattatraya Jadhav vs. The State of Maharashtra** *supra* and **Ravi Anandrao Gulpude vs. State of Maharashtra** *supra*, as the facts are not identical, the same decisions are not helpful to the defence.

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55. The another ground raised by learned counsel for the accused is that the statement of the accused under Section 313 of the CrPC is not recorded in his language.

56. Admittedly, on recording the statement of the accused, the accused has not raised grievance that any prejudice is caused to him as to the recording of statement and he is not acquainted with Marathi language.

57. It is well settled that It is ideal and proper and always desirable to prepare the questions to be put to the accused in a language in which the accused is well versed.

58. Here, in the present case, the accused hails from Maharashtra. He never made a grievance that he is unable to understand the Marathi language. What is essential is that the accused shall clearly understand the questions put to him so that he could give proper

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answers. The presiding officer has certified at the bottom of the record of examination that questions were asked and explained in language Marathi to the accused and he understood those question and in his presence its answers were written as per his say. Thereafter, the accused has signed on it. The very purpose of introducing Section 313 of the CrPC in the Scheme of criminal trial is to afford an opportunity to the accused personally and that too without administering any oath to explain circumstances appearing against him/her during the trial. The questioning need not be confined to alone, since the law states the words any circumstance. Thus, incriminating circumstance is to be put to the accused.

59. Learned counsel for the accused placed reliance on the decision in the case decision of **Surjit Biswas vs. State of Assam** *supra* wherein also it is held that the purpose of examining the accused person under Section 313 of the

CrPC, is to meet the requirement of the principles of natural justice. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him.

60. Learned Additional Public Prosecutor for the State placed reliance on the decision in the case of **Shobhit Chamar and anr vs. State of Bihar, reported in AIR 1998 SC 1693** wherein the Hon'ble Apex Court held that The examination by the Sessions Judge of the appellants was perfunctory. Every error or omission in complying with Section 342 does not vitiate the trial. It is further held that the challenge to the conviction based on non compliance of Section 313 of the Cr.P.C. first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them.

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61. In the present case, as mentioned earlier, the incriminating evidence is put and explained to the accused to which he answered and not made grievance that any prejudice has been caused to him and, therefore, the ground raised by the accused is not sustainable.

62. The defence has not disputed the fact that the victim was along with the accused. Only defence taken is that she herself went along with the accused. Admittedly, history was given by her to the Medical Officer that she went along with the accused. But, she specifically stated during history also that she was subjected for the sexual assault by the accused against her consent. At the relevant time, the victim was only 13 years of age. Her consent admittedly was not relevant. On multiple occasions, she was subjected for the sexual assault. Nothing is on record to show that the victim has any ulterior motive to implicate the accused in the false case.

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The accused who is in authoritative position being uncle of the victim was under obligation to protect the victim. However, he betrayed the trust of the victim and subjected her for forceful sexual assault. The basic principles of criminal jurisprudence is that the prosecution must establish the guilt of the accused by cogent and reliable evidence and burden always rests on the prosecution to prove guilt beyond all reasonable doubts. The same principles is applicable to the cases of sexual offences against persons of tender age. After applying all tests, nothing is on record to show that there was any ulterior motive to implicate the accused falsely. The evidence of the victim is inspiring confidence and also corroborated by other evidence.

63. After re-appreciating the entire evidence, it reveals that the victim who is real niece of the accused was subjected for sexual assault by him. He has betrayed the

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trust of the small child. Learned Judge of the trial court has appreciated all these aspects and considering the evidence on record rightly convicted the accused.

64. In the light of the foregoing discussion, no infirmity can be found in the judgment impugned in the appeal.

65. In view of the amendment by Act of 22 of 2018 w.e.f. 21.4.2018 in Sub-section (3) of Section 376(2) of the IPC, it shall not be less than 20 years if the victim is below 16 years of age, but which may extend to imprisonment for life which shall mean imprisonment of the remainder of that person natural life and shall also be liable to fine.

66. In view of the above, the appeal being devoid of merits is liable to be dismissed and the same is **dismissed**.

67. Fees of learned counsel Shri S.S.Das appointed for the accused and learned counsel Ms.Apurva Kolhe

appointed for the victim be quantified and the same be paid to them as per rules.

Appeal stands **disposed of**.

**(URMILA JOSHI-PHALKE, J.)**

!! BrWankhede !!