



Judgment

428 apeal268.23

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

CRIMINAL APPEAL NO.268 OF 2023

Subhash s/o Devnath Bhovate,
aged about 25 years, occupation: labour,
r/o Kilewada, tahsil Pauni, district -
Bhandara. **Appellant.**

:: VERSUS ::

1. State of Maharashtra,
through PSO, Adyal, Bhandara.

2. XYZ (victim) in Crime No.182/2021,
registered at PSO Adyal, Bhandara. **Respondents.**

Shri M.V.Rai, Counsel for the Appellant.

**Shri M.J.Khan, Additional Public Prosecutor for the
Respondent/State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 17/06/2025

PRONOUNCED ON : 10/07/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 3.4.2023 passed
by learned Additional Sessions Judge, (Special Judge,

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POCSO), Bhandara (learned Judge of the trial court) in Special Case (Child Protection) No.115/2021.

2. By the said judgment impugned in the appeal, the accused is convicted for offences under Sections 363 and 376(2)(n) of the Indian Penal Code and under Sections 4 and 6 of The Protection of Children from Sexual Offences Act, 2012 (POCSO).

For offence under Section 363 of the IPC, he is sentenced to undergo rigorous imprisonment for 1 year and to pay fine Rs.500/-, in default, to undergo further simple imprisonment for 1 month.

For offence under Section 4 of the POCSO Act, he is sentenced to undergo rigorous imprisonment for 10 years and to pay fine Rs.1000/-, in default, to undergo further simple imprisonment for 2 months.

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For offence under Section 6 of the POCSO Act, he was sentenced to undergo rigorous imprisonment for 20 years and to pay fine Rs.3000/-, in default, to undergo further simple imprisonment for 3 months.

Learned Judge of the trial court directed that all sentences shall run concurrently.

3. Brief facts for disposal of the appeal are as under:

Father of the victim girl on 26.9.2021 lodged an oral report alleging that his daughter, the victim girl, aged about 17 years, is studying in Std.12th at Adyal . On 23.9.2021, she left house at about 6:30 am on a pretext of attending school on her bicycle and did not return, till evening. On taking due search, she was not found and, therefore, suspected that she had been kidnapped by some unknown person and lodged the report at police station.

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4. On the basis of the said report, the police registered the crime, initially under Section 363 of the IPC. During investigation, search of the victim girl was taken and she was found at Veltur with the accused and they were brought to the police station.

The statement of the victim girl was recorded and she disclosed that the accused expressed that “he loves her”. On 22.9.2021, the accused communicated with the victim girl and called her at the bus stop along with documents and by luring her that he would perform marriage with her took her at Bhandara by bus. At Bhandara, they resided till 28.9.2021 and during this period, he subjected her for physical relationship against her will and desire. Thereafter, she was taken to Mandhal and, thereafter, to Veltur and subjected her for forceful sexual assault though he was knowing that the victim girl is below 18 years of age.

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On the basis of the said statement, the crime was registered under Section 376(2)(n) of the IPC and under Sections 4 and 6 of the POCSO Act.

The investigating officer visited the alleged spot of the incident and has drawn spot panchanama. After completion of the investigation, he submitted chargesheet against the accused.

5. Learned Judge of the trial court framed charge vide Exh.7. The contents of the charge are read over to the accused to which he pleaded not guilty and claimed to be tried.

6. In support of the prosecution case, the prosecution examined as many as 10 witnesses, which are as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	The victim girl	15

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2	The father of the victim girl	19
3	Pramod Meshram, pancha on spot panchanama	25
4	Avinash Gosavi, pancha on various panchanamas	28
5	Sunil Jibhkate	37
6	Prakash Talmale	41
7	Gauri Uikey, investigating officer	43
8	Harsha Mandhre, police constable	44
9	Sushant Patil, investigating officer	45
10	Nisha Bhavsar, medical officer	61

7. Besides the oral evidence, the prosecution placed reliance on birth certificate Exh.16, report Exh.19, FIR Exh.20, spot panchanama Exh.21, another spot panchanama Exh.31, blood sample seizure memo of the victim girl Exh.33, clothes seizure memo of the victim girl Exh.34, clothes seizure memo of the accused Exh.35, sample seizure memo of accused Exh.36, medical certificate of the accused Exh.39, requisition letter to

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Chemical Analyzer Exh.51, requisition letter to the Medical Officer Exh.62, and medical certificate Exh.63.

8. 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 regarding the evidence appearing against him by recording his statement under Section 313 of the CrPC to which he denied all allegations.

9. After appreciation of the evidence, learned Judge of the trial court came to conclusion that at the time of the incident, the victim girl was below 18 years of age and was subjected for forceful sexual assault and thereby the accused committed an offence as alleged.

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10. Heard learned counsel Shri M.V.Rai for the accused and learned Additional Public Prosecutor Shri M.J.Khan for the State. They took me through the entire evidence on record.

11. Learned counsel for the accused submitted that there was love affair between the accused and the victim girl and out of the love affair, the victim girl went along with the accused. They stayed together at various places. The victim girl travelled by public transport and did not make any grievance to anybody as to the force used on her. He submitted that she resided in a rented premises in a residential locality wherein also the victim girl was having an opportunity to disclose her grievances as to the forceful sexual assault, but she has not made any such grievances. In fact, the evidence on record shows that she was waiting at the bus stop. The accused kept her at the bus stop, went to his home, and again

came back and, thereafter, went along with her to Bhandara by bus. Thus, after having a sufficient opportunity, she did not flee away from the spot of the incident which creates a doubt as to the entire version of the prosecution. In view of that, the judgment and order of conviction impugned in the appeal deserves to be quashed and set aside.

He further submitted that the age of the victim is also not proved by the prosecution. It was the victim girl who joined the company of the accused on her own and, thereafter, travelled along with him at various places and not made any complaint which create a doubt about the prosecution case.

12. Per contra, learned Additional Public Prosecutor for the State submitted that the victim girl was below 18 years of age. The evidence of the victim girl discloses

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her date of birth as 12.11.2004. Thus, at the time of the incident she was 16 years and 9 months old. Her evidence further shows that the accused was unknown to her. He made telephonic call to her and called her at the bus stop and, thereafter, took her at various places and subjected her for the forceful sexual assault. As she is below 18 years of age, her consent is not relevant.

The evidence of the victim and the medical evidence sufficiently show that the victim was subjected for the forceful sexual assault.

Thus, there is a sufficient evidence on record to show involvement of the accused.

As far as “consent” of the victim girl is concerned, the same is not relevant.

In view of that, the appeal being devoid of merits is liable to be dismissed.

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13. The accused is facing charge of offence under Section 363 of the IPC that the victim girl was taken by him from lawful custody of her parents without their consent.

14. To prove the said allegation, the prosecution mainly placed reliance on the evidence of the PW1 victim. As per her evidence, she was born on 12.11.2004 and in the year 2021 she was studying in 12th Std.. She was also possessing a mobile phone. In September 2021, she received a phone call of an unknown person who disclosed his name as Subhash Bhovte and also expressed that he is having feelings for her. On 21.9.2021, at about 11:30 to 12:00 pm, when she was waiting for bus at the bus stop to return home, the accused approached her, introduced himself, and expressed his feelings. However, she did not respond to him. On 22.9.2021, she received a phone call of the

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accused who expressed his feelings and also disclosed to her that he wants to perform marriage with her and called her along with documents at the bus stop. Accordingly, on 23.9.2021, on a pretext of attending the school, she went at the bus stop. The accused met her at the bus stop by informing her that he will bring money from his friends and he left the bus stop asking her to wait there. She was at the bus stop, till 2:00 pm and, thereafter, the accused brought her by bus at Bhandara wherein they stayed at a room of his friend, wherein, on the promise of marriage, he subjected her for the forceful sexual assault. She stayed at the said place for 3 days. Thereafter, the accused brought her at Veltur, at his counsin's house by bus, wherein also they resided there for three days and subjected her for the forceful sexual assault and on 4.10.2021 the police approached to her and brought her at the police station.

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15. The cross examination of the victim girl shows that she is unable to tell her mobile number. She is unable to tell on which date she received the phone call and from whom. She deposed that as narrated by the police, she has deposed. She is aware that, prior to marriage, having physical relationship, is wrong.

16. The defence of the accused is that there was one sided love affair of the victim girl and out of the same love affair she joined his company

17. To prove the offence under section 363 of the IPC, the prosecution has also examined PW2 the father of the victim girl, who testified that on 23.9.2021, his daughter left the house on a pretext of attending school and did not return back to home. On 4.10.201, she was found and she gave her statement. Accordingly, the accused was arrested.

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His cross examination shows that the victim disclosed to him that she was taken at Kalewada. He also admitted that on 23.9.2011 the accused called her at bus stop and, thereafter, they went at Bhandara.

18. Thus, the cross examination of the victim girl and the father of the victim girl shows that as the accused called the victim girl, she went at the bus stop.

19. To prove the offence of the “kidnapping”, the prosecution mainly placed reliance on the evidence of the victim girl who narrated her birth date as 12.11.2004. As per her evidence, she received a phone call of the accused who called her at Adyal Bus Stop along with documents and, therefore, she went there. The accused expressed her that he loves her and asked her to come along with him and, therefore, she went along with him.

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The evidence of the father of the victim girl is only to the extent of birth date of the victim who narrated her birth date as 12.11.2024. He has lodged the report as the victim was not traced. His evidence shows that the victim girl disclosed to him that she went along with the accused as he took her.

The cross examination of the victim girl shows that she is unable to tell her mobile number. She is also unable to tell from whose mobile phone she received the phone call. As far as her birth date is concerned, the same is not challenged during the cross examination. Her birth certificate is at Exh.16 which also discloses her birth date as 12.11.2004.

20. On appreciating the evidence, it reveals that birth date of the victim is 12.11.2004 which remained unchallenged. Thus, on the date of the incident, her age

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was 16 years and 9 months. Her further evidence shows that as she received phone call of the accused, she went along with him. The evidence further reveals that she travelled along with him by public transport i.e. bus.

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

22. Section 7 of the said Act deals with appointment of Registrar 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.

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

24. 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 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 and Death 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

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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 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.

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25. 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.

26. 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.

27. 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.

28. The evidence of the victim girl shows that she went along with the accused as she received phone call of the accused at Adyal Bus Stop. The accused asked

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her to come along with him as he wants to perform marriage with her as he loves her. The evidence further shows that after she reached at the bus stand, the accused informed her that he does not have money and he will return back with money and asked her to stay at the bus stand. At 2:00 pm he returned at the bus stand and till then, she was waiting there. Thereafter, she along with the accused went at Bhandara by bus, and Bhandara to Veltur again by bus.

During her cross examination, she stated that she deposed as the police asked her to depose.

Thus, her evidence shows that as the accused called her, she went along with him.

29. It is pertinent to note that though the accused left her for some time at the bus stand and she was having an opportunity to return to her home, she did not return

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and was waiting for him. She travelled along with him by public transport, but she has not made any complaint against him that he is taking her without consent of her parents.

30. As far as “taking” or “enticing” is concerned, the same is an essential ingredient of the offence of “kidnapping”.

31. For the purpose of proving the offence under Section 366 of the IPC, material required to be established is that minor is taken with an intent to marry against her will or to force her or seduce her for illicit intercourse.

32. 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, reported in reported in AIR 1965 SC 942** wherein it is held that there is a

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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. Where the minor alleged to have been 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, the accused cannot 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

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participation by him in the formation of the intention of the minor to leave the house of the guardian.”

33. From the evidence on record, it reveals that it was the victim who joined the company of the accused and travelled along with him at various places and not made any grievances, which sufficiently show that the victim voluntarily joined the company of the accused. Thus, the prosecution failed to prove the offence of “kidnapping”.

34. The accused is also facing the charge that he took the victim girl along with him and on the promise of marriage subjected her for the forceful sexual assault.

As already observed that as far as “taking” is concerned, it was the victim who joined the company of the accused and, therefore, the said allegation is not substantiated by any material evidence.

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35. Now, let us come to the another aspect as to that whether the victim girl was subjected for the forceful sexual assault by the accused.

36. Admittedly, the victim girl went along with the accused by public transport at Bhandara and from Bhandara to Veltur. She resided in a residential premises i.e. at the house of the friend of the accused at Bhandara.

Her cross examination shows that when they reached at the room of friend of the accused, he was present. Admittedly, she has not disclosed anything to the friend of the accused and stayed there for three days. Thereafter, she was brought at Veltur at the house of the cousin of the accused by bus. Though she alleged that, at Bhandara, she was subjected for the forceful sexual assault by the accused, while travelling in the

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public transport, though she was having an opportunity, she has not disclosed the said fact to anybody. She resided at the cousin brother of the accused with the accused for three days. Thereafter, she was brought at Mandhal wherein also she resided for three days and returned to Veltur. Her cross examination specifically shows that the police disclosed to her that she has to depose as per statement. She also admitted that she was aware about the fact that keeping physical relationship with anybody prior to marriage is wrong.

The defence of the accused was that she was having one sided love affair with him and she was insisting him for marriage, but he denied and, therefore, this false report is lodged.

37. To corroborate the version of the victim, the prosecution examined the father of the victim who

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stated that the victim disclosed to him that on the promise of the marriage, the accused took her and subjected her for the forceful sexual assault. Though he is cross examined, nothing came on record.

38. PW10 Dr.Nisha Bhavsar, is the medical officer who examined the victim on 5.10.2021. The requisition addressed to the medical officer is at Exh.62. History narrated by her is also written down. As per the history given by the victim, on 23.9.2021, at about 7:00 am, she went to Adyal Bus Stop and met the accused. Later on, they went to Chandni Chowk, Bhandara and stayed there for two days and came at Kuhi where they stayed for three days and, thereafter, at Veltur. On her examination, the medical officer found that hymen was open. She obtained her blood sample and accordingly issued medical certificate Exh.63. The medical officer admitted during cross examination that she was told by

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the victim girl as to history and, therefore, she opined that sexual intercourse took place with the victim girl. She did not notice any injury on the body of the victim girl or at her private part. She further admitted that the chastity of unmarried girl can be determined by the medical examination. She further admitted that hymen open can be noticed by so many reasons. Hymen open and hymen torn both are different. Thus, the medical evidence shows that on medical examination, the medical officer found the hymen was open. She specifically admitted that there can be many reasons for opening of hymen. In a history given to the medical officer, the victim nowhere stated that on the promise of marriage the accused took her and subjected her for the forceful sexual assault though she denied for the same. On the contrary, history given to the medical officer shows that she met the accused at bus stop and from the

bus stop they went to Bhandara, Bhandara to Kuhi, and Kuhi to Veltur.

39. PW5 Dr.Sunil Jibhkate, is the another Medical Officer, who examined the accused and collected his samples. As per his evidence, the accused is capable of having physical relationship. His cross examination shows that the police naratted him the nature of the offence for which the accused was brought about the incident.

40. PW3 Pramod Meshram and PW4 Avinash Gosavi, acted as panchas on spot panchanamas and various seizure memos. The said seizure memos are regarding blood samples and clothes' seizures of the victim and the accused.

41. PW6 Prakash Talmale and PW7 Gauri Uikey and PW9 Sushant Patil are investigating officer who narrated

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about the investigation carried out by them. PW8 Harsha Mandhre is the police constable who took the victim for medical examination in the hospital.

42. On appreciation of the evidence, question is, whether testimony of the victim girl can be relied to base conviction. The victim girl, as seen from her evidence, is the only witness as to the actual incident.

43. As a rule of prudence, let us find out whether the evidence of the victim girl is corroborated by other evidence.

44. Admittedly, at the time of the incident, the victim girl was aged about 16 years and 9 months and her age is proved by the prosecution. As per the history narrated by her to the medical officer, she went at bus stand where she met the accused and she went along with him and there was physical relationship between

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them. Admittedly, her evidence shows that she travelled along with the accused by public transport at various places.

45. Generally, oral testimony in this context may be classified into three categories, namely (1) wholly reliable; (2) 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

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in material particulars by reliable testimony, direct or circumstantial.

46. The cross examination of the victim girl shows that she was asked to depose as per her statement by the police and accordingly she deposed before the court. She further admitted that she is aware of the fact that before the marriage keeping physical relationship is wrong.

47. To corroborate the version of the prosecution, the prosecution mainly placed reliance on the evidence of PW10 Dr.Nisha Bhavsar. As per her evidence, the victim has narrated history that she went along with the accused and stayed with him at Kuhi, Bhandara, and later on at Veltur where the police came and brought her at the police station. The medical certificate Exh.63 wherein history is mentioned nowhere discloses that she

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was subjected for the forceful sexual assault by the accused. The medical officer further admitted that there are many reasons behind opening of the hymen. She further admitted that opening of hymen and hymen torn both are different.

48. Thus, the deposition of the victim that she was subjected for the forceful sexual assault is not substantiated by the medical evidence. There is no dispute as to legal position that the injuries are not *sine qua non* for establishing the offence of rape. It is also true that the rape is not an medical term but it is a legal term.

49. The law on the point of “rape” is well settled 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

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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.

50. At the same time, it is also well settled that the testimony of the victim stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the victim inspires confidence and appears to be credible.

51. Perusal of the testimony of the victim itself would reveal that she had gone with the accused on her own. She stayed along with the accused at various places including friend’s house at Bhandara and at the house of relative at Veltur. The houses are situated in a residential locality. Though, she was previously, as per her evidence, was not acquainted with the accused, she

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went along with him, stayed with him and though she was subjected for the forceful sexual assault, has not made a grievance against the accused though she was having an opportunity. She also nowhere disclosed before the medical officer to whom she narrated the history that she was subjected for the sexual assault, which raises the doubt about occurrence of the incident.

It is true that the sole testimony of the victim is sufficient to warrant conviction against the accused if it inspires confidence.

52. Considering the entire evidence on record, it is difficult to accept the evidence adduced by the victim. There is no corroboration which is required as the evidence of the victim falls short to repose the confidence in her. The medical evidence is also not supporting as far as the sexual activity is concerned.

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53. In view of the above evidence on record, the same is not sufficient to hold that the victim was subjected for the forceful sexual assault.

54. The presumption under Section 29 of the POCSO is available only when foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 of the POCSO Act deals with punishment for punishment for aggravated penetrative sexual assault.

55. Section 3 of the POCSO Act defines what penetrative sexual assault is.

56. The presumption under Section 29 of the POCSO Act is not an absolute presumption. It is rebuttable presumption. The presumption figures only when foundational facts are established by the prosecution

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beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution and thereby support the very foundation of the case of the prosecution *vis a vis* the charge against the accused has been shaken. Therefore, presumption under Section 29 of the POCSO Act would not get automatically triggered.

57. In the present case, the conduct of the victim shows that she on her own went along with the accused, stayed with him, not made her grievances, though she was having an opportunity, as she travelled by the public transport, when her admission during cross shows that she is aware that having physical relationship before the marriage is wrong. The medical evidence is only to the extent of opening of hymen for which there are several reasons. While narrating the history, she has not narrated about the sexual assault on her. Though her clothes were seized and forwarded to the analysis,

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neither blood nor semen was detected on the said clothes as per the Chemical Analyzer's Report. Some blood stains are found on Article-2 leggings and Article-4 nicker, but the evidence of the medical officer shows that at the time of her examination she was in her menstruation.

58. All above these facts sufficiently show that the prosecution failed to establish the charges against the accused beyond reasonable doubt.

59. After re-appreciating the entire evidence, it reveals that the evidence of the victim falls short to inspire confidence. It is not corroborated either by the medical evidence or by the chemical analysis. The evidence of the father of the victim is only to the extent of disclosure of the victim about the incident. She has not narrated about the sexual assault before the medical

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officer and there is no independent corroboration even to the fact that she stayed along with the accused at his friend's house in his absence or at the relative's house in their absence. Thus, involvement of the accused in the above said crime, as far as allegation about sexual assault is concerned, appears to be doubtful. The evidence is consistent with the hypothesis of the innocence of the accused.

60. In this view of the matter, I proceed to pass following order:

ORDER

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

(2) The judgment and order dated 3.4.2023 passed by learned Additional Sessions Judge, (Special Judge, POCSO), Bhandara in Special Case (Child Protection) No.115/2021 is hereby quashed and set aside.

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(3) The accused is acquitted of offences for which he is convicted and sentenced.

(4) The accused shall be released from the jail forthwith, if he is not required in any other crime.

(5) The Bail Bonds of the accused stand cancelled.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!