



Judgment

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

CRIMINAL APPEAL NO.334 OF 2023

Ajaj Ahmad Jitullah Iraki,
age – 21 years, occupation – private,
r/o at – house No.2277/38,
Garib Nawaz Nagar, near
Shitala Mata Mandir, Nagpur. **Appellant.**

:: VERSUS ::

1. State of Maharashtra,
through the officer-in-charge,
Police Station Lakadganj, tahsil-
Nagpur, district – Nagpur.

2. Victim XYZ,
Crime No.68/2022,
P.S.Lakadganj, Nagpur. **Respondents.**

Mrs.Meena Hiwase, Counsel for the Appellant.
Mrs.Swati Kolhe, Additional Public Prosecutor for the
Respondent No.1/State.
Ms.F.N.Haidari, Counsel Appointed for Respondent No.2/
Victim.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 04/03/2025

PRONOUNCED ON : 07/04/2025

JUDGMENT

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1. By this appeal, the appellant (the accused) has challenged judgment and order dated 28.3.2023 passed by learned Extra Joint District Judge and Additional Sessions Judge, Nagpur (learned Judge of the trial court) in Special (POCSO) Case No.155/2022.

2. By the said judgment impugned, the accused is convicted for offence under Section 376(3) of the IPC and and sentenced to undergo rigorous imprisonment for 20 years and to pay fine Rs.5000/-, in default, to undergo rigorous imprisonment for two months.

3. Brief facts of the prosecution can be summarized as follows:

The victim girl aged about 14 years is adopted daughter of the informant as she was taken in adoption in the year 2015 and her date of birth is 20.12.2008. At the relevant time, the victim girl was studying in 9th Std. in

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Vidya Niketan Shala, Nagpur. On 3.2.2022, at about 11:30 am, the informant had gone to Itwari Post Office and Bank and her husband left the house to attend the office. The victim girl was only present at the home. At about 3:00 pm, when the informant returned back to home, she found that the victim girl was not at home and, therefore she searched for her, but she could not trace her. Therefore, she lodged a missing report at Lakadganj Police Station against unknown persons. Initially, the offence was registered under Section 363 of the IPC. The victim girl was traced from her mobile location and it was revealed that she proceeded to Mumbai. Finally, she found at Mumbai by Mumbai Police along with the accused. The victim girl and the accused are brought to Nagpur. On recording her statement and on her medical examination, involvement of the accused was found in sexual assault. Accordingly, the offence was registered

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under Sections 376(3) and 376(2)(i) of the IPC and 4 of The Protection of Children from Sexual Offences Act, 2012 (the POCSO Act). After completion of the investigation, the chargesheet was submitted against the accused.

4. Learned Judge below framed charge vide Exh.2 which was modified vide Exh.51. In support of the prosecution case, the prosecution has examined in all 7 witnesses namely :

PW Nos.	Names of Witnesses	Exh. Nos.
1	The mother of the victim girl	4
2	The victim girl	12
3	Nilkanth Pandharinath Larokar, pancha on spot panchanama and memorandum statement of the accused	15
4	Dr.Trupti Wankhede, Medical Officer	19
5	Dr.Atikukar Khan, on age proof	27
6	Rita Meshram	33
7	Disha Patil	34

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5. Besides the oral evidence, the prosecution placed reliance on report Exh.5, FIR Exh.6, letter written by the the victim girl Exh.9, statement of the informant under Section 164 Exh.11, memorandum statement of the accused Exh.16, spot panchanama Exh.17, medical certificate Exh.13, letter to the Medical Officer Exh.20, spot panchanama Exh.24, birth extract Exh.28, birth certificate Exh.29, general diary entry Exh.35, letter to the Medical Officer Exh.36, property seizure Exh.41, arrest panchanama Exh.43, property seizure memo Exh.44, letter to CA Exh.45, and sexual assault report Exh.47.

6. On the basis of the said oral as well as documentary evidence, the prosecution claimed that it has established the case against the accused.

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7. The defence of the accused is of total denial and of false implication. All the incriminating evidence was put to the accused in order to obtain explanation regarding the evidence appearing against him.

8. After hearing both the sides and perusing of the evidence and appreciating the same, learned Judge of the trial court held the accused guilty as the aforesaid.

9. Heard learned counsel Mrs.Meena Hiwase for the accused, learned Additional Public Prosecutor Mrs.Swati Kolhe for the State, and learned counsel Ms.F.N.Haidari appointed for the victim. They have taken me through the entire record and proceedings of the case.

10. Learned counsel for the accused submitted that the accused is prosecuted of the offence under Section 4 of the POCSO Act. However, the age of the victim girl is not proved. There is no cogent and reliable evidence as to the

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age of the victim girl. The evidence of PW5 Dr.Atikukar Khan shows that as per the order of the District Judge, Nagpur, the entry of birth was taken. As the exact information as to her age was not with the investigating agency, it was obligatory on the part of the investigating officer to refer her for ossification test which is not carried out. Thus, the evidence adduced by the prosecution is not sufficient to prove the age of the victim girl. She further submitted that as per the evidence of the victim girl, it was she who left her parents house by calling the accused and went along with him. Therefore, ingredients of Section 363 of the IPC are also not established. As to the physical relationship, only one incident is narrated by her and her evidence is vague as to the sexual assault by the accused on her. She is unable to tell the details about the said incident. The medical report only shows that hymen was torn at 8 O'clock position and old tear. The

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victim girl further admitted during the cross examination that she was having love affair with the accused and as she was fed up with the quarrels between her parents, she left the house. Thus, the evidence shows that due to the love affair between her and the accused, she called the accused and joined his company. Thus, the prosecution failed to prove the charges against the accused, however learned Judge of the trial court has not considered the same and convicted the accused. In support of her contentions, she placed reliance on the decision in the case of **Ashik Ramjail Ansari vs. State of Maharashtra and anr, reported in 2023 SCC OnLine Bom 1390.**

11. *Per contra*, learned Additional Public Prosecutor for the State submitted that at the relevant time the victim girl was only 14 years of age and, therefore, her consent is not relevant. It was the accused who has taken her and prior to the incident of taking the victim girl, he had also

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developed physical relationship with the victim girl. The evidence of the victim girl corroborated by the medical evidence establishes the guilt of the accused and, therefore, no interference is called for.

12. Learned counsel for the victim girl endorsed the same contentions and submitted that the appeal is devoid of merits and liable to be dismissed.

13. The allegations against the accused is that he kidnapped the victim girl from lawful guardianship of her parents and also subjected her for sexual assault. As far as the offence of kidnapping is concerned, the prosecution has to establish that at the relevant time the victim girl was below 18 years of age and she was taken by the accused from lawful guardianship of her parents.

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14. Section 359 of the IPC deals with the offence of “kidnapping” which is of two types: kidnapping from India and kidnapping from lawful guardianship.

15. In view of Section 361 of the IPC, whoever takes or entices any minor 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.

16. Thus, the prosecution has to prove that the victim girl was below 18 years of age at the relevant time.

17. To prove the age, the prosecution mainly placed reliance on the evidence of PW1 the mother of the victim girl who disclosed that the birth of the victim girl is

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20.12.2008. The victim girl has also narrated her birth date as 20.12.2008.

18. PW5 Dr.Atikukar Khan, was serving as Medical Officer in Nagpur Municipal Corporation and having charge as Deputy Registrar Births and Deaths Registration Department. As per his evidence, as per the direction of the District Judge, Nagpur, in Criminal Application No.471/2015, the birth date of the victim girl was registered. Accordingly, the entry was taken on the basis of the order passed by the District Court. He has produced on record the birth registration extract Exh.28 and birth certificate Exh.29. During cross examination, also he admitted that the entry was taken as per the direction of the District Court, but exactly when the birth was occurred, he is unable to state.

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19. As far as the mother of the victim girl is concerned, she is not cross examined on the birth date of the victim girl. The victim girl is also not cross examined as to her birth date. Admittedly, the radiological examination of the victim girl was not carried out.

20. 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.

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

“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;

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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.

22. In the light of the above legal position, the birth entry taken by PW5 Dr.Atikukar Khan is merely on the basis of direction issued by the District Judge. The exact age of the victim girl was not brought on record by the prosecution. In the above circumstances, it was obligatory on the part of the investigating agency to carry out her radiological examination as the victim girl was below 14 years of age and was studying in 9th Std.. Therefore, matriculation certificate was not available.

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Her birth certificate or the entry in school wherein she was firstly admitted is also on the basis of direction given by the court.

23. Thus, when actually birth of the victim girl occurred was not evident from the record. Thus, the age of the victim girl is not proved by the prosecution.

24. Now, let us examine the evidence of the victim girl as to whether she was taken by the accused from the lawful guardianship of her parents.

25. Perusal of the evidence of the victim girl reveals that on 3.2.2022 she left the house and before leaving the house, she wrote a letter to her mother which is at Exh.9. In absence of her mother, she called the accused and the accused came by auto-rickshaw and, therefore, she left with the accused and proceeded towards Mumbai. Her cross examination shows that there used to be frequent

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quarrels between the parents and, therefore, she was fed up and she went along with the accused on her own. The accused came along with her to assist her. She specifically admitted during cross examination that the accused has not subjected for sexual assault when she proceeded with him at Mumbai. Thus, the evidence of the the victim girl shows that it was she who called the accused and joined his company by leaving the house on her own. The letter written by her also shows that as she was fed up with the frequent quarrel between her parents, she is leaving the house.

26. To prove the offence under Section 363 of the IPC, “taking” or “enticing” away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of “kidnapping”.

27. The definition of Section 361 of the IPC shows that “taking” or “enticing” away a minor out of the keeping of lawful guardian is of the offence of “kidnapping”. What amounts to “taking” is dealt with by the Hon’ble Apex Court in the case of **S.Varadrajan vs. State of Madras, reported in AIR 1965 SC 941** wherein it is held that when the victim girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is minor college student) herself telephoned to the accused to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord and the accused takes her to various places and ultimately to the Sub Registrar’s Office where they got an agreement to marry registered and there is no suggestion that this was done by force or blandishment or on the part of the accused but it is clear from the evidence that insistence of marriage came from

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her side. The accused by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. The fact of her accompanying the accused is quite consistent with her own desire. 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. 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 take her away from keeping of her lawful guardianship. Something more has to be shown in a case of this kind and that is some kind of inducement held out

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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.

28. In the light of the aforesaid legal position, if the evidence of the victim girl is appreciated, it shows that she has called the accused by making a telephone call and at her own she left the lawful guardian of her parents and joined the company of the accused. Thus, ingredient “taking” is not established by the prosecution.

29. The accused is further charged for the offence punishable under Section 376(2)(i) of the IPC. As per the allegations, in absence of the parents, the accused used to come to her house and by taking her at Koradi, subjected her for sexual assault. The evidence of the victim girl, as far as sexual assault is concerned, is not helpful to the prosecution to establish the charge. The only evidence

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available is of the victim girl who narrated the incident and deposed that once the accused has taken her at Koradi and subjected her for sexual assault, but the evidence is vague in nature as she has not narrated exactly when the alleged incident has taken place. She has not disclosed the said incident to anybody till recording of her statement. Her Chief Examination itself shows that the accused has shared his mobile number to her, she used to communicate with him and she fell in love with him. Her cross examination also shows that she herself has left the house and went along with the accused at Mumbai, but the accused had not developed any physical relationship with her when she was taken at Mumbai.

30. To corroborate the version, the prosecution has placed reliance on the evidence of PW4 Medical Officer Dr. Trupti Wankhede. As per the evidence, the victim girl

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was referred to her for medical examination on 23.2.2022. She examined the victim girl. The victim girl narrated history that she is having love affair with the accused and she had gone with him at Mumbai. She denied any history of any sexual relationship. On genital examination, she observed old healed hymen tear at 8:00 O'clock position and opined that possibility of sexual intercourse cannot be ruled out. During her cross examination, she admitted that hymen can be torn by any reason apart from sexual intercourse. She has given provisional opinion as to the sexual relationship.

31. PW3 Nilkanth Larokar, acted as pancha on spot panchanama and memorandum statement of the accused, has shown the spot of incident. Admittedly, the said spot panchanama was drawn after a long period of the alleged incident as exact date of incident is neither stated by the

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victim girl nor disclosed by the accused and no incriminating evidence is found at the spot panchanama.

32. The evidence of PW6 Rita Meshram shows that she had been to Mumbai to bring the victim girl at Nagpur as she was deputed by investigating officer.

33. The evidence of PW7 Disha Patil is also formal in nature.

34. Although it is true that in the case of “rape” conviction can be made on the sole testimony of the prosecution, as her evidence is in the nature of an injured witness, which is given a very high value, but when a person is to be convicted on the testimony of sole witness, the utmost care is to be taken and the testimony of such witness must inspire the confidence. It is true that in a “rape” case the accused could be convicted on the sole testimony of the victim, if it is capable of inspiring of

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confidence in the mind of the court. If the version given by the victim is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, court shall not act on the solitary evidence of the victim. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

35. Here, in the present case, the evidence of the victim girl narrates a single incident of sexual assault which is also vaguely stated by her. The evidence of the victim girl is not corroborated by independent material as far as the sexual assault is concerned.

36. Learned Additional Public Prosecutor for the State vehemently submitted that statutory presumption under Section 29 of the POCSO Act is absolute. The date of

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birth of the victim girl is duly proved and is indeed not challenged by the accused and the victim girl and, therefore, she is child within the meaning of Section 2(d) of the POCSO Act. Whereas, learned counsel for the accused submitted that contention of learned Additional Public Prosecutor for the State that statutory presumption under Section 29 of the POCSO Act which is absolute deserves to be rejected as the age of the victim girl is not established and to attract the presumption foundational facts are to be established. The statutory presumption under Section 29 of the POCSO Act must be understood and tested on the anvil of the golden thread which runs through the web of the criminal jurisprudence system in this country that an accused is presumed to be innocent till the guilt is conclusively established beyond reasonable doubt.

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37. In the present case, the evidence brought on record is insufficient to prove the offence of “kidnapping” as well as to prove the offence of “sexual assault”. Mere suspicion is not sufficient as it is not substitute of proof. There is difference between “might have committed” and “must have committed” as it has to be bridged by the prosecution by unimpeachable and inspiring evidence which is absent in the present case.

38. On appreciation of the evidence, benefit of doubt goes to the accused as the prosecution failed to establish the charges. 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 28.3.2023 passed by learned Extra Joint District Judge and Additional Sessions

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Judge, Nagpur in Special (POCSO) Case No.155/2022 is hereby quashed and set aside.

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

(4) The accused shall be released from the jail forthwith, unless his custody is required in any other case.

(5) Fees of learned counsel Ms.F.N.Haidari appointed for respondent No.2/victim be quantified and the same be paid to her as per rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!