



Judgment

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

CRIMINAL APPEAL NO.447 OF 2023

Gajanan s/o Shankar Tokse,
aged : 56 years, occupation : labour,
r/at Village – Neri, tahsil and district
Wardha.

..... **Appellant.**

:: VERSUS ::

1. State of Maharashtra,
Through PSO Sawangi (M), Tahsil and
District Wardha.

2. XYZ (victim) through her father in
Crime No.552/2020 registered PSO,
Sawangi, District Wardha.

..... **Respondents.**

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

**Shri C.A.Lokhande, Additional Public Prosecutor for the
State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 04/08/2025

PRONOUNCED ON : 04/09/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 21.6.2023 passed

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by learned Special Judge (POCSO Act), Wardha in Special (Ch.Act) C.No.6/2021.

2. By the said judgment impugned in the appeal, the accused is convicted for offence under Section 9(m) punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) and sentenced to suffer rigorous imprisonment for 5 years and to pay fine Rs.3000, in default, to suffer simple imprisonment for 3 months.

He is also convicted for offence punishable under Section 342 of the IPC and sentenced to suffer rigorous imprisonment for 6 months and to pay fine Rs.1000, in default, to suffer simple imprisonment for 15 days.

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

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The informant is the father of the victim who lodged report at Sawangi Meghe Police Station on 19.11.2020 alleging that on 19.11.2020, he along with his wife left the house for attending the work. His three daughters were at home. The victim, who is his daughter aged about 8 years old, disclosed to him that she was called by the accused at about 2:00 pm to 3:00 pm on the pretext of bringing biscuits and chocolates and shut the door of the house and attempted to disrobe her by paying her Rs.10/- and outraged her modesty. On the basis of the said report, the police registered the crime under Sections 354(B) and 342 of the IPC and under Sections 7 and 8 of the POCSO Act.

4. After registration of the crime, the investigating officer has visited the alleged spot of the incident and in presence of panchas drawn spot panchanama. The accused was arrested. The *bona fide* certificate of the

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victim was collected from her school. The birth certificate of the victim was also collected. After completion of the investigation, the investigating officer submitted chargesheet against the accused.

5. Learned Judge of the trial court framed the charge against the accused vide Exh.50. The contents of the charge are read over and explained to the accused. The accused denied the charges and claimed to be tried.

6. In support of the prosecution case, the prosecution has examined in all eight witnesses, as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	Gangadhar Nagrale, pancha on spot	20
2	Father of the victim	28
3	Archana Kombe, teacher	36
4	the victim	42
5	Mohd.Avej	46
6	Sister-in-law of the victim	51

7	Sister of the victim	53
8	Priti Ade, Investigating Officer	59

7. Besides the oral evidence, the prosecution placed reliance on requisition letter Exh.21, intimation letter Exh.22, spot panchanama Exh.23, report Exh.29, FIR Exh.30, letter Exh.37, *bona fide* certificate Exh.38, arrest panchanama Exh.60.

8. The entire incriminating evidence was put to the accused in order to obtain his explanation by recording his statement under Section 313 of the CrPC. The defence of the applicant was of false implication due to previous enmity.

9. After recording the evidence, learned Judge of the trial court held the accused guilty and convicted him as the aforesaid.

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

11. Learned counsel for the accused submitted that on the basis of false and baseless allegations, the accused is implicated. The evidence adduced by the prosecution is not inspiring the confidence and the case of the prosecution is shattered during the cross examination. The evidence on record shows that the alleged incident took place during the lock-down. The victim and PW7 her sister specifically admitted that their parents never allowed them to leave the house. The victim specifically admitted that she has not visited anybody's house on the day of the incident. She further admitted that the accused and her father were not on talking terms. She further admitted that there was anger in mind of her father and they all are against the accused, which can be

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reason to implicate the accused falsely. He submitted that though the area where the accused was residing is exactly behind the house of the complainant. No independent witness is examined to show that anybody has noted the presence of the victim at the house of the accused. The evidence on record shows that the shops remained to be closed after 12:00 pm during lock-down. Therefore, the story narrated by the witnesses that the victim was called for bringing biscuits and chocolates itself is false. Learned Judge of the trial court has wrongly relied upon the evidence of the victim which is not inspiring the confidence. Therefore, the judgment impugned in the appeal deserves to be quashed and set aside.

12. Learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal and submitted that the evidence of the victim is corroborated by PW6 sister-in-law of the victim and PW7

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sister of the victim. There is no reason for the prosecution witnesses to implicate the accused falsely. The prosecution has proved the facts that the accused has called the victim; attempted to disrobe her, and outraged her modesty. He invited my attention to the evidence of PW2 the father of the victim, PW4 the victim, PW6 the sister-in-law of the victim, and PW7 the sister of the victim and submitted that the evidence of the witnesses is corroborated by these witnesses. The age of the victim is also proved by documentary evidence as well as the evidence of PW3 the teacher. Thus, the evidence adduced by the prosecution is consistent and reliable. Therefore, no interference is called for and the appeal deserves to be dismissed.

13. The accused is charged on allegation on 19.11.2020, in absence of father and mother, the victim along with her sisters was at home. The accused, residing

behind the house of the father of the victim, called the victim at 2:00 pm to 3:00 pm on the pretext of bringing biscuits and chocolates and attempted to disrobe her and outraged her modesty. To support the said allegations, the prosecution mainly placed reliance on the evidence of PW2 the father of the victim, who testified that on 19.11.2020 his three daughters were at home and the victim's age is 8 years. He narrated the birth date of the victim as 28.9.2012. As far as the evidence as to the birth date of the victim is concerned, the same is not shattered during the cross examination.

14. To prove the age of the victim, the prosecution has examined PW3 Archana Kombe, who was serving as teacher in the Zilla Parishad School at Neri. She testified that the victim is studying in 4th Std.. As per the *bona certificate* prepared on the basis of the documents, the birth date of the victim is 28.9.2012. Though she is cross

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examined at length, except the admission that in absence of documentary evidence, she cannot tell firmly whether birth date of the victim was entered in register or not, she admitted that it is necessary to take birth certificate of student while giving admission in school.

15. PW5 Mohd.Avej Sheikh, examined vide Exh.46, states in his evidence that he received requisition from the police to furnish the birth certificate of the victim and accordingly he issued birth certificate in crime no.552/2020. As per the record, birth date of the victim is 28.9.2012. Verified copy of the relevant extract and birth certificate is at Exh.50. Though he is cross examined, nothing is brought on record to falsify the version that victim's birth date is 28.9.2012.

16. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this

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Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is

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a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act.

17. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, in fact, the extract of Birth Register in respect of entry of birth of the victim child and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the

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relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The birth certificate is a public document and primary evidence which can be proved by

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production in view of Section 77 of the Indian Evidence Act.

18. To prove the allegation of outraging the modesty, the evidence of the PW2 the father of the victim shows that on the day of the incident, at 5:00 pm, the victim narrated the incident to him that she was called by the accused, the accused paid her Rs.10/- and asked her to sit on bed and attempted to disrobe her by removing her frock. She pushed him and ran away from the house. During the cross examination, some material omissions are brought on record that he has not stated before the investigating officer that the victim has disclosed to him that she said “no” to the accused and the accused started forcing on the victim. His further cross examination shows that there are cordial relations between him and his neighbours. The accused is residing at the backside of his house. His house is surrounded by other houses.

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There was no concerned between him and the accused any time. He has already informed his daughters not to go with unknown persons. He admitted that the alleged incident has taken place during lock-down. During the said period, nobody was allowed to leave the house.

19. PW4 the victim has also narrated the entire incident during her evidence. She testified that on the day of the incident she was at home. At about 2:00 pm to 3:00 pm, the accused called her in his house. She went to his house. The accused gave her Rs.10/- for bringing chocolates and biscuits and asked her to sit on bed. He closed door of the house and sat near to her and tried to remove her frock. Though she refused him, he tried to remove. She pushed him and opened the door and she narrated the incident to her sister and her sister told the incident to her parents. During her cross examination, she admitted that in November 2020, there was lock-

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down. At that time, all people used to remain in home. There are houses adjacent to her house. Neighbours were at house at the relevant time. Due to Corona, nobody used to go outside the house. Her elder sister was looking after her and younger sister. Her parents told her elder sister not to allow them to go anywhere alone. Wherever, she and her younger sister used to go, her elder sister used to accompany them. She had good relationship with her sister-in-law. Her sister-in-law used to reside adjacent to her house. On the day of the incident, her sister-in-law was at her house. Whenever she went, her sister was with her. Her further cross examination shows that during the Corona period, shops used to be remained close from 7:00 am to 10:00 am. In the village, shops were closed after 10:00 am. She was aware about the facts that after 10 am, she was instructed by her parents not to take chocolates or biscuits from any unknown

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persons. She is not acquainted with the accused. She did not tell the name of the accused to anybody. Her father told the name of the accused to the police and action was initiated. She further admitted that mobile was kept with her sister. Her elder sister did not immediately make phone call to her parents for informing. She further admitted that for proceeding to the house of the accused, she has to go by main road as his house is at the backside of her house. She specifically admitted that prior to the incident her father and the accused were not on talking terms with each other. There was anger in mind of her father and they all were against the accused.

20. In the light of the above cross examination, if the evidence of PW6 sister-in-law of the victim is considered, it shows that on the day of the incident she has seen that when the victim was proceeding towards her house, the victim was crying. She called the victim

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and asked her what had happened. The victim told her that the accused called the victim at his house for bringing chocolate and biscuit; took the victim inside his house, made her to sit on bed, closed the door from inside and he tried to remove clothes of the victim. The accused also removed his shirt. She further stated that the victim told her that she shouted and ran away by opening the door. Her cross examination also shows that the incident occurred during Corona period. Due to Corona, people used to remain in the house and as per the Government guidelines, shops used to be closed at 11:00 am. The omissions are brought on record that she has not stated before the police that the accused removed his shirt, which is not appearing.

21. The evidence of PW7 the sister of the victim shows that the victim was called by the accused and after some time, the victim came crying and disclosed that the

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accused attempted to remove her clothes. She pushed the accused and ran away from his house. She also admitted that the alleged incident has taken place during the Corona period when nobody was allowed to go out of the house. She admitted that she never allowed her sisters to go alone. She has not made phone call to her father after the victim disclosed the same incident to her.

22. On appreciating the evidence, it reveals that the alleged incident has taken place during the lock-down when nobody was permitted to visit each other's houses. The victim specifically admitted that she has not visited anybody's house on the day of the incident and she was along with her sister. She went to the shop along with her sister.

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23. Thus, as far as the case of the prosecution is concerned, that she went at the house of the accused, is shattered during the cross examination.

24. The cross examination further shows that the shops remained to be closed after 10:00 am in the villages. The cross examination further shows that the victim was not knowing the accused. Thus, this evidence sufficiently shows that name of the accused was informed to her by her father. Her admission further shows that there were no talking terms between her father and the accused. If this admission is taken into consideration, there was no reason for the victim to visit the house of the accused.

25. To corroborate the evidence of the victim, the prosecution has examined PW6 the sister-in-law of the

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victim whose evidence is not consistent with the evidence of the victim.

26. The evidence of the victim is silent on the aspect that the accused removed his clothes at the time of the incident. Whereas, PW7 the sister of the victim narrated that the victim disclosed to her that the accused removed her clothes and also removed his clothes and the victim shouted and ran away by opening the door of the house of the accused.

27. Thus, there is material improvement by PW6 the sister-in-law of the victim. The evidence of the victim and PW7 the sister of the victim is also not consistent.

28. If these evidence is appreciated, in the light of the evidence of PW1 pancha on spot Gangadhar Nagrale, it would show that he has stated that he acted as a pancha and in his presence the panchanama of the house of the

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accused was drawn. During cross examination, he stated that the police had seen main door from outside and inside in their presence. There was bolt at upper side of door from inside. Said door was more than 5 feet in height.

If the evidence of the said witness is considered, in the light of the evidence of the victim, that she opened the door and ran away, which is highly improbable as the victim is eight years old girl. Moreover, the presence of the victim is not noted by any person though the house of the accused is surrounded by many houses. The spot panchanama also shows that the house of the accused is surrounded many houses. Adjacent to the house of the accused, there were houses of one Chandrakala and Mohan Watkar. The alleged spot of the incident was shown in the room of the house which is facing towards porch of the house.

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29. The accused is charged under Sections 7 and 8 of the POCSO Act. The Sections are reproduced for the purposes of reference:

“7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault.—Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

30. Section 7 of the POCSO Act defines as to offences of sexual assault. It provides that a persons is

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said to commit sexual assault if he with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration. It provides punishment if whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

31. On appreciation of the evidence, there is no allegation as to the physical touch to the private part of the victim.

32. In fact, the prosecution has not proved foundational facts that the victim was called by the accused and she was subjected for sexual assault as the

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evidence of the victim is shattered during cross examination which sufficiently shows that the evidence on record is not inspiring the confidence to prove the charges against the accused. The admission of the victim during cross examination is that she has not visited anybody's house on the day of the incident; due the lock-down nobody was permitted to leave the house; and wherever she used to go, her sisters were along with her, which raise doubt about the prosecution case. PW8 Investigating Officer Priti Ade has also admitted that she has not recorded statement of independent witness residing near the house of the accused.

33. Thus, the evidence on record falls short to prove the charges against the accused. The presumption under Section 29 of the POCSO Act will attract only on proof of foundational facts. As the evidence of the prosecution witnesses is not inspiring confidence, the judgment impugned in the appeal based upon the evidence, which is

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not sufficient to convict the accused, deserves to be quashed and set aside.

34. 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 21.6.2023 passed by learned Special Judge (POCSO Act), Wardha in Special (Ch.Act) C.No.6/2021 is hereby quashed and set aside.

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

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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