



Judgment

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

CRIMINAL APPEAL NO.477 OF 2023

Kishor Shamrao Dhale,
aged about 34 years, occupation:
driver, r/o Geeta Nagar, Near
Emerald Colony, Akola, taluka and district
Akola. **Appellant.**

:: VERSUS ::

1. State of Maharashtra,
through Police Station Officer, Police
Station Civil Lines, Akola, district
Akola.

2. XYZ in Crime No.337/2014,
Police Station, Civil Lines Akola,
district Akola. **Respondents.**

Shri H.M.Mohta, Counsel for the Appellant.
Mrs.S.S.Dhote, Additional Public Prosecutor for Respondent
No1/State.
Ms.Mitisha Kotecha, Counsel Appointed for Respondent No.2/Victim.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 21/04/2025

PRONOUNCED ON : 08/05/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 16.6.2023 passed

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by learned Additional Sessions Judge, Akola (learned Judge of the trial court) in Sessions Case No.226/2014.

2. By the said judgment impugned in the appeal, the accused is convicted for offence under Section 376(2)(f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years and to pay fine Rs.25,000/-, in default, to undergo simple imprisonment for 1 month.

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

The accused is stepfather of the victim girl who was 14 years of age at the time of the incident. As per allegations, the victim girl was residing along with her mother; three sisters; the accused, and her cousin. On 20.9.2014, her cousin brother was missing and, therefore, her mother and aunt had been to police station to lodge a

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report. At that time, the accused asked the mother of the victim girl to go to Bhusawal as his aunt was sick and, therefore, the mother directly went from police station to Bhusawal. On the same night, when the victim girl and her three sisters were sleeping at home, at about 12:00 am, the accused came and consumed liquor and subjected the victim girl for sexual assault by threatening her. As per the allegations, sisters of the victim girl witnessed the victim girl when she was disrobed and also wearing underwear on his person. Thereafter, the victim girl narrated the incident to her mother by telephonic call. Her mother returned back to home at 12:00 pm and along with her mother, she approached police station and lodged a report. On the basis of the said report, the police registered the crime against the accused.

4. After registration of the crime, wheels of investigation started rotating. The victim girl was

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referred for medical examination. The accused was arrested. The investigating officer has visited the alleged spot of the incident and drawn spot panchanama. The samples of the victim girl and the accused are obtained. Their clothes are also seized and the same are forwarded for forensic analysis. After completion of the investigation, chargesheet is filed against the accused.

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

PW Nos.	Names of Witnesses	Exh. Nos.
1	Vikas Jadhav, pancha on spot panchanama and seizure of clothes of the victim girl.	28

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2	Vishwambhar Muthad, pancha on spot and seizure of clothes of the victim girl.	31
3	Vilas Pundge, pancha on seizure of clothes of the accused.	35
4	Dr. Bhupendra Patil, Medical Officer.	39
5	Praksh Sawkar, Investigating Officer.	55
6	Sister of the victim girl.	59
7	The victim girl.	60
8	The mother of the victim girl.	71
9	Ajay Behade, Radiologist	81
10	Karuna Atram, Investigating Officer	94
11	Ukanda Jadhav.	102

6. Besides the oral evidence, the prosecution placed reliance on seizure panchanama of clothes of the accused Exh.36, requisition to medical officer Exh.40, medical certificate Exh.41, report Exh.61, FIR Exh.62, seizure memo Exh.63, statement under Section 164 of the CrPC of the victim girl Exh.64, age determination test Exh.82, arrest panchanama Exh.95, spot panchanama Exh.96,

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letter to CWC Exh.97, requisition to the Chemical Analyzer Exh.98, Chemical Analyzer's Report Exh.99.

7. All incriminating evidence is put to the accused by recording his evidence under Section 313 of the CrPC. The defence of the accused is of total denial and of false implication due to dispute between him and his wife the mother of the victim girl.

8. Heard learned counsel Shri H.M.Mohta for the accused; learned Additional Public Prosecutor Mrs.S.S.Dhote for the State, and learned counsel Ms.Mitisha Kotecha appointed for the victim.

9. Learned counsel for the accused Shri H.M.Mohta for the accused, submitted that panchas PW1 Vikas Jadhav; PW2 Vishwambhar Muthad, and PW3 Vilas Pundge have not supported the prosecution case. The age of the victim girl is not proved by the prosecution. The

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evidence of the victim girl is not trustworthy as inconsistent evidence is adduced by the victim girl and her sisters. The evidence of the mother of the victim girl, who was not present at the time of the incident, is also not trustworthy and not inspiring the confidence. It reveals from the cross examination of the mother of the victim girl that there was dispute between her and the accused, who is her second husband. The mother of the victim girl admitted that she had no cordial relation with the accused after the incident. The evidence of the victim girl and the mother is also not consistent. There is no corroboration to the evidence of the victim girl. In view of that, the judgment impugned in the appeal is liable to be quashed and set aside.

10. *Per contra*, learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal and submitted that there is no reason for the victim girl to

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implicate the accused falsely. The evidence of the victim girl is corroborated by her sister who witnessed the accused and the victim girl in a disrobed condition. The medical evidence is also supporting. For all above these reasons, the judgment impugned in the appeal calls for no interference.

11. Learned counsel appointed for the victim girl supported the judgment impugned in the appeal and submitted that learned Judge of the trial court has rightly considered the aspect that the victim girl was subjected for sexual assault by the accused, which is substantiated by medical evidence. In view of that, the judgment impugned in the appeal requires no interference.

12. As per the prosecution case, at the time of the incident, the victim girl was about 14 years of age. She

has narrated her birth date as 20.9.2014. She was studying in school at the relevant time. The victim girl was having three sisters. The cross examination of the victim girl shows that as far as her age is concerned, the same is not challenged during the cross examination. Admittedly, no document is produced by the victim girl or investigating officer has also not collected either her birth certificate or the school leaving certificate wherein she was firstly admitted. The school leaving certificate though brought on record, the same is not proved by the prosecution and the same is also not from the school wherein she was firstly admitted. The victim girl was referred for the ossification test.

13. PW9 Ajay Behade, Radiologist, is examined by the prosecution to prove the age of the victim girl. His evidence shows that he was a Medical Officer in Radiology Department. He received X-Ray plates of the

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victim girl to seek his opinion as to the age determination. He prepared X-Ray Report and opined that the age of the victim girl was less than 17 years. During cross examination, he admitted that the margin of 2 years is not applicable as he ascertained the age of bony age wherein such margin is not applicable. He further stated that being Radiologist, his duty was to ascertain the bony age on the basis of the X-Ray.

The evidence of the said witness shows that he has determined bony age of the victim girl. Admittedly, neither the birth certificate nor school leaving certificate, wherein she was firstly admitted, was produced by the prosecution.

14. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 also states that in every case concerning a child or juvenile in conflict with

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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 matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin

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

15. Thus, in view of the evidence adduced by the prosecution, the age of the victim girl is not proved.

16. The accused is facing charge that he subjected a minor girl (the victim girl) for forceful sexual assault and thereby committed offence punishable under Section 376(2)(f) and 376(2)(i) of the IPC.

17. To substantiate the said charge, the prosecution mainly placed reliance on the evidence of the victim girl,

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examined vide Exh.60. There is no dispute as to the fact that the accused is her stepfather as her mother married with the accused. Her evidence shows that she was residing along with 3 sisters, a cousin brother, her mother, and the accused at the time of the incident. On the day of the incident, her mother had been to Bhusawal as the accused has sent her to see his aunt. She further deposed that on that night, when she was sleeping at home with her sisters and a cousin brother, the accused came home and consumed liquor. Then, he woke up her and asked to massage his legs. Then, he forced her to fall down and subjected her for the forceful sexual assault by disrobing her. He also assaulted her when she was lying disrobed. Her sister saw her. Thereafter, she became unconscious. Her sister sprinkled water and put clothes on her. Her mother returned back home in the morning. She narrated the incident. Thereafter, she approached the police

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station and lodged the report at Civil Lines Police Station, which is at Exh.61 and FIR is at Exh.62. Her clothes “kurti” is at Article-A and “green salwar” is at Article-B. The seizure of clothes panchanama is at Exh.63.

Her cross examination shows that her mother is staying separate from her real father since last 15 years. She further admitted that her mother and maternal aunt both were wives of her father.

Her further cross examination shows that her marriage was performed and the accused was present in her marriage. She further admitted that her mother was having love affair with the accused and they married with each other. The accused was residing with them at their house after marriage. The accused was bearing expenses of his mother and other family members.

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The cross examination further shows that she is acquainted with person Krushna Ingle against whom she gave report to the police in the year 2018-2019 that he had kidnapped her by Purna Police Station, district Parbhani. Subsequently, the matter was compromised between them. She further admitted that she was disliking the accused staying with her and her mother. In para No.12, during the cross examination, omissions are brought on record which show that she has stated before the police that the accused woke up her. She has also not stated the same in her statement as well as statement taken by the Member of CWC. She has also not stated that she was lying in disrobing condition and her sister put clothes on her and she was unconscious. She also stated that she raised shouts, however the accused put hands on her mouth at the time of the incident. The

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accused was present after the incident and went away in the morning.

18. To corroborate the version of the victim girl, the prosecution has examined PW6 her younger sister, who testified that on the day of the incident, her mother had been to other place. She along with sisters was at home. When she was sleeping, she heard voice of crying and, therefore, she woke up. The accused asked her to sleep, otherwise he would kill her. When she woke up, she saw that the victim girl was crying and her stepfather was having only underwear on his person and the victim girl was in a disrobed condition. Her cross examination shows that the accused was residing with them. There was only one house in front of their house.

Her evidence entirely is of omission as far as her deposition that when she woke up, her sister was crying.

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Her stepfather was wearing underwear and her sister was in a disrobed condition, have not been stated by her while recording her statement.

The another omission is that the accused asked her to sleep, is also not narrated by her.

19. PW8 is the mother of the victim girl. Admittedly, she was not present at the time of the incident. As per her evidence, she had been to Bhusawal to bring the aunt of the accused. She made phone calls to the accused, but the accused has not picked up the calls and he switched-off his phone. In the next morning, she returned her house. The victim girl narrated the incident to her that the accused subjected her for forceful sexual assault and the incident was seen by her another daughter PW6. Thereafter, the report was lodged. Her cross examination shows that the accused is her husband. She has married

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with the accused without obtaining decree of divorce from her first husband. During her cross examination, the omissions that she made phone calls to the accused four times and the accused switched-off his phone on fifth time, are not narrated by her. Her further cross examination shows that mobile number 9921367990, which she was using, is obtained by her after the incident which is in the name of the accused. After lodging of he FIR, she made phone calls to the accused by using the said number. She has made NC Complaint against the accused at Dabki Road Police Station. She admitted that she does not have cordial relations with the accused. She specifically admitted that she had anguished against the accused due to the incident of 2014 with the victim girl. The victim girl has also initially lodged report against Krushna Ingle at Purna Police Station.

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20. To corroborate the version of the victim girl, as per the evidence of the prosecution, the victim girl was referred for medical examination. PW4 Dr.Bhupendra Patil, examined vide Exh.39, testified that on 21.9.2014, he examined the victim girl and issued certificate. He has not observed any injury on genital part. He has also not given any opinion as to whether “rape” was committed or not. Perusal of the medical certificate history narrated by the victim girl shows that she was subjected for sexual assault on intervening night of 20.9.2024 and 21.9.2014 at 12:30 am. She was medically examined on 21.9.2014 at 5:00 pm. On local examination, old healed hymen scar and hymen was found torn at 6:00 O’clock position. No fresh injury was noted by him.

21. Besides the evidence of medical officer, the prosecution further placed reliance on the Forensic Evidence i.e. the Chemical Analyzer’s Report. As per the

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evidence of Investigating Officer PW10 Karuna Atram, she has forwarded all articles that is clothes of the victim girl and clothes of the accused for chemical analysis along with their samples. Chemical Analyzer's Report Exh.99/1 shows that neither blood nor semen is detected on Exh.125, which are clothes of the victim girl and the accused. Chemical Analyzer's Report Exh.99/2 shows that neither blood nor semen is detected in nail clipping of the victim. No semen is detected on vaginal swab or pubic hair of the victim girl. Neither blood nor tissue matter is detected in nail clipping of the accused. No semen is detected on pubic hair of the accused.

22. Coming to the evidence of the seizure of the articles and the spot panchanama, the prosecution examined PW1 Vikas Jadhav and PW2 Vishwambhar Muthad PW1 Vikas Jadhav and Vishabar, who acted as panchas on the spot panchanama and seizure of clothes of

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the victim girl. They both have not supported the prosecution case. The spot panchanama is proved by the prosecution by examining Investigating Officer PW10 Karuna Atram. She only narrated that she has visited the spot of incident shown by the victim girl. It was the residential home and the panchanama was drawn. Perusal of the spot panchanama shows that no incriminating article is found at the spot of the incident. It further shows that house of the victim girl whereat the alleged incident took place is surrounded by other houses.

23. Investigating Officer PW5 Praksh Sawkar, recorded statements of some of witnesses who are neighbouring witnesses. They have not stated about the incident.

24. On the basis of the above said evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt.

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25. It is well settled that the evidence of the victim, which inspires confidence, is sufficient to warrant conviction and no independent corroboration is required. It is also well settled victim's evidence is to be tested like the evidence of the witnesses though the statute provides presumption, however foundational facts are to be established. If circumstances arise of possibility of innocence, benefit of doubt goes to the accused.

26. On appreciation of the evidence, there is no dispute as to the fact that the accused is the stepfather of the victim girl. The cross examination further shows that the victim girl was disliking the accused staying with them. As per the evidence of the victim girl her sister saw her in a disrobed condition and put clothes on her person. Whereas, the evidence of PW6 the sister of the victim girl nowhere shows that she has seen the victim girl in an unconscious condition. She has not stated that she was

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the person who put the clothes on the person of the victim girl. Admittedly, at the time of the incident, the victim girl was sleeping along her sister and her cousin brother. The admission of the victim girl is that she shouted, but it is difficult to accept that after her shouts, other sisters have not woke up and have not made any hue and cry. There is material inconsistency between the evidence of the victim girl and her sister. Though PW6 the sister of the victim girl stated that when she woke up, the victim girl was crying and her father was wearing only underwear and her sister was in a disrobed condition, is not narrated by her while recording her statement. The evidence of the victim girl, that she became unconscious and her sister sprinkled water on her and put clothes on her, is also not narrated by PW6. Though the victim girl has stated that she narrated the incident to her mother by telephonic call, the mother deposed that when she

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returned home, on the next date, the victim girl has narrated the said incident to her.

27. Thus, the evidence of the victim girl and PW6 the sister of the victim girl and the mother of the victim is not consistent on material particulars. If their evidence is appreciated, in the light of the medical evidence, the alleged incident has occurred in intervening night of 20.9.2024 and 21.9.2014 at 12:30 am and the victim girl was examined on 21.9.2014 at 5 pm. No fresh injury or fresh hymenal tear has been observed by the medical officer. No single injury was found on the person of the victim girl though the victim girl has stated that she was assaulted by the accused. The clothes of the victim girl and clothes of the accused are seized and the same were immediately forwarded for the chemical analysis. Neither blood nor semen is detected on Exhs.1 and 3.

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28. Thus, the evidence of the victim girl is inconsistent with the evidence of PW6 the sister of the victim girl and PW8 the mother of the victim girl.

29. There is no dispute as far as legal position is concerned that “rape” is not “Medical Term”, but it is the “Legal Term”. The Medical Officer has to ascertain from the medical examination as to whether any physical activity was done with the victim girl.

30. 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

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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.

31. It is to be noted that absence of injury on the private part of the victim girl is not *sine qua non* and the same itself is not sufficient to discard the evidence adduced by the prosecution. However, in such a case, the evidence on analysis must be found to be credible and trustworthy. The evidence must be of sterling quality.

32. Perusal of the evidence of the doctor shows that there was no injury and even no fresh tear is noted on genital examination of the victim girl. While appreciating the evidence by invoking the test of preponderance of probabilities, all these factors, in my view, would assume significance. The story narrated by the victim girl itself

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appears to be improbable and untrustworthy and, therefore, it requires corroboration.

33. In view of such nature of the evidence, the evidence of the victim girl falls short to inspire confidence. The inconsistent evidence of the victim girl and her sister not corroborated by the medical evidence or forensic evidence is sufficient to hold that the prosecution failed to prove the charges levelled against the accused beyond reasonable doubt.

34. In this view of the matter, as benefit of doubt goes in favour of the accused, I proceed to pass following order:

ORDER

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

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(2) The judgment and order dated 16.6.2023 passed by learned Additional Sessions Judge, Akola in Sessions Case No.226/2014 is quashed and set aside.

(3) The accused is acquitted of offence for which he was charged.

(4) The accused be set at liberty forthwith, if he is not required in any other case.

(5) Fine amount, if any, be refunded to the accused.

(6) Fees of learned counsel Ms.Mitisha Kotecha appointed for the victim be quantified and the same be paid to her as per rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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