



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 721 OF 2024

1. Ajaybhai Jamanbhai Sardar,
Age 32 Years, Occu : Labour,
2. Jayashri Ajaybhai Sardar,
Age -29 Years, Occu : Household,

Both R/o : Room No. 404,
Shrushti Row House, Sai Residency,
Taluka Amroli, District Surat.

... Appellants
(Orig. Accused)

Versus

1. The State of Maharashtra,
Through Shindkheda Police Station,
Taluka Shindkheda, District Dhule.
2. X Y Z
Through her Father as Natural Guardian ... Respondents

.....
Mr. Anudeep Dilip Sonar and Mr. Mahesh K. Bhosale, Advocates for
the Appellants.

Mr. B. B. Bhise, APP for Respondent No.1-State.

Ms. Usha Jadhav, Advocate for Respondent No.2 (appointed).

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 30.04.2026

Pronounced on : 05.05.2026

JUDGMENT :

1. This is an appeal by convicts (original accused) on account of
their conviction dated 11.07.2024 recorded by learned Special Judge
[POSCO] and Additional Sessions Judge, Dhule in Special Case No.

17 of 2016, i.e. convicting appellant no.1 Ajaybhai for offence under Sections 376(2)(i)(n) and 344 of IPC as well as Section 4 Protection of Children from Sexual Offences Act, 2012 [POCSO Act]. Similarly, appellant no.2 Jayashri is held guilty, but only for offence punishable under Section 344 of IPC and is sentenced to suffer imprisonment for six months.

CASE OF PROSECUTION

2. Both accused were chargesheet by Shindkheda Police Station for commission of offence under Sections 363, 376(2)(i), 376(2)(n), 344, 504, 506 r/w 34 of IPC and Section 4 of POCSO Act on accusations that, victim, a minor, who had left the house on 13.08.2015 to attend school, had not returned and therefore, initially her father lodged report for kidnapping by unknown persons, on the strength of which, crime was registered bearing no. 101 of 2015. When the victim returned, she reported that accused took her from Nandurbar to Ankleshwar and thereafter at Surat and there, he maintained physical relations with her in a rented premises. On her above statement, there was addition of offence under Section 376(2)(i)(n), 344 of IPC and Section 4 of the POCSO Act.

On conclusion of investigation, both accused were made to face trial before the Special Court, who appreciated the oral and documentary evidence and accepted the case of prosecution and convicted both appellants as stated above. Precisely, said judgment and order of conviction is the subject matter of instant appeal.

SUBMISSIONS

On behalf of the Appellants :

3. Learned counsel for the appellants-convicts would submit that, there is false implication. That, there is no conclusive proof to hold victim to be a minor and so as to attract provisions of POCSO Act. According to him, victim had left her house on her own accord and it was she who had developed contact with accused and therefore charges for kidnapping are totally misplaced. He further submitted that, she had willingly accompanied accused to several places without raising alarm and resistance and had almost spent months in his company. Therefore, whatever relations developed, were consensual and not forceful. According to him, at the instance of father, false and concocted story has been narrated. He pointed out that, testimony of victim is an improvised version and moreover, victim is changing her versions at distinct times, i.e. while giving statement to police, while giving statement before learned Magistrate and finally while deposing

before the court, and as such, it is his submission that, sole testimony of the victim failing to inspire confidence, ought not to have been accepted by the trial court for convicting the accused.

4. It is his further submission that, here, there is inordinate delay in reporting and lodging FIR. There is no evidence about victim to be taken to places like Ankleshwar, Surat or victim to be confined, as is the story of prosecution. He pointed out that, case of prosecution is that, there was conversation on mobile and then further meeting of accused as well as victim at Nandurbar, but there is no distinct evidence to that extent.

5. It is further pointed out that, prosecution has failed to record evidence of persons with whom victim allegedly came in contact. Such witnesses were crucial but they were not examined by prosecution and as such, it is submitted that, story of prosecution is weak and has no foundation, leave aside the evidence.

6. It is submitted that, here, there is no corroboration from medical evidence and even scientific evidence does not support prosecution story. As regards to appellant no.2 is concerned, it is submitted that there are general and vague allegations against her

and most of the allegations are directed against main accused. There is no evidence to show that, said appellant confined the victim or prevented her from proceeding to any direction and therefore, the essential ingredients for attracting the charge of Section 344 IPC were missing in the prosecution evidence. Attributing incorrect appreciation of evidence and failure to consider law, the impugned judgment is taken exception to.

On behalf of Respondent State as well as Victim :

7. In answer to above, both, learned APP as well as learned counsel representing the victim, would point out that victim was proved to be 14 years of age and as such she to be a minor. That, on this count, there is convincing evidence of victim, her father and Headmistress which has remained intact and undisturbed.

8. On the point of occurrence and rape, reliance is placed on testimony of victim as well as medical evidence. It is pointed out that, accused was a married man having a daughter. That, he has taken disadvantage of minority of victim and has committed above serious offence and therefore they both justify the conviction and pray to dismiss the appeal for want of merits.

BRIEF ACCOUNT OF DEPOSITIONS BEFORE TRIAL COURT

9. In support of its case, prosecution seems to have examined in all eight witnesses. Their role and status, as well as the sum and substance of their evidence can be summarized as under :

10. **PW1** father of the victim deposed that date of birth of his daughter is 25.12.2000 and at the time of incident, she to be studying in 8th standard. According to him, incident took place on 13.08.2015. On that day he and his wife had been to agricultural field, but when they returned at 5.30 p.m., victim had not returned home and therefore, after inquiry and search, he lodged missing complaint at Shindkheda police station. According to him, his daughter was not found for two to three months, but one day she suddenly appeared. According to him, she was frightened and when his wife took her in confidence and made inquiry, she reported the incident with her and was consequently taken to police where his supplementary statement was recorded. His daughter showed the spot.

While under **cross**, he admitted that, on 18.08.2015 he had lodged missing report and that his daughter studied at Chimthane. He admitted searching his daughter at Surat while she had gone missing. Rest is all denial.

11. **PW2** pancha to spot panchanama and he identified it to be at Exhibit 54.

12. **PW3** is pancha to seizure of clothes of victim at Exhibit 58.

13. **PW4** is the victim and her deposition is at Exhibit 59. Her testimony and cross is dealt at appropriate place.

14. **PW5** is the Headmaster who at Exhibit 62 testified that, she was in-charge Headmistress of Zilla Parishad Marathi School which has classes from 1st standard to 4th standard. That, victim was student of their school who had taken admission in their school on 15.06.2007 in 1st standard. She deposed about carrying original register and stated that the student left the school after 4th standard and that, school leaving certificate was issued on 15.06.2011.

While under **cross**, witness admitted that victim was not in their school in the year 2015 and that she was deposing only on the basis of record available in the school and also admitted that school leaving certificate does not bear her signature.

15. **PW6** is the medical officer who, at Exhibit 70, testified about victim being brought for examination on 24.11.2015 and victim

narrated history that she did not know accused and that she was threatened by her relative to kill her father and was forced to marry accused on 13.08.2005 and forcibly taken to Surat, staying there for three days at the house of parents of accused. According to her, victim gave history that there was forceful penetrative vaginal sexual intercourse between **13.08.2015 to 16.08.2015**.

Medical witness further deposed about following injuries found on the person of the victim:

- i) multiple contused abrasion on the back of right shoulder, age of injury to be 2 to 3 days old.
- ii) Multiple contused abrasion on right chest aged 3 to 4 days prior to examination.

There was hymenal tear. Samples were preserved and based on examination findings, opinion was issued that overall findings are consistent with sexual intercourse, however final opinion was kept pending till receipt of FSL report.

While under **cross**, medical expert has answered that she was gynecologist and she further admitted that except injuries noted in column no.5, rest everything was normal. She denied injuries mentioned in column no.5 to be possible due to inner wears, but admitted that, there can be tear to hymen due to cycling and playing

sports. She denied that she cannot opine whether victim was subjected to sexual intercourse.

16. **PW7** and **PW8** are Investigating Officers who deposed about carrying out investigation at respective times.

APPRECIATION AND ANALYSIS OF AVAILABLE EVIDENCE

AGE DETERMINATION

17. There being charge and also conviction for offence under Section 4 of POCSO Act, it becomes incumbent on prosecution as well as court to see whether victim is a “child” as provided under the POCSO Act.

18. Here, father has given date of birth of victim as 25.12.2000 and at the time of incident, she to be studying in 8th standard. Victim also gave her date of birth as 25.12.2000. PW5 in-charge Headmistress has placed on record Exhibit 63 which is an extract of original register, showing admission of victim in 1st standard i.e. on 15.06.2007. Testimony of this witness also shows that, as per such record, victim's date of birth is 25.12.2000.

Going by the hierarchy of documents as held in case of *Jarnail Singh v. State of Haryana* [2013] 8 SCR 1044 and *P. Yuvaprakash v. State Represented by Inspector of Police* [2023] 10 SCR 478 ; 2023 INSC 676, which are required to be relied for age determination, there is indeed documentary evidence showing date of birth reflected in the school record at the time of admission of victim in 1st standard. Therefore, in the light of above material, there is no hesitation to hold that victim, at the time of incident, was around 15 years of age and consequently she is proved to be a minor being below 18 years of age.

OFFENCE

19. Trial court has already acquitted appellant from charge under Sections 363, 504 and 506 of IPC. There is no challenge by the State on such finding and therefore, what remains to be considered is whether charge under Section 376(2)(i)(n) of IPC and Section 4 of POCSO Act is at all proved by prosecution.

Both above provisions, for ready reference, are reproduced as under :

“376. Punishment for rape

(1)

(2) Whoever,-

(a) to (h)

(i) commits rape on a woman when she is under sixteen years of age; or

(j) to (m) ...

(n) commits rape repeatedly on the same women,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

Explanation. - For the purpose of this sub-section,-

(a) “armed forces” means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) “police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 1961 (5 of 1861);

(d) “women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected women or children or a widow’s home or an institution called by any other name, which is established and maintained for the reception and care of women or children.”

Section 4 of the POCSO Act reads as under :

“4. Punishment for penetrative sexual assault. -

[1] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

[2] Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder natural life of that person, and shall also be liable to fine.

[3] The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

20. Both offences being interlinked, are dealt together. To decide this issue, evidence of victim alone is crucial, coupled with that of medical expert.

21. Evidence of victim (**PW4**) is at Exhibit 59 wherein, in paragraph 3, she deposed about traveling with accused to Baroda and Ankleshwar for two to three days, then going to Surat and accused meeting his wife and daughter in a zoo and then they all going to house of accused and after spending three days, accused taking her to a house taken on rent where she was confined for three months and was prevented from going out, and there he committed sexual intercourse with her time to time.

Victim is subjected to searching **cross** from paragraph 5 onward wherein it is brought that, she on her own accord telephoned accused after returning to village. She denied meeting accused at Surat Railway Station, accompanying him to Surat for taking money from his friend, traveling to Jamnagar in luxury bus. She admitted about accused taking her to a zoo, where there were security guards. She has admitted in cross para 7 that there was crowd during journey from Ankleshwar to Surat, including presence of Railway Police and ticket collector. She also admitted that she did not raise shout during

railway journey nor made any complaint with police or ticket collector. Such cross examination clearly shows that accused has brought his own presence throughout from Nandurbar till reaching Surat. She has flatly denied that after visit to the zoo, she returned back to her own home. Rather, it is further brought that she stayed in the house of accused approximately for three months. It is also brought in her cross that accused stayed on the 3rd floor, though she expressed ignorance about availability of lift. There are suggestions that she had become friendly with one Nilam, going to buy grocery, milk and eatry, playing garba during festival, accompanying accused and his wife for emersion of Lord Ganpati idol. There is clear suggestion which she denied that, she resided with accused for three months on her own will. Again in para 8 of her cross, she has answered that they had sexual intercourse from time to time.

Consequently, in the light of such cross examination, coupled with specific defence about acts to be consensual, there is no hesitation to hold that there were multiple physical contacts by accused with victim. She being minor, her consent becomes insignificant.

22. The Hon'ble Apex Court in the recent case of ***Varun Kumar @ Sonu v. State of Himachal Pradesh and others*** 2025 INSC 1232 [Criminal Appeal No. 1295 of 2018], has reiterated that victim's consent, even if assumed, has no legal significance since she was a minor, by observing that, *"even assuming that victim had willfully volunteered to sexual intercourse, this aspect becomes immaterial as the victim was minor on the date of incident"*.

Applying the above law, offence of Section 376(2)(i) and 376(2)(n) of IPC as well as Section 4 of POCSO Act can be said to be proved.

23. Here, there is conviction of appellants under Section 344 of IPC, and for ready reference, said provision is reproduced as under :

"344. Wrongful confinement for ten or more days.- Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

24. On this point, learned trial court seems to have made discussion in paragraphs 43, 44, 45 and 46. If evidence of victim is revisited, it is

noticed that in para 3 of her chief, she has stated that, initially accused took her to his own house, where his brother, mother and sister resided, and they stayed there for three days. She further claims that accused told her that he had taken a house of four rooms on rent and then she claims that, in said house she resided with accused, his wife and their daughter, and then she makes general allegations that accused confined her for three months and they did not allow her to go anywhere nor did they allow her to talk to anyone. In the same breath, she states that one lady namely Vibha Patel resided in front of the said house, and victim claims that, she informed such lady that she wanted to go home and according to her, said lady also told accused to let her go and then, she claims that, as she was missing her parents, she was crying for two to three days and she was unable to eat meal. Therefore, on one day at 5.00 a.m. when all were sleeping, she claims to have packed her belongings and gone to Surat Railway Station. So much is her only evidence.

25. To attract above offence, it is incumbent upon prosecution to prove that, victim was restrained to such an extent that she was prevented from proceeding in any direction in which she had right to proceed. It has to be demonstrated that the restraint was wrongful confinement preventing her from proceeding in circumscribed limits

and she was confined or forced to stay against her will by use of threats, force or coercion. These are some of the essential requirements to attract rigors of Section 344 IPC.

26. However, above discussed testimony of victim is not fulfilling above requirements. She has merely stated that she was confined by accused persons, but by which of the accused or in what manner or by both of the accused, has not been stated by her. On the contrary, there are suggestions to her in cross that she has participated in festivals like garba, emersion of idol of Lord Ganesh and that she used to visit shops for purchasing provisions. Above all, when she claims that a lady named Vibha Patel, who resided in front of house of accused, used to come to the house of accused, she would have been the best witness because it is victim's version that said lady also requested accused to let her go to her parents.

27. Consequently, on the point of confinement, there is weak evidence. Resultantly, conviction of both appellants for the above charge was unwarranted and only interference to that extent is called for. Hence, following order :

ORDER

- I. The appeal is **partly allowed**.
- II. The judgment and order of conviction dated 11.07.2024 passed by Special Judge [POSCO] and Additional Sessions Judge, Dhule in Special Case No. 17 of 2016, **to the extent of conviction of both the appellants** i.e. appellant no.1 Ajaybhai Jamanbhai Sardar and appellant no.2 Jayashri Ajaybhai Sardar for the offence punishable **under Section 344 of IPC is hereby set aside**.
- III. Both the appellants are acquitted from offence under Section 344 of IPC.
- IV. **Rest of the impugned judgment** and order dated 11.07.2024 passed by Special Judge [POSCO] and Additional Sessions Judge, Dhule in Special Case No. 17 of 2016, **including conviction of appellant no.1 Ajaybhai** for offence under **Section 376(2)(i)(n) of IPC** as well as **Section 4** Protection of Children from Sexual Offences Act, 2012 [POCSO Act] is hereby **maintained**.
- V. Bail Bonds of the appellant no.2 Jayashri Ajaybhai Sardar stand cancelled.
- VI. The fees of learned counsel appointed to represent respondent no.2 be paid by the High Court Legal Services Sub-Committee, Aurangabad as per Rules.

[ABHAY S. WAGHWASE, J.]