



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 36 OF 2026
WITH CRIMINAL APPLICATION NO. 875 OF 2025**

Mahadu Krushna Dherange,
Age: 63 yrs, Occ: Agri.,
R/o: Ambi Dumala, Tq. Sangamner
Dist. Ahmednagar

..APPELLANT

VERSUS

1. State of Maharashtra
Through Ghargaon Police Station,
Ghargaon, Tq. Sangamner
Dist. Ahmednagar.

2. XYZ

..RESPONDENTS

....

Mr. B.S. Dhawale, Advocate for appellant
Mrs. M.N. Ghanekar, A.P.P. for respondent no.1 – State
Mr. A.B. Nehe, Advocate for respondent no.2

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**CORAM : RAJNISH R. VYAS, J.
DATE : 04th FEBRUARY, 2026**

ORAL JUDGMENT :

. The present appeal takes exception to the judgment passed in Special Case No. 16 of 2018 by the Extra Joint District Judge and Additional Sessions Judge, Sangamner, by which the appellant is convicted and sentenced for the commission of following offences :

Section	Sentence	Fine	Default Sentence
376(2)(i) of I.P.C.	R.I. for 10 years	Rs.2,000/-	S.I. for 3 months
4 of POCSO	R.I. for 7 years	Rs.2,000/-	S.I. for 3 months
6 of POCSO	R.I. for 10 years	Rs.2,000/-	S.I. for 3 months

All the sentences were ordered to run concurrently.

2. In short, it is the case of the prosecution that the accused was 63 years of age at the time of the incident and had asked the victim to take his penis in her mouth, and thereafter the accused touched the vagina of the victim with his private part. The said act was reported to the concerned police station by the victim's mother, upon which an F.I.R. was registered against the accused, and an investigation was subsequently carried out. During the investigation, the appellant was arrested on 03rd April, 2018, and the clothes of the appellant and the victim were also seized.

3. The victim and appellant were subjected to medical examination. Spot panchanama was also drawn. Statement of the victim, under Section 164 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'), was also recorded. Upon completion of the investigation, Charge-sheet No. 29 of 2018, dated 04th August, 2018, was filed against the accused. As the accused did not plead guilty to the charges framed by the trial Court below (Exhibit 11), on 07th July, 2021, the prosecution, to prove the guilt, examined eleven witnesses. Thereafter, the accused was questioned under Section 313 of the CrP.C. While answering the same, he took the defence of total denial and false implication. The trial Court then convicted the appellant of the offences stated above, heard him on sentence, and awarded the sentence stated above.

4. Since the appellant is convicted for the commission of an offence punishable under the Protection of Children from Sexual Offences Act, 2012

(hereinafter referred to as 'the Act of 2012'), it is necessary to see whether the prosecution has proved that at the time of the incident, the victim was a 'child' or not. Section 2(d) of the Act of 2012 defines 'child' as any person below the age of eighteen years.

5. PW 4 is the mother of the victim, who has deposed that at the time of the incident, the victim was studying in 2nd standard and her age was 8 years. So far as the age of the victim is concerned, in cross-examination, nothing has been put by the accused to this witness except the suggestion that the statement given by her is false. PW 5 is the victim of a crime, who has stated that she was born on 24.12.2010. Needless to say, PW 5 cannot prove her date of birth, as her evidence would be hearsay in that regard.

6. Prosecution has examined PW 11, who was working on the post of Gramsevak with the concerned Grampanchayat. He submitted that the concerned police station had requested to provide the birth certificate of the victim, and accordingly, he provided it. He submitted that the said birth certificate was issued based on entry no. 22 mentioned in the birth register. The entry for the victim's date of birth was taken on 31.12.2010, whereas the victim's date of birth was 24.12.2010. He also deposed about the names of the mother and father of the victim. He stated that the victim's grandfather had submitted an application, based on which the information was noted. He was

shown Exhibit 44, the birth certificate, and proved the same. In cross-examination, it was only suggested to this witness that the birth certificate was given at the request of the parents of the victim. He denied the said fact. He also denied that a false birth certificate was given.

7. Perusal of the testimony of this witness reveals that the prosecution has not challenged the age of the victim with all seriousness. Even learned counsel for the appellant has submitted that the child's age is not in dispute.

8. Considering the nature of evidence and the birth certificate, which are produced on record and proved, I conclude that the prosecution has proved that at the time of the commission of the offence, the victim was a 'child' and her date of birth is 24.12.2010.

9. Since the accused is convicted for the commission of an offence punishable under Section 376(2)(i) of the Indian Penal Code (hereinafter referred to as 'I.P.C.'), it is necessary to see what said section says. The said section concerns the commission of an offence against a woman under sixteen years of age. Section 375 of the I.P.C. says a man said to commit rape if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person. At this stage, it is necessary to mention here that clause (i) of sub-section (2) of Section 376

of the I.P.C. was deleted with effect from 21st April, 2018, whereas the offence in question occurred before the date of omission of said clause. In view of the same, the said section is applicable in the present case.

10. The appellant is also convicted for the commission of an offence punishable under Section 4 of the Act of 2012, which prescribes punishment for penetrative sexual assault. Penetrative sexual assault is defined under Section 3 of the Act of 2012. Ingredients of Section 375 of the I.P.C. and Section 3 of the Act of 2012 are somewhat similar.

11. The appellant is also convicted for the commission of an offence punishable under Section 6 of the Act of 2012, which prescribes punishment for aggravated penetrative sexual assault. Aggravated penetrative sexual assault is defined under Section 5 of the Act of 2012. Whenever a penetrative sexual assault is committed, clause (m) of Section 5 of the Act of 2012 comes into play, which says whoever commits rape on a child below twelve years of age is said to have committed aggravated penetrative sexual assault.

12. In this background, it will have to be decided whether prosecution had proved offence of penetrative sexual assault and rape as defined under the Act of 2012 and I.P.C. In this regard, the testimony of PW 5 / victim would be of vital importance.

13. PW 5 / victim, in her testimony, has stated that at the relevant time she was studying in 2nd standard and on many occasions she used to go to school by walking or was dropped off by vehicle. She stated that there was standing grass and that the accused had called her. Thereafter, the accused had asked her to take his penis in her mouth. The accused had touched his private part to her vagina. She deposed that, out of fear of her mother, she did not disclose the aforesaid fact to her mother or anyone else. She stated that she was called to the police station and that she narrated the incident to the police. She stated that she could identify the accused and had, in fact, identified the accused in Court. According to her, her date of birth is 24.12.2010.

14. In cross-examination, she admitted that she was liked by her parents as well as by her grandparents. Also, her grandparents did not allow her to go anywhere alone. She also stated in cross-examination that she used to return to the house by 06:00 in the evening. She denied that she had narrated the incident to the police and to the Court, as per her mother's instructions.

15. Her cross-examination was completed on 06th August, 2021. Perusal of the record shows that on 09th October, 2021, the prosecution moved an application under Section 311 of the Cr.P.C. for the recall of the

victim. The accused/defence did not object to the application, which was consequently allowed, and the victim again entered the witness box on 22nd October, 2021.

16. This time, the victim, in her examination-in-chief, had stated that the accused used to ask her to take his penis in her mouth, and she acted accordingly. When she refused, the accused told her that he would tell her mother. She also deposed that the accused tried to give her a certain amount, but she refused to accept it. She further deposed that her statement was recorded before the Court and that she had narrated the incident before it. She further stated that her statement was recorded in the Court, as her mother had stated. Statement under Section 164 of the Cr.P.C. was then proved by her, which was at Exhibit 48.

17. At this time, cross-examination was conducted again, and it was suggested to her that on the concerned road, there is a house and a field of one Ravi. A suggestion was given to her that the incident narrated regarding the accused asking her to take his penis in her mouth was false, which she denied. She also denied other suggestions.

18. If the statement of the victim under Section 164 of Cr.P.C., below Exhibit 40, is perused, it would reveal that the victim had stated that on the

day of the incident, the accused initially called her. When the victim did not go near him, the accused caught hold of her hand and pulled her into the grass. Thereafter, the accused removed his pants, and so also of victim. At the relevant time, the victim was resisting the said act. She further stated that when she tried to run away, the accused caught hold of her leg and again obstructed her. She further stated that the accused used to penetrate his private part in her mouth and vagina.

19. At this stage, it is necessary to discuss the testimony of PW 7 / Ravindra, who has seen the accused and victim at the spot of the incident. This witness has deposed that he knows the family of the victim, and when the incident took place, the victim was studying in 2nd standard. On the day of the incident, when he was standing in his field at about 05:30 p.m., the accused was grazing cattle, at which time the girl was on her way home from school. The accused was sitting on the boundary of the field, and the girl was there. While he was collecting the grass, he noticed that the girl was in a bent position in front of the accused, and as soon as they saw PW 7, they stood up. At that time, the accused had his half-pant removed to his knees, and thereafter he went away.

20. He was then intended to discuss the incident with the father of the victim, but since the father of the victim could not meet, he could not narrate

the incident. He disclosed that he had narrated the said incident to PW 8 / Pankaj. He stated that he did not visit the accused's house. He stated that the police recorded his statement. He stated that his statement under Section 164 of Cr.P.C. was recorded, which is at Exhibit 31.

21. In cross-examination, he admitted that he and PW 8 / Pankaj are good friends of PW 6 / Ankush / father of the victim, and they used to help each other. He denied the suggestion that Ankush was his cousin brother. He stated the accused used to work as labour in his field on some occasions. He denied that any wages were outstanding and accused the came to house to demand the money, and, for that reason, a quarrel ensued. A suggestion was given to him that the aforesaid three have conspired to lodge a false report against the accused. The said suggestion was also denied. Thus, it is crystal clear that on the day of the incident, PW 7 had seen the victim and the accused together at a secluded place, at which time part of the victim's pants was removed, and the accused's pants was removed till his knees. The victim was in a bent position in front of the accused.

22. This takes me to the testimony of PW 4 / mother of the victim. In her testimony, she stated that at the time of the incident, the victim was in 2nd standard. She was 8 years old and used to reside with her grandparents. She submitted that on 03rd April, 2018, she filed the complaint, though she came

to know of the incident on the 1st , whereas, the incident had occurred before 8-10 days. She stated that Pankaj was a friend of her husband, and he had informed her husband that Ravindra had seen the accused taking the victim in the grass, and the accused had removed his pants, which Ravindra saw.

23. PW 4 then stated that an enquiry was made with the victim, who disclosed that the accused offered her money for purchasing candies and took her to a place where grass was grown, removed his pants as well as hers. She stated that the victim had disclosed to her that the accused had touched his private part to her private part and used to penetrate his private part in her mouth. PW 4 then stated that, thereafter, she, along with her husband and Pankaj, went to the house of the accused. When the accused was questioned, he initially denied committing the offence. Thereafter, Ravindra was called, and when he arrived, the accused admitted his guilt, and they then went home. Thereafter, it was decided on the third day of the month to lodge the report; accordingly, it was lodged, and the statement of PW 4 was marked as Exhibit 27. She deposed that the date of birth of the victim is 24th December, 2010.

24. In cross-examination, she stated that Ravi was the cousin of the victim and that Ravi, Pankaj, and her husband were good friends. She stated that she had known the accused since her marriage, since the accused used to do labour work and graze the cattle near her house. She denied that the

accused had seen her and Pankaj in a compromising position, and therefore, both of them went to the house of the accused. It was also stated to her that a quarrel had taken place between the accused and Ravi regarding non-payment of wages, and that, for this reason, a false case was filed.

25. In cross-examination, she admitted that the incident narrated in the complaint had taken place before 15 to 20 days. She also admitted that she, her husband, and Pankaj had been to the accused's house. She stated that she was pregnant at the time of lodging the complaint and that an error might therefore have occurred at that time. In this context, the medical officer's testimony will have to be considered.

26. PW 10 / Medical Officer deposed that in the year 2018, he was working at Primary Health Centre, Ghargaon as Medical Officer. On 05th April, 2018, he examined the victim after taking consent and recorded the victim's medical history, in which the victim stated that she was called by the accused twenty days before. He had given Rs. 10-20/- to her, and thereafter the accused had removed her clothes and used to give his private part in her mouth and used to insert the same in her vagina. The said act was done 4 to 5 times. He then examined the victim and prepared the report, which was at Exhibit 41. He also examined the accused on the same day and issued a certificate to that effect, as shown in Exhibit 42 below. He opined that there was a possibility of sexual assault upon the minor girl.

27. In cross-examination, he admitted that he did not find any internal and external injury on the minor girl. He also stated that he has not issued a final opinion in that case. If Exhibit 41 is perused, it would reveal that there are no external injuries and there was no injury to the labia majora and labia minora.

28. It is in this background that learned counsel for the accused contended that the testimony advanced by the victim, mother and the medical officer, as well as the father, is not cogent, reliable, and in fact failed to make out any case for offences for which the accused is convicted. According to him, there is a delay in lodging the F.I.R., and, further, medical evidence supports his case. He submitted that it was a striking case of false implication, since the accused had seen PW 4 in a compromising position with Pankaj, and, further, the wages outstanding were not paid to the accused; therefore, a false report was lodged.

29. He further submitted that even if the testimony of the mother of the victim is taken into consideration, it would be clear that what the accused had done was only touch his private part with the private part of the victim. Therefore, it cannot be said that there was penetration. He then submitted that when there is no penetration, then the accused should not have been convicted for the commission of an offence punishable under Section 376(2)

(i) of the I.P.C. According to him, there are several material omissions and contradictions in the witnesses' testimony. PW 7, who is the eyewitness, would in fact not be an eyewitness, and his testimony is not enough to conclude that there was sexual intercourse. He also submitted that in the initial examination-in-chief and cross-examination, the victim had only stated that the accused had touched his private part with the private part of the victim, and nothing about insertion/penetration was stated. He then submitted that the prosecution, to plug the loopholes, recalled the victim and re-examined her. This time, the victim narrated the incident of insertion of the private part of the accused in her mouth and vagina at the instance of the accused. He submitted that the prosecution violates the norms governing a fair trial, and therefore, the appellant is liable to be acquitted. He further submitted that, according to the prosecution witnesses, the accused was found wearing a half pant, whereas what was seized was a full pant; therefore, the testimony will have to be considered with a corrected approach.

30. Assailing the testimony of PW 5 / victim, who was a child studying in 2nd standard at the time of the incident, learned counsel for the appellant has relied upon various authorities, including the law laid down by the Apex Court in the case of *Digamber Vaishnav and Ors. Vs. State of Chhattisgarh* reported in *MANU/SC/0316/2019*, more particularly paragraph no. 21. So also *Criminal Appeal No. 422 of 2020* in *Nikhil and Ors. Vs. The State of*

Maharashtra decided on 29.09.2023, as well as *Criminal Appeal No. 642 of 2020* in *Sudhir and Ors. Vs. State of Maharashtra and Ors.* decided on 31.01.2024 by the coordinate Bench of this Court. The Hon'ble Supreme Court and this Court, in the aforesaid judgments, have laid down the following principles:-

- (i) The witness can be categorised as wholly reliable, wholly unreliable, partly reliable or partly unreliable;
- (ii) The testimony of a child witness is required to be taken into consideration with due care and caution.
- (iii) Corroboration is required to be looked into.
- (iv) Statement recorded under Section 164 of the Cr.P.C. is not a substantive piece of evidence, and therefore, cannot be solely relied upon to award the conviction.
- (v) The testimony of the child will have to be tested in the light of the surrounding material available on record.

31. He then submitted that the child witness's testimony cannot be relied upon as she has changed her version from time to time, i.e. in the statement recorded under Section 164 of Cr.P.C. and deposition before the Court. He, thus, prays for acquittal.

32. Learned A.P.P. submitted that the prosecution has proved the case beyond a reasonable doubt, and the evidence laid by the prosecution was cogent and trustworthy. She submitted that there is absolutely no delay in lodging of F.I.R. and there was, in fact, no contradiction. According to her,

any contradiction, if any, is minor, and the fact that one of the witnesses stated the accused was wearing a half pant, while what was seized was a full pant, would not go to the root of the matter. She submitted that it is not the case that the prosecution is contending that the statement under Section 164 of Cr.P.C. is the only evidence available. She submitted that the victim was studying in 2nd standard and there was absolutely no reason to implicate the accused falsely. According to her, the defence taken regarding the illicit relationship between the mother of the victim and Pankaj is fragile one.

33. Learned counsel appearing for Respondent No.2/victim has invited my attention to Section 29 of the Act of 2012 and contended that since the prosecution proves the foundational facts, the presumption triggers, and the accused has not rebutted the said presumption. He contended that the accused could have very well rebutted the presumption, either by cross-examination, by entering the witness box or by examining any defence witness. Since the accused has not rebutted the evidence, he will have to face the consequences.

34. I have given the thoughtful consideration to arguments advanced by respective counsels and have gone through the record of the case. Admittedly, at the time of the incident, the victim was studying in 2nd standard. She has identified the accused in the examination-in-chief. The

victim has stated that the accused had called her at a place where there was grass and asked her to take his penis in her mouth. She further stated that the accused had touched his private part to her private part. She submitted that, out of fear of her mother, she did not narrate the incident. At this juncture, it is necessary to mention that this witness was recalled, and no objection was raised by the accused to her recall. Accordingly, when on the second occasion this witness/victim entered the witness box, she categorically stated that the accused had asked her to take his penis in her mouth, which the victim did. On the second occasion, she did not state anything about penetration in the vagina. The fact remains that in the statement under Section 164 of the Cr.P.C., the victim has categorically stated that the accused used to forcefully penetrate his private part in the mouth of the victim.

35. According to learned counsel for the appellant, this is an improvement, and this should not have been relied upon while awarding a conviction. It is necessary to mention here that the aforesaid part cannot be termed as an improvement for the reason that, in the examination-in-chief, she has categorically stated that the aforesaid act of inserting the private part in the mouth was done by the accused. Had there been any grievance regarding the recall of the witness/victim and the recording of evidence, the accused could have taken objection. The said step was not taken by the accused. On the contrary, no objection was given by the accused to the said

application. Even in cross-examination, nothing has been brought on record to disbelieve the victim's testimony. Thus, it cannot be said that what has been taken into consideration is the statement recorded under Section 164 of Cr.P.C. only. The witness has categorically stated about the incident in examination-in-chief.

36. As rightly pointed out by learned counsel for Respondent No.2, the presumption under Section 29 and 30 of the Act of 2012 has also triggered. The prosecution has proved the foundational fact by way of recording the victim's evidence; therefore, it was on the accused to rebut the presumption. The accused did not make any effort to rebut the presumption; therefore, he will have to face the legal consequences flowing from the mandate of Sections 29 and 30 of the Act of 2012.

37. The testimony of the victim of the crime, as well as the testimony of PW 7, clearly shows that the accused had removed his pants and the victim was in a bent position. PW 7 had seen the accused and the victim at a secluded place. The accused's intention can also be inferred from the surrounding circumstances. As the previous and subsequent conduct of the accused is important, according to Section 8 of the Indian Evidence Act, 1872, it is necessary to mention here that when the parents of the victim visited the house of the accused, he initially denied the commission of the offence, but

subsequently admitted it. Though it is well-settled law that the said admission in criminal law would not carry any weight, the fact remains that his conduct shows he had a guilty mind at the relevant time.

38. So far as medical evidence is concerned, learned counsel for the appellant may be right in saying that the testimony of PW 10 / Medical Officer fails to support the case of the prosecution. But it is not the mandate of law that in every case of rape, the medical evidence should be supportive of the case of prosecution. Even the slightest penetration is sufficient to prove the offence of rape. In this case, the penetration is not only in the vagina, but also in the mouth of the victim. The defence taken by the accused regarding the false implication is also unsupported. The defence that since PW 4 / mother of the victim was found in a compromising position with one Pankaj, and therefore, a false report was lodged, does not inspire confidence since no mother, in the peculiar facts and circumstances of the case, would ask her daughter to depose falsely about sexual intercourse. It cannot be denied that such a version would affect the future of the child.

39. In the aforesaid background, there is absolutely nothing to disbelieve the testimony of the victim, who was at the relevant time 7 years and 2 months and 1 day old. As already stated, the case advanced by the prosecution is Cogent and reliable and the trial Court has correctly and

properly appreciated the evidence. In the aforesaid facts, I am not inclined to allow the present appeal and accordingly, the following order is passed:-

ORDER

- (I) Criminal appeal is rejected.
- (II) Criminal applications pending, if any, stands disposed of accordingly.

(RAJNISH R. VYAS, J.)

SSD