



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 54 OF 2026
WITH CRIMINAL APPLICATION NO. 4226 OF 2025

Nitin Nagnath Mupidwar

Age : 36 years, Occu.: Agriculture,

R/o:- Ashok Colony, Bhokar, Tq. Bhokar,

Dist. Nanded.

..APPELLANT

VERSUS

1. State of Maharashtra
Through Bhokar Police Station,
Tq. Bhokar, District Nanded.

2. X.Y.Z.

..RESPONDENTS

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Mr. A.D. Khot, Advocate for appellant (Appointed through Legal Aid)

Mrs. A.S. Deshmukh, A.P.P. for respondent no.1 – State

Mr. S.A. Ambilwade, Advocate for respondent no.2 (appointed through Legal Aid)

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CORAM : RAJNISH R. VYAS, J.
DATE : 02nd FEBRUARY, 2026

ORAL JUDGMENT :

. Heard Mr Khot, learned counsel appointed through Legal Aid to represent the appellant, Mrs Deshmukh, learned A.P.P. for the State and Mr Ambilwade, learned counsel appointed through Legal Aid to represent Respondent No.2 / victim.

2. This appeal takes exception to the judgment of conviction awarded by the Special Judge, Bhokar, in Special Case No. 13 of 2022 on 02nd May, 2025. By the said judgment, the appellant was convicted for commission of

offences punishable under Section 376-AB, 376(2)(l) and 376(3) of the Indian Penal Code (hereinafter referred to as 'I.P.C.') and the offences punishable under sections, 4(2), 6, 8 and 12 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as 'the Act of 2012').

3. The appellant was directed to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 5,000/-, and in default to undergo rigorous imprisonment for 3 years for the offence punishable under Section 4(2) of the Act of 2012. He was also directed to undergo rigorous imprisonment for 20 years and to pay fine of Rs.5,000/-, and in default to suffer rigorous imprisonment for 3 years for the offence punishable under Section 6 of the Act of 2012. He was further directed to suffer rigorous imprisonment for 3 years and to pay fine of Rs.3,000/-, and in default to suffer rigorous imprisonment for 6 months for the offence punishable under Section 8 of the Act of 2012. For the offence punishable under Section 12 of the Act of 2012, he was directed to undergo rigorous imprisonment for 1 year and to pay fine of Rs.2,000/-, and in default to suffer rigorous imprisonment for 3 months. All the sentenced were directed to run concurrently. In view of Section 42 of the Act of 2012, no separate sentence was awarded for the offence punishable under Sections 376-AB, 376(2)(l) and 376(3) of the I.P.C.

4. In short, it is the case of prosecution that the appellant was running a photo studio and on the date of incident, the appellant subjected

the victim to forcible sexual intercourse in the said photo studio. According to the prosecution, when the victim of crime raised hue and cry, PW 1 / mother of the victim, who was searching for her, heard the said shout, and therefore, saw from the glass door of the photo studio that pant of the victim was removed and the appellant was removing his pant.

5. This incident has resulted into setting the criminal law in motion. With the help of respective counsels and after perusing the paper-book, which was tendered by learned counsel for the appellant which he has obtained through Legal Aid, I have scrutinised the evidence.

6. The incident narrated above has resulted in setting the criminal law in motion by way of registration of F.I.R. No. 151 of 2022 dated 30th April, 2022 against the appellant, which further resulted into arrest of the appellant on 01st May, 2022. During the course of investigation, the clothes of accused and victim were seized and forwarded for the chemical analysis. Completion of investigation resulted into filing of the charge-sheet.

7. The charge was framed against the appellant on 03rd September, 2022 for commission of offences punishable under Sections 376-AB, 376(2) (I), 376(3) of the I.P.C. and under Sections 4, 6, 8 and 12 of the Act of 2012. As appellant did not plead to the charge. Prosecution ,in order to bring home the guilt, has examined total eight witnesses and has relied upon total 21 exhibits.

8. Since the appellant is convicted under the provisions of Act of 2012, it is necessary to see whether the prosecution has proved whether the victim of crime was below eighteen years of age and as such a 'child' as defined under Section 2(d) of the Act of 2012.

9. PW 1 / mother of the victim, in her testimony, has stated that on 30th April, 2022 i.e. on the day of the incident, the victim was 11 years and 6 months old and was mentally retarded. She then narrated the incident. This witness was cross-examined in which she admitted that the victim and daughter of the appellant were friends and at the time of incident, the victim was studying in 5th standard in a school.

10. The victim of crime was examined as PW 5, who in her cross-examination has not stated her date of birth.

11. PW 8 was the Headmaster of school of the victim, who in his evidence had stated that since 07th September, 2019 he was working on the post of Headmaster and he had information of all the students in the school. He stated that on 01st May, 2022, at the request of the concerned police station, extract of school admission register was provided. The said request letter is at Exhibit 44. He stated that the victim had taken admission in the school when she was in first standard. He had brought all the original record in the Court and according to him, at Sr.No.14735 name of mother, caste and place of birth, nationality, date of birth of the victim was mentioned. The date

of birth of the victim was 16-09-2012 and she had taken admission in the first standard on 06-02-2017. The extract of admission register was marked at Exhibit 56.

12. In cross-examination, this witness had admitted that at the time of giving admission, the birth certificate of the student is accepted, but he was unaware whether the said procedure was followed at the time of giving admission to the victim. He further admitted that the victim was not mentally retarded student, but was suffering from fits only. He admitted that in the school, admission was given to the normal students. This witness has admitted that the school attendance register are available in market. He denied the suggestion that he was giving false evidence. Exhibit 56 is the certificate which was proved by the said witness, which also shows that date of birth of the victim was 16th September, 2010.

13. PW 7 is the Investigating Officer, who in his testimony had stated that he had written to the Headmaster of the school for supplying the extract of school register and had proved Exhibit 44. He also stated that he received the school admission register extract.

14. In the aforesaid background, the prosecution contended that same proves the date of birth of the victim.

15. Per contra, learned counsel for the appellant has submitted that the prosecution had not proved date of birth of the victim since the person who was having first hand information i.e. mother of the victim, had not deposed about the date of birth. He further contended that the person, who had supplied the information either to the school or to the concerned municipal council, was not examined.

16. He has further contended that the birth certificate of the victim was produced on record, however same was not exhibited, and therefore, cannot be relied upon. He relied upon the judgment in case of *Sanjiv Baidya Vs. State of Arunachal Pradesh*, reported in *(2011) 1 Gauhati Law Reports 220*, more particularly paragraph no.8, in which the Hon'ble High Court has observed that it is the settled position of law that unproved or unexhibited document cannot be treated as a piece of legal evidence and the lapse on the part of the prosecution cannot be condoned and for that matter, prosecution could not be allowed to prove the document on remand to the trial Court, moreso, when the prosecution, on record, did not make any application before the trial court for giving it chance to prove and exhibit the document by examining the concerned witnesses.

17. Suffice it to say that in the case in hand, the mother of victim has stated that at the time of incident, the victim was 11 years and 6 months of age. Further in cross-examination, a specific question was put by defence to

the said witness, which was answered by her by stating “it is true that at the time of incident, the victim was studying in 5th standard”. The aforesaid two facts also get support from the testimony of PW 8 / Headmaster, who has specifically stated that he is aware about the information given at the time of admission of the students. He has also proved the entry in the admission register.

18. Not only this, PW 7 / Investigating Officer also corroborated the version of PW 1 and PW 8 and had proved the document i.e. letter by which the information was sought regarding date of birth of the victim. In this background, it can be said that the prosecution has proved the age beyond reasonable doubt since the manner in which the cross-examination was conducted, shows that age of the victim was not seriously challenged.

19. So far as judgment delivered by the Hon’ble Apex Court in ***Birka Shiva Vs. State of Telangana*** reported in ***2025 SCC OnLine SC 1454*** is concerned, the ratio in the said judgment cannot be disputed at all. In the instant matter, the date of birth is duly proved by PW 1 / mother of the victim as well as PW 8 / Headmaster and PW 7 / Investigating Officer. As far as the judgment in case of Sanjiv Baidya (supra) is concerned, the ratio laid down therein is also well settled and while deciding the age in the instant case, birth certificate is not taken into consideration.

20. Relying on the age of victim, the Court has awarded conviction to the appellant for commission of offence under different sections of Act of 2012. It is necessary to mention here that the appellant has been charged for commission of offence of committing rape on a woman suffering from mental or physical disability [Section 376(2)(l) of I.P.C.]. While deciding the question whether the offence of rape is committed so also the offence of penetrative sexual assault under the Act of 2012, it will have to be looked into whether the child was suffering from mental or physical disability.

21. Since both the issues are interlinked, it is necessary to first discuss the testimony of the victim. PW 5 / victim, who was below twelve years at the time of incident, in her evidence had stated that she has two brothers and she was brought in the Court by her parents. The accused was residing opposite to her house and the said accused had bitten her tongue and after removing her pant, had pressed her vagina. The victim then shouted for help, at which time her mother came who called father of the victim. She stated that one uncle by name Vinayak came, who broke the mirror in the studio and thereafter her mother came near her and had quarrel with the accused. She identified the accused in the Court.

22. In cross-examination, it was admitted by PW 5 / victim that near her house a school is situated, so also one bakery and her father runs a

grocery shop. She admitted that near the grocery shop of her father, one more photo studio is situated which is of her relative. She further admitted that near the grocery shop of her father a beauty parlor is situated and near her house several students gather for tuition classes. On the playground of her school, Karate classes are conducted. She further admitted that she has deposed in the Court as per say of her parents. She denied that she was deposing falsely.

23. PW 1 / mother of victim deposed that on the day of incident the victim was 11 years 6 months old and was mentally retarded. When she was cleaning the utensils at 06:00 o'clock, her son and the victim were playing. As she could not hear any voice of the victim, she started searching for her. She then reached near the photo studio of the appellant and was calling the victim, at which time the call was heard by the victim, who replied her. She also deposed that when she proceeded towards the studio, she saw from the glass that pant of the victim was removed and one person was also removing his pants. She then knocked the door, but it was locked from inside, and therefore, she raised alarm due to which one person by name Inayat came, who broke open the door. Thereafter she took the victim near her, at which time she was frightened and crying. The victim was taken to the house by PW 1, where she was consoled. The victim then informed her that the accused had bitten her tongue and by removing her pant pressed the vagina. At this

juncture it is necessary to reproduce her sentence in examination-in-chief that

“तिने मला सांगितले की, मामाने पॅन्ट काढून सु ला दाबले व जिभेला चावले.”

24. The said witness had stated that thereafter she called her husband and both of them went to police station where they lodged the report which was at Exhibit 18. On the next day, the police officers visited the spot of incident as it was shown by the witness. She stated that clothes of victim were seized and her statement was recorded below Exhibit 19 (statement under Section 164 of Cr.P.C.). In the said statement she had stated that the victim had narrated to her that the accused had stated to the victim that he would click her photographs. Thereafter he removed the pant of victim and pressed the vagina by hand and thereafter had bitten her tongue.

25. Relevant portions of the statement of PW 1 / mother and PW 5 / victim, necessary to reproduce as under :-

PW 1 - *“मी तिला विचारणा केली असता, तिने मला रडत रडत, नितीन मामांनी मला, तुझा फोटो काढतो असे म्हणून स्टूडीओत नेले. त्यांनी माझी पॅट काढली व माझ्या सु करण्याच्या ठिकाणी त्याने हाताने दाबला. त्यानंतर माझी जीभ त्याने दाताने चावली.”*

PW 5 - *“मी वर नमुद पत्यावर माझे आई, वडील व भावांसह राहते. मी घरासमोर अंगणात खेळत असतांना नितील मामांनी मला, तुझा फोटो काढतो असे म्हणुन त्यांच्या स्टूडीओत नेले. त्यांनी माझी पॅट काढली व माझ्या सु करण्याच्या ठिकाणी त्याने हाताने दाबला. त्यानंतर माझी जीभ त्याने दाताने चावली. त्यानंतर माझी आई मला घेवून घरी आली.”*

The aforesaid testimony of PW 1 and PW 5 shows that the appellant had pressed vagina of the victim by his hands.

26. Testing the aforesaid testimony in the light of evidence of PW 6 / Medical Officer, who opined whether the appellant had committed an act either defined under Section 376 of the I.P.C. or under Section 3 of the Act of 2012. PW 6 / Medical Officer, in his examination-in-chief, had stated that on 01st May, 2022 he received a letter from the concerned police station regarding medical examination of the victim. He proved the said letter below Exhibit 36. He then obtained consent of the mother of victim. The victim was 11 years old. Mother of victim had stated that accused tried to forceful sexual assault on the victim. PW 6 examined the victim. In testimony, it was described as under :-

“A] Abrasion on right forearm, size of injury 2x1 c.m, swelling is present. Thereafter on local examination of victim, pubic hairs present, Labia Majora- odematous /red. Labia Minora-swelling and red, Clitoris-redness/ blood oozing out, Fourchette & Introitus/Vagina- there is red, no finger in the vagina, hymen injury- present, Bleeding- mild blood oozing out, then Oedema present, position of tears not seen and then E/o Perineal tear if any- no any, Urethra -no injury, PS examination- not done as very painful, Anus- normal, Oral cavity- Normal, and other findings not any. Then I have taken the samples i.e. High vaginal swab, blood and urine for chemical examination. Pregnancy test not done. I have given provisional opinion in column no.7. Evidence of injuries to the genitals present, as there is signs of inflammation. Then evidence related to non-penetrative assault- is present, these are redness, swelling on Majora and Minora, Evidence of injures, suggestive application of force present, forceful injury on lip and

tongue bite. Opinion as to age of injuries and nature of injuries, all injuries are fresh. Results of Wet mount slide- not done. Evidence as to consumption being under the influence of drugs nothing. Then, I have given my opinion that over all findings are consistent with sexual assault. Accordingly, I issued medical examination report of alleged victim, is now shown to me, it is the same. It bears my signature and contents are true and correct. It is at Exh. 37.”

27. The aforesaid witness had proved the medical examination report of the victim which is at Exhibit 37. In cross-examination, the suggestion put to him was denied that the injury was fresh and within one hour to six hours and abrasion injury and bleeding can be stopped within 10 to 15 minutes. The other suggestions were also denied.

28. It is necessary to mention here that the clothes of victim so also clothes of accused were forwarded to the Regional Forensic Science Laboratory, Nanded with a query below Exhibit 50. The examination and report dated 16th December, 2022 below Exhibit 51 submitted by the Regional Forensic Science Laboratory, Nanded shows that T-shirt, salwar, jangya of the victim were forwarded, whereas full open shirt, full jeans pant, underwear and T-shirt of the accused were also forwarded.

The said report shows that Exh.1 i.e. T-shirt had few blood stains of 0.1 cm to 1 cm in diameter on front portion. Exh.2 i.e. salwar had one

blood stain of about 1 cm in diameter on front left upper portion and appeared brushed. On Exh.3 i.e. jangya no blood was detected, whereas no semen was detected on Exh.1 to 7. Blood detected on Exh.1, 2, 4, 5, 6 and 7 was of human.

29. It reveals from Exhibit 51 that Exh.4 (full open shirt), Exh.5 (full jeans pant), Exh.6 (underwear) and Exh.7 (T-shirt) were stained with blood group 'B'. Group of blood detected on Exh.1 and 2 could not be determined as results were inconclusive. The blood group of accused was 'B', which is clear from Exhibit 52, whereas blood group of the victim was 'O', which is clear from Exhibit 53.

30. Relying upon the aforesaid evidence and the documents, learned A.P.P. submitted that the prosecution has proved the case beyond reasonable doubt that there was sexual intercourse. The stand taken by prosecution was also supported by learned counsel for Respondent No.2 / victim.

31. Per contra, learned counsel for the appellant submitted that in fact there was no sexual intercourse and just because the medical evidence shows that there were certain injuries on the private part of the victim, it does not mean that there was penetrative sexual intercourse. He submitted that if testimony of PW 1 / mother of victim and PW 5 / victim so also statement of

PW 1 recorded under Section 164 of the Cr.P.C. are perused, it would reveal that what has been done is only pressing of vagina by the hands by the accused, and therefore, it cannot be said that there was penetrative sexual assault. He then submitted that he was wrongfully convicted for the commission of offence punishable under Sections 376-AB, 376(2)(I) and 376(3) of the I.P.C.

32. Learned counsel for the appellant also contended that not a single witness, through testimony, has stated that the victim was mentally retarded, except one i.e. PW 1 / mother of the victim. He submitted that if examination and cross-examination of PW 8 / Headmaster is perused, it would reveal that the victim was not mentally retarded girl, and in fact victim was studying in a school where other students were studying and not mentally retarded. He submitted that even the manner in which the victim had deposed before the Court would clearly reveal that she is an intelligent girl.

33. He further submitted that there is fundamental defect in the trial since the mandate of Section 235 of Cr.P.C. was not honored since the accused was not heard on the point of sentence. He submitted that even the procedure, which is required to be adopted before recording the testimony of the minor witness, in order to judge her intelligence, was not followed by the trial Court. He, therefore, prays for acquittal.

34. With the help of respective counsels I have gone through the testimony of PW 1, 5, 6; so also C.A. reports and the medical reports. The testimony would reveal that the accused removed pant of the victim and also of himself, had bitten her tongue and thereafter pressed the vagina of the victim. In the aforesaid background, it is necessary to go through the relevant sections for which the appellant is convicted. Section 376-AB of the I.P.C. prescribes the punishment for rape. No doubt the prosecution has proved the date of incident and age of the victim i.e. below 12 years but the question is whether rape is committed or not.

Section 375 defines rape, which means a man is said to have committed 'rape' if he -

- (a) 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; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

35. Since the accused is also convicted for commission of offence punishable under Section 4(2) of the Act of 2012 for committing penetrative sexual assault, it is necessary to see what is the penetrative sexual assault which is defined under Section 3 of the Act of 2012. The said section is somewhat similar to the definition of 'rape' defined under Section 375 of the I.P.C. It also defines penetrative sexual assault as penetration of penis, insertion to any extent any object and manipulation of any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person.

36. The testimony clearly shows that the accused, by removing his pant so also the pant of victim, had taken bite of the tongue of the victim and pressed her vagina. Thus, he was manipulating the part of body of the child so as to cause penetration into the vagina. The reason for this is removing clothes and biting the tongue of the victim. Suffice it to say that had mother of the victim not arrived at the particular point of time, the accused could have completed the act of penetrative sexual intercourse.

37. There is one more reason to give aforementioned findings. PW 1 / mother of the victim has stated that when she knocked the door, it was locked from inside by the accused and he did not open it. This Act also shows the intention of the accused. The act clearly shows that part of the body i.e vagina

was manipulated so as to cause penetration. In that view of the matter and in view of testimony of PW 1 and PW 5 and medical evidence, I come to the conclusion that offence punishable under Section 376-AB of the I.P.C. as well as the offence punishable under Section 4(2) of the Act of 2012 are proved by the prosecution.

38. Coming to Section 6 of the Act of 2012, it speaks about punishment for aggravated penetrative sexual assault. The penetrative sexual assault gets aggravated when the said assault is committed on a child below 12 years of age. In this case, both, the age and penetrative assault are already proved, and therefore, even conviction awarded under Section 6 of the Act of 2012 cannot be faulted with.

39. Coming to Section 8 of the Act of 2012, it prescribes punishment for sexual assault. Sexual assault is defined in Section 7 of the Act of 2012 which says that 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. In this case, testimony of PW 1 and PW 5 clearly shows that the accused had given bite to the tongue of the victim, and therefore, it would amount to an act involving physical contact without penetrations with sexual

intent, and therefore, conviction under Section 8 of the Act of 2012 is also rightly awarded.

40. So far as Section 12 of the Act of 2012 is concerned, it provides punishment for sexual harassment. Sexual harassment is defined under Section 11 of the Act of 2012, which says that a person is said to commit sexual harassment upon a child when such person with sexual intent,-

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person;

In this case, the pant of the child was removed by accused, and therefore, the body of child was exhibited so that it can be seen by the accused, and therefore, even punishment awarded under Section 12 of the Act of 2012 cannot be faulted with.

41. Coming to awarding conviction for the offence punishable under Section 376(2)(l) of the I.P.C., it is necessary to mention that according to Clause (l) of sub-section 2 of Section 376 the I.P.C., a man can be punished if he commits rape on a woman suffering from mental or physical disability. In this case nothing has been brought on record to show that the victim was

suffering from mental or physical disability, and therefore, the conviction awarded under Section 376(2)(l) of the I.P.C. cannot be sustained.

42. So far as conviction under Section 376(3) of the I.P.C. is concerned, it speaks that if a person commits rape on a woman under sixteen years of age, shall be punished with rigorous 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 of that person's natural life, and shall also be liable to fine. Since the accused has committed offence of rape on a child below 12 years, even punishment under Section 376(3) is also properly awarded.

43 At this juncture, it is necessary to mention here that in view of Section 42 of the Act of 2012, separate sentence was not awarded.

44. Submission of Mr. Khot, learned counsel for the appellant that he was not heard on the point of sentence, is not correct since the judgment of trial court, if perused, more particularly paragraph no. 68, it cannot be said that provision of Section 235(2) is not honored.

45. The last contention that before testing the testimony of the victim the mandate of law led down in case *Pradeep Vs. State of Haryana*, reported

in *(2023) 19 SCC 221* should have been honored. Suffice it to say that in the said judgment the Hon'ble Apex Court has stated that before recording the evidence of minor, it is the duty of the judicial officer to ask preliminary questions to the minor with a view to ascertain the minor is in a position to give rational answers. So far as present case is concerned, it can be said that the trial Court had an opportunity to see demeanor of minor witness so also put the preliminary questions to her. Even the testimony of PW 5 / minor witness clearly shows that she was intelligent, and therefore, the ratio of the aforesaid cannot be made applicable since in that case there was contention of the learned counsel of that case that there were material contradictions and improvements in her testimony.

46. Considering all the aforesaid aspects following order is passed :-

ORDER

- (I) Criminal appeal is partly allowed.
- (II) Conviction awarded to the appellant by Special Judge, Bhokar in Special Case No. 13 of 2022 vide judgment and order dated 02nd May, 2025 for commission of offence punishable under Sections 376-AB and 376(3) of the Indian Penal Code and the offences punishable under sections, 4(2), 6, 8 and 12 of the Protection of Children From Sexual Offences Act, 2012 is maintained, so also the punishment given therefor.

- (III) However, conviction awarded to the appellant by Special Judge, Bhokar in Special Case No. 13 of 2022 vide judgment and order dated 02nd May, 2025 for commission of offence punishable under Sections 376(2)(1) of the Indian Penal Code is set aside and consequently, the appellant is acquitted of the said offence.
- (IV) At this juncture it is necessary to mention here that Mr. Khot and Mr. Ambilwade, learned counsel appointed through Legal Aid to represent the appellant and Respondent No.2, respectively have acted as officers of Court since they, without taking any adjournment, have prepared themselves fully and relied upon several judgments in very short time and assisted the Court.
- (V) In view of the same, fees of Mr. Khot and Mr. Ambilwade, learned counsel be quantified at Rs.10,000/- each.
- (VI) Pending criminal application, if any, stands disposed of accordingly.

(RAJNISH R. VYAS, J.)

SSD