



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

CRIMINAL APPEAL NO. 719 OF 2025

Samiran Nirmal Sarkar
Age. 41 years, Occ. Labour,
R/o. Aakaipur, Gopalnagar,
District uttar Pargana State, West Bengal.
At present R/o. Pande Pokhari, Tq. Partur,
District Jalna.

...Appellant

Versus

1. The State of Maharashtra,
Through Police Inspector,
Aashti Police Inspector,
Tq. & District Jalna.

2. XYZ

...Respondents

...

Advocate for Appellant : Mr. Chatterji Joydeep
APP for Respondent No. 1 : Ms. M.N. Ghanekar
Advocate for Respondent No. 2 : Mr. Rahul M. Gaikwad

...

**CORAM : RAJNISH R. VYAS, J.
DATE : 27TH JANUARY, 2026**

ORAL JUDGMENT :

1. Heard respective learned counsels.
2. The appellant/original accused has preferred this appeal challenging the judgment dated 12.08.2025, passed by Special Judge, Jalna, in Special Case No. 19/2025, by which, he was convicted for commission of offence punishable under Section 258 (2) of the Bhartiya Nagarik Suraksha Sanhita, 2023, and under Section 6 of Protection of

Children and Sexual Offences Act, (herein after would be referred to as 'the Act of 2012' for the sake of brevity) and sentenced to suffer rigorous imprisonment for twenty years and pay fine of Rs. 20,000/- and in default payment of fine to suffer simple imprisonment for two years.

3. The appellant was also convicted for commission of offence punishable under Section 64 (2) (m) of the Bhartiya Nyaya Sanhita, 2023, (herein after would be referred to as 'the Act of 2023' for the sake of brevity) and was directed to suffer rigorous imprisonment for twenty years and pay fine of Rs. 20,000/- and in default payment of fine to suffer simple imprisonment for two years.

4. The appellant was also convicted for commission of offence punishable under Section 65 (1) of the Act of 2023, and was directed to suffer rigorous imprisonment for twenty years and pay fine of Rs. 20,000/- and in default payment of fine to suffer simple imprisonment for two years.

5. He was also convicted for commission of offence punishable under Section 10 of the Act of 2012, and directed to suffer rigorous imprisonment for five years and pay fine of Rs. 2,000/- in default to suffer simple imprisonment for two years.

6. He was also convicted for commission of offence punishable under Section 12 of the Act of 2012, and directed to suffer rigorous

imprisonment for one year and pay fine of Rs. 2,000/- in default to suffer simple imprisonment for two years. All these sentences were ordered to run concurrently.

7. Furthermore, a fine of Rs. 44,000/- was imposed upon the appellant, out of which Rs. 40,000/- was directed to be given to the victim towards compensation.

8. In nutshell, it is the case of prosecution that the criminal law was set in motion on the basis of information supplied by the mother of victim to Police Station Ashti, Taluka Partur, on the basis of the which, First Information Report No. 246/2024 dated 30.09.2024, was registered against the present appellant. After registration of FIR, the Investigating Officer, during the course of investigation, subjected the victim and appellant to the medical examination, collected samples of blood, seized the clothes, so also collected the birth certificate. The accused was arrested and after completion of investigation, final report No. 14/2025, was placed before the trial Court.

9. In this backdrop and since the accused did not plead guilty to the charge, the prosecution examined following witnesses.

Rank	Name	Nature of Evidence (Eye Witnesses, Police Witness, Medial Witness, Panch Witness)
PW-1	‘H.N.S.’ (mother of victim)(name withheld)	Informant

PW-2	‘S.N.S.’ (name withheld)	Victim
PW-3	Dr. Shireen Nasir Shaikh	Medical Officer
PW-4	Gajanan Kisanrao Ganjale	Panch Witness
PW-5	Venkatrao Sundarrao Jagtap	Witness
PW-6	Amit Madhukar Chate	Investigating Officer
PW-7	Hanumant Aasaram Jagtap	Panch Witness
PW-8	Pradip Datta Dolare	Investigating Officer
PW-9	Vishnu Shrawan Thoke	Gramsevak

10. After the evidence of nine witnesses, the accused was examined under section 313 of Code of Criminal Procedure, where he stated that he was falsely implicated. The accused neither entered into the witness box nor examined any other witness. Finally by considering the evidence on record, the trial Court convicted the appellant / accused as stated above.

11. In short, it was the case of prosecution that at the time of the incident victim was minor as defined under Section 2 (d) of the Act of 2012, and the accused was 41 years old. The accused was running an Ayurvedic Clinic and was known to the victim since last four years of incident. On 28.09.2024, the victim was not found at home and, therefore, enquiry was made by the mother. On an enquiry, it revealed that the appellant had taken her to Manvat Railway Station and, thereafter, they went to Muradabad, Uttar Pradesh.

12. As the information was supplied to the concerned police station and on 10.12.2024, the staff from police station Ashti visited village Nagalia and brought the victim and the appellant to the Ashti police station.

13. Pointing out the evidence available on record, learned counsel for the appellant submitted that the story advanced by the prosecution is not cogent and reliable. According to him, in order to bring home the charge for commission of offences under the Act of 2012, it was necessary for the prosecution to prove the date of birth. He submitted that the birth certificate, which was exhibited in the evidence of P.W.1 (mother), was relied upon to prove the date of birth. One more witness that is P.W. 9, who was working as a Gramsewak at the relevant time was also relied upon the trial Court. He submitted that both the witnesses cannot be relied on as neither mother had stated the date of birth nor P.W.9 had taken entry regarding the date of birth personally. He, therefore, submitted that once the date of birth is not proved, the question of convicting the appellant for the commission of an offence punishable under the Act of 2012, cannot be sustained.

14. Learned counsel for the appellant contended that the story advanced by the prosecution cannot be believed as date of birth of the victim has not been proved by the prosecution beyond reasonable doubt.

15. He further submitted that if the evidence is holistically considered, it would reveal that it was the victim who on her own accompanied the appellant to various places, which clearly shows that there was participation at the instance of the victim herself. He further submitted that even if the story of the prosecution is admitted as it is, it can be seen that the victim was on the verge of attaining majority.

16. He also stated that it was a classic case of false implication since even according to the admission given by P.W. 1, it is at the instance of P.W. 5 – landlord of the appellant, she lodged the report. The reason for false implication was non payment of the rent by the appellant to P.W. 5. He further submitted that even the sexual intercourse is not proved as the medical evidence shows that the hymen was ruptured, which was old. He then invited my attention to the testimony of the victim, wherein she had stated that she used to run the bicycle. He then invited my attention to the testimony of doctor who had examined the victim, who had clearly stated that hymen can be ruptured due to cycling also. He, thus, submitted that considering the fundamental principle that prosecution is required to prove the case beyond reasonable doubt, the appellant be acquitted.

17. Per contra, learned APP Ms. Ghanekar, submitted that by way of production of relevant documents, the prosecution has proved the

age of the accused and, therefore, the trial Court has rightly convicted the appellant under the Act of 2012. She further submitted that consent of minor is no consent in the eyes of law.

18. Learned counsel Mr. Gaikwad, appointed for victim, supported the stand taken by the prosecution and submitted that there is no reason to disbelieve the testimony advanced by the victim. He submitted that the defence taken by the appellant was fragile and in order to rebut the presumption as prescribed under the Act of 2012, more particularly, Section 29 and 30, the appellant could have either explained it by way of cross-examination or by answering the question put under Section 313 of Cr.P.C. or by examining the defence witnesses. He submitted that by not doing so, the burden is not discharged and, therefore, interference at the hands of this Court is not required.

19. Rival contentions for consideration :

P.W. 1/ the mother of the victim in her testimony had submitted that her husband was dumb and deaf and victim was her daughter who was 16 years old at the time of commission of offence. P.W. 1 was an illiterate lady who could not read or write. That incident had occurred prior to the date of registration of FIR and she was known to the accused. She was residing in the same village where the accused was residing. P.W. 1 was on visiting terms to the house of the appellant.

The appellant was a tenant in the house of Venkatrao Jagtap, where he used to run his clinic since last six years of lodging report.

20. P.W. 1, had stated that on the day of incident, victim had gone to the tailor at about 02:00 p.m. to bring her dress but did not return, due to which she started taking search of her. According to her, she had told to her brother-in-law about victim having gone missing. At about 08:00 p.m. , victim had telephoned the brother-in-law and then the phone was handed over to P.W. 1, wherein victim informed her that P.W. 1 need not wait for her as she had gone to Parbhani along with the appellant. Victim then disconnected the phone.

21. Thereafter, appellant made phone call on the phone of brother-in-law of P.W. 1 and stated that victim had gone along with him to Parbhani. Brother-in-law of P.W. 1 then asked the appellant to bring the victim back, to which appellant replied that he would do so after 10 to 12 days. Thereafter, the call was disconnected. According to P.W. 1, she then went to the police station and lodged the FIR, and her statement was recorded which was marked as exhibit P-1/PW-1.

22. This witness had further stated that after two months, she received a call from her daughter who requested her to bring her back and disclosed that she was at West Bengal. Thereafter, the police went and brought the victim and the appellant back. Victim disclosed to her

that accused had taken her to West Bengal, where they had exchanged garlands and stayed at the house of the relatives of the accused for one day. Victim further disclosed that accused started clinic and had also disclosed that when the accused was residing in her village, she had gone to his clinic and they had physical relations there. She further disclosed that victim and accused were in relation for four years and accused had also purchased a phone for her. She stated that at West Bengal, both were staying as husband and wife.

23. P.W. 1 also stated that she had given the birth certificate of victim to the police and victim was born at the village "Pa.Po.". The birth certificate of the victim was marked at exhibit P-2/PW-1.

24. P.W 1 was subjected to cross-examination in which she admitted that her financial position was not good. She denied the fact that victim was born at village Rampuri in hospital. She stated that victim was not born in the hospital and she was born at the home. She further stated that she was on bed for five to six days after her delivery. She had denied that she had given name to the victim after one month. She stated that she had decided name of the victim when she was not born. She stated that her relatives had given information of her birth. She admitted that she had never seen the birth certificate and she had not given it to the police. She further admitted that she cannot state date of birth of any of her

daughters. She admitted that the victim was in love with the accused and she was searching for bridegroom for victim.

25. She further admitted that quarrels used to take place between the accused and his landlord and, therefore, the accused left the village and she had lodged the complaint as the landlord told her to lodge complaint. Thereafter, suggestion was given that at the time of incident, victim was not sixteen years of age and more than eighteen years of age. P.W. 1 also admitted that she was aware of the fact that the victim of sexual assault gets compensation from State.

26. If the testimony of the aforesaid witness is perused, it would be crystal clear that she had categorically stated that she is illiterate and cannot read and write.

27. At this stage contention of learned counsel for the appellant that the birth certificate was not properly proved since victim had not handed over the said certificate to the police, which is admitted in the cross-examination by P.W. 1., is required to be considered. Learned Counsel has further argued that P.W. 1 had categorically stated that she was not aware about the dates on which her daughters were born. He thus submitted that the said testimony cannot be relied upon.

28. It is to be noted that for proving the date of birth P.W. 9, was also examined by the prosecution. P.W. 9 at the time relevant time was

working on the post of Gramsewak at the Grampanchayat of Village 'Pa.Po', since 2021. He had brought along with him the original register of 2007. He stated that on 30.12.2024, he had issued the birth extract, exhibit P-2/PW-1, to the police and had prepared the said birth extract from the original, which was along with him on the day of deposition. He submitted that there was entry of date of birth of victim which shows that she was born on 12.03.2007. He submitted that on the same date, the entry was taken and the information was given by Investigating Officer. He produced the documents showing information supplied for recording of name and said document was marked at exhibit P-1/PW-9.

29. According to the learned counsel for appellant, Aarogya Sevak B.M. Khot, who had provided information regarding birth of victim, ought to have been examined by the prosecution but the best evidence was not produced on record.

30. If the testimony of P.W. 1 and P.W 9 are read holistically, it would be crystal clear that P.W. 1, had categorically stated that victim was her daughter and she had produced her birth certificate on record. She had also stated that even before the birth of the victim, she had decided a particular name to be given to the victim. Thus, the contention of the counsel for the appellant that the birth certificate mentioning the name of the victim is suspicious, cannot be said to be convincing. Just

because the name of victim was mentioned in date of birth on the same day, on which she was born, same does not mean that the said birth certificate would lose its evidentiary value.

31. So far as contention of the learned counsel for the appellant that the person who supplied information to the Gramsewak, more particularly Aarogya Sevak B.M. Khot was not examined, suffice it to say that P.W. 9 in his testimony had categorically stated that he had brought relevant original extract of birth record, wherein date of birth of girl was shown as 12.03.2007. It is thus crystal clear that the birth certificate exhibit P-2/PW-1 is based upon exhibit P-1/PW-9, which is duly proved by P.W. 9. Nothing has been brought on record to disbelieve the testimony of the witness. Just because, this witness himself had not taken the entry regarding the date of birth, it does not mean that his testimony is required to be ignored. The testimony of P.W. 1 and P.W. 9, categorically shows that the date of birth of the victim was 12.03.2007. The birth certificate clearly shows the name of victim, name of mother, name of father and place where the victim was born.

32. Learned counsel for appellant further stated that P.W. 1, in her testimony had categorically stated that her relatives had given information regarding the birth and thus relatives should have been examined. While Learned Counsel tried to encash the said statement,

the fact remains that said statement in cross examination is not very specific. Simply stating that her relatives gave information about her birth does not mean that information was given to public authorities.

33. Learned counsel for the appellant has relied upon the case of **Alamelu and another Versus State represented by the Inspector of Police**, decided by the Hon'ble Apex Court on 18.01.2011 in Criminal Appeal No. 1053/2009 with connected Criminal Appeals. In the said judgment the Hon'ble Apex Court has taken into consideration the law laid down in the case of **Birad Mal Singhvi Versus Anand Purohit, 1988 (Supp) SCC 604**. Learned counsel for the appellant has relied upon the following observation of the Hon'ble Apex Court paragraph nos. 38 to 44, which read thus :

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be

admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under [Section 311](#) Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts

stated in the transfer certificate.

39. *Considering the manner in which the facts recorded in a document may be proved, this Court in the case of [Birad Mal Singhvi Vs. Anand Purohit1](#), observed as follows:-*

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....

..... Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the

circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

The same proposition of law is reiterated by this Court in the case of [Narbada Devi Gupta Vs. Birendra Kumar Jaiswal](#)², where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"."

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

41. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC

745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of [Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.](#)³, In the aforesaid judgment, it is observed as follows:-

".....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

42. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a

major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

43. We may further notice that even with reference to [Section 35](#) of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of [Ravinder Singh Gorkhi Vs. State of U.P.](#)⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of [Section 35](#) of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence

where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under [Article 21](#) of the Constitution, as [in that case](#) the accused may unjustly be convicted."

44. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor."

34. He thus submitted that evidence tendered by P.W. 9 was of no help to the prosecution and P.W. 1 is also liable to be ignored. His main thrust of argument is that both P.W. 1 and P.W. 9, have not proved either the birth certificate or the extract of the birth information since their testimony is not convincing, reliable and cogent. He submitted that just because document is exhibited, it does not mean that this document is proved. He further submitted that proving of document requires following of certain procedures which is discussed by the Hon'ble Apex Court in the aforesaid paragraphs.

35. I have gone through the aforesaid judgment. The law laid down by the Hon'ble Apex Court in the aforesaid judgment cannot be disputed but the facts of the said case and the facts involved in the present case are totally different. In that case, the Hon'ble Apex Court was dealing with a transfer certificate and not the birth certificate. In the instance case, the birth certificate is duly proved by the mother of victim which is based upon the document proved by P.W. 9 I.e. birth extract certificate. Therefore, the document is not only exhibited but proved by following the prescribed procedure.

36. Learned APP has also invited my attention to the judgment passed by this Court in the case of **Sanjay Jagannath Ursal Versus The State of Maharashtra**, on 29.08.2006, in Criminal Appeal No. 937/2003, more particularly, paragraph no. 10, which is reproduced here below :

“10. Counsel for the Appellant had also relied on the decision of this Court in the case of Jagannath Bhika Patil vs. The State of Maharashtra Jagannath Bhika Patil vs. The State of Maharashtra Jagannath Bhika Patil vs. The State of Maharashtra reported in 1979 Bom.C.R. 664 reported in 1979 Bom.C.R. 664 reported in 1979 Bom.C.R. 664. Reliance was placed on the exposition articulated in head note (C) of this decision. To my mind, even this decision will be of no avail to the Appellant. The medical evidence cannot be the

basis to discard the Register of Births and Deaths, which has been proved and in law, is a conclusive piece of evidence. Indeed, the presumption in respect of the entries in the said Register is rebuttable. However, merely because there is some inconsistency in the age given in the opinion of the doctor decided on the basis of ossification test with that of the Birth Register, that itself cannot be the basis to hold that the legal presumption relating to the entries in the Register of Births and Deaths stood rebutted as such. In my view, however, the decision in the case of Jagannath Bhika Patil (supra) goes against the Appellant. It has been observed that "if" entry regarding date of birth admittedly made in Gram Panchayat Office was produced and proved, that would have been credit worthy evidence in favour of the prosecution. That evidence was not produced by the prosecution in the said case. However, in the present case, the prosecution is relying on the Register of Births and Deaths. The said evidence has been duly proved. The Trial Court has accepted that evidence. I see no infirmity either in the approach or the conclusion reached by the Trial Court in that behalf. Accordingly, the said finding is accepted."

37. Learned APP contended that, P.W. 9 had categorically deposed about the date of birth and proved the document and, as the register was maintained in the ordinary course of business, the entry can be relied upon. Learned APP is right in saying so. Thus, I come to

conclusion that prosecution had proved that victim on the day of incident was a child.

38. Coming to the conviction of the appellant under Section 6 of the Act of 2012 is concerned, it would be necessary to discuss the ingredients of Section 6 of the Act, which reads as under :

*“6. Punishment for aggravated penetrative sexual assault.--
(1) Whoever commits aggravated penetrative sexual assault 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 natural life of that person and shall also be liable to fine, or with death.
(2) 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.”*

39. Section 5 of the Act of 2012, speaks about aggravated penetrative sexual assault. Section 3 speaks about penetrative sexual assault, which reads as under :

*“3. Penetrative sexual assault.— A person is said to commit “penetrative sexual assault” if—
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or.....*

40. Aggravated penetrative sexual assault is defined under Section 5 (l) which means penetrative sexual assault committed repeatedly on child.

41. Section 64 (2) (m) of the Act of 2023, is also one of the Sections under which the appellant is convicted. Section 64 defines rape and clause (2) (m) speaks about commission of rape repeatedly on the same woman. The definition of rape under the Act of 2023 and definition of penetration sexual assault under Section 3 of the Act of 2012, is somewhat similar.

42. In this background, the testimony of the victim would be of much importance. P.W. 2 is the victim of crime who in her evidence had sated that she was known to the accused since last four years of lodging the report and she used to pass from the clinic of the accused. Accused was 40 years of age at the relevant time and was native of West Bengal. She stated that accused had purchased a cell phone for her and had sexual relations with the accused several times in the clinic.

43. She further stated that on 28.09.2004, she had gone to tailor and accused had taken her to Manwat Railway Station. Then, they went by train to Muradabad, Uttar Pradesh, where they stayed in the house of the one of relatives of the accused for one day. She stated that accused had then taken a room on rent where they stayed as husband and wife for

two months. She deposed that her date of birth is 12.03.2007. According to her, on 10.12.2024, (typographical mistake in the deposition as 10.11.2024) the police from Ashti police station had come and taken the victim and the appellant to the police station. Her statement was recorded under Section 164 of the Code of Criminal Procedure.

44. In cross-examination, she had admitted that her father was deaf and dumb and mother used to manage all the outside work. She admitted that she was in love with the accused and also admitted that there were several houses surrounding the house of the accused. She further stated that she used to ride a bicycle and play other games and on some occasions she got injured also. She admitted her family members were arranging her marriage. The omissions in her testimony were tried to be brought on record, but the fact remains that the said omissions were not put to the Investigating Officers i.e. P.W. 6 and P.W 8, and therefore, cannot be taken into consideration.

45. If testimony of said witness is seen, she had categorically stated that she was presented with a phone and, thereafter, sexual relations with the accused had taken place on several occasions.

46. In the light of testimony of P.W. 2, let us see the testimony of P.W. 3 who was working as Medical Officer at District Women Hospital, Jalna and examine the victim.

47. P.W. 3 – Medical Officer, had stated that she found no evidence or sign of recent sexual intercourse on the person of the victim but there was evidence of old rupture hymen. In cross-examination, this witness had admitted that the cause for hymen rupture could be cycling or other sport activities. The said witness had proved medico legal examination report of sexual violence and same was marked as exhibit P-1/PW-3.

48. Learned counsel for the appellant submitted that though P.W.3 had stated that there was evidence of old rupture hymen but she had also admitted that the cause for hymen rupture could be cycling or other sports activities. He then relied upon the part of the testimony of the victim wherein she had stated that she used to ride bicycle and had sustained injuries also. He then submitted that if both statements are looked together, it can be simply said that possibility can be ruled out that hymen was ruptured due to cycling.

49. At first glance, the arguments advanced by the learned counsel for the appellant may seem attractive but on the deeper scrutiny it can be said that the victim who was the child had categorically stated that she was subjected to the sexual intercourse and the doctor had also stated that the hymen was ruptured. When these facts are brought on record, the presumption as prescribed under Sections 29 and 30 of the Act of 2012

triggers. Once the foundational facts are established i.e. proving of age and sexual intercourse, then the appellant ought to have brought material on record either by way of cross-examination, by answering questions put to him under Section 313 of Cr.P.C. or by examining the defence witnesses, in order to rebut the presumption. I, therefore, come to conclusion that prosecution has proved beyond reasonable doubt that the accused had committed offence of aggravated penetrative sexual assault.

50. As the victim was also repeatedly subjected to penetrative sexual assault, clause 1 of Section 5 of Act of 2012 gets attracted. Thus, the appellant was rightly convicted by the trial Court for commission of said offences.

51. Learned counsel for the appellant submitted that even according to the learned trial Court, more particularly, in finding given at paragraph no. 26 of the judgment, the victim was 17 years 6 months and 16 days old on 28.9.2024, and therefore, the appellant ought not to have been convicted for commission of offence punishable under Section 65 (1) of the Act of 2023. Section 65 of the Act of 2023, prescribed punishment for rape in certain cases. It states that whoever commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

52. Admittedly on 28.09.2024, victim was 17 years 6 months and 16 days old and, therefore, the appellant should not have been convicted for commission of offence under Section 65(1) of the Act of 2023. I thus come to conclusion that the conviction of the appellant for commission of offence punishable under Section 65 (1) cannot be sustained.

53. As already discussed (supra), the prosecution has not only proved the age of the victim but also the act committed by the appellant. Hence no interference is required in the findings rendered by the trial Court, except stated below. Accordingly, I pass the following order :

ORDER

- i. Criminal Appeal is partly allowed.
- ii. Conviction of the appellant for commission of offence punishable under Section 65 (1) of Bharitya Nyaya Sanhita, 2023, awarded in Special Case No. 19/2025, by Special Judge, Jalna, on 12.08.2025, is set aside.
- iii. The other part of the judgment dated 12.08.2025, passed in Special Case No. 19/2025, by Special Judge, Jalna, is maintained and consequently, the conviction of appellant is upheld for commission of offence punishable under Section 6, 10, and 12 of the Protection Of Children

From Sexual Offences Act of 2012 and Section 64 (2) (m) of the Bhartiya Nyaya Sanhita, 2023.

iv. Mr. Gaikwad, learned appointed counsel has ably assisted the Court. His fees be quantified at Rs. 10,000/- (Rupees ten thousand).

(RAJNISH R. VYAS, J.)

SPC