

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 857 OF 2024

Mohd. Aarif Akbarali Shaikh,
 Prisoner No.C-8058
 Age: 27 yrs. (approx.),
 Occ: Labourer, R/o Laukana, Post
 Dharampur Nagar Zhopadpatti, Below
 SCLR Bridge, Kurla West, Mumbai
 Presently in Kolhapur Central Prison,
 Kolhapur

**...Appellant/
 Org. Accused**

~ versus ~

- 1. State of Maharashtra,**
 Through V. B. Nagar Police Station,
 Kurla, Mumbai.
 C.R. No. 60 fo 2019
 Copy to be served on the Public
 Prosecutor, Appellate Side,
 Bombay High Court.
- 2. XYZ,**
 Complainant-Mother of Victim,
 R/o Bharatiya Nagar Zhopadpatti,
 Near Hanuman Mandir, First Lane,
 Below SCLR Bridge, Kurla West,
 Mumbai

...Respondents

SHEPHALI
 SANJAY
 MORMARE

Digitally signed
 by SHEPHALI
 SANJAY
 MORMARE
 Date: 2026.02.27
 11:24:18 +0530

APPEARANCES

Appointed Advocate for the Appellant	Mr Sushan Mhatre.
For The Respondent No. 1-State	Mr RM Pethe, APP
Appointed Advocate for the Respondent No. 2	Ms Priyanka Chavan.

CORAM : R. M. JOSHI, J.

DATED : 17TH FEBRUARY 2026.

JUDGMENT:

1. The Appellant/convict in POCSO Special Case No. 469 of 2019 takes exception to the Judgment and Order dated 20th November 2023, whereby he was convicted for the offences punishable, under Sections 363, 376 of IPC and Section 4, 6, 8 and 12 of POCSO Act, and sentenced to suffer rigorous imprisonment for a term of 10 years with fine and default sentence.

2. Informant is the mother of victim, who lodged report to the police with regard to her daughter went missing on 10th March 2019. She left home on the pretext of going to wash-room and, thereafter, did not come back. The search taken for her in the surrounding area was futile. Report came to be lodged against unknown person. On 14th May 2019, the Accused and victim were taken in custody by the police, and thereafter, the victim informed to her mother about the occurrence of the incidents. As per the narration given by victim to her mother, on 10th March 2019, at about 11:00 pm, victim was roaming around the area and, at that

time, she met Accused. Accused asked her to come along with him. Victim was scared and, therefore, went along with the Accused in an auto rickshaw. The Accused and victim went to the house of a relative of the Accused. **At the same place they stayed for about eight days, and during this period, repeatedly,** physical relations were established with her by the accused. Victim, thereafter, was taken to Uttar Pradesh by the Accused. Since the father of the Accused refused to take them in the house, they stayed for some days in the garden in Uttar Pradesh. Victim claimed that during this period too, the Accused has established physical relations with her. Both victim and Accused were taken in custody at Uttar Pradesh and were brought to Mumbai. Accordingly, supplementary statement of the informant was recorded.

3. Crime was registered vide C.R. No. 60 of 2019 for offence under Section 363 of IPC and, later on, pursuant to the statement of victim and supplementary statement of informant, offences under Section 363, 376 of IPC, and Section 4, 6, 8 and 12 of the POCSO Act came to be added. Investigation into the said crime was conducted by a woman police officer. Victim was referred to

the medical examination. Accused came to be arrested. Statements of witnesses were recorded and the documentary evidence such as panchnama, medical report, etc were included in the investigation papers. On conclusion of investigation, charge-sheet came to be filed before the competent Court.

4. Charge came to be framed against the Accused by the Exhibit-12. Since the Accused denied charges, prosecution led evidence in order to prove the guilt of the Accused. The prosecution examined following witnesses and also led documentary evidence to support its case.

Rank	Name	Exhibit
PW-1	Informant	P-20
PW-2	Victim	P-27
PW-3	Mohd. Salim Hamidulla Khan	P-28
PW-4	Nasim Ejajali Shaikh	P-30
PW-5	Afroz Mohd. Sayed Khan	P-32
PW-6	PSI Subhas Gopal Rathod	P-34
PW-7	Narendra Vansingh Padvi	P-44
PW-8	Dr. Disha B. Dave	P-49

5. The incriminating circumstances, as brought on record by the prosecution, were put to the Accused in his statement under Section 313 of CRPC. Learned Trial Court found evidence led by

the prosecution sufficient to bring home guilt of the Accused beyond reasonable doubt and hence convicted him.

6. Learned counsel for the Appellant at the outset submits that the burden is upon the prosecution to prove that victim was a minor at the time of occurrence of the incident. It is his submission that the evidence led by the prosecution on record does not prove that the victim was below age of 18 years at the relevant time and, hence, the prosecution has failed to prove that victim was a child within the meaning of Section 2(d) of the POCSO Act and, consequently, the provisions of the said Act do not apply to the present case. It is his submission that the evidence led with regard to the age of the victim is far from satisfactory and, in any case, is not conclusive to hold that she was minor at the relevant time. He, thereafter, took this Court through the evidence on the record, more particularly, evidence of the victim recorded before the Trial Court and her earlier statements. It is his submission that the evidence of the victim is not reliable for the reason that in the statement, during the investigation, she gives altogether different version of the incident, so also, the manner in which she was allegedly abducted by the Accused herein. It is a

submission that, during the cross-examination, the victim has accepted that whatever was recorded in her statement was not narrated by her to the police. In this regard, he made reference to paragraph 8 of the evidence of the victim. According to him, the evidence of the victim, with regard to she being abducted is not supported from the admissions given in the cross examination. It is a submission that victim has made no attempt to escape or to raise alarm, if she was forcibly taken by the Accused to his relatives or even to Uttar Pradesh. In this regard, reference is made to the evidence of the Medical Officer to whom history was given by the victim and, according to the learned counsel, the said history is inconsistent to her statement before the Court. On among these submissions, it is his contention that evidence of the victim is not reliable in order to record conviction against the Accused and, more particularly, when the prosecution has failed to prove victim to be minor, the conviction cannot sustain.

7. Learned APP and learned counsel for Respondent No. 2 supported impugned Judgment and Order. It is their contention that the prosecution has proved age of the victim to be below 18 years at the time of occurrence of the incident. In this regard,

reliance is placed on the evidence of PW-7, Mr Padvi, who is the Principal of this school, wherein the victim was studying. Learned APP, by relying upon provisions of Section 94 of Juvenile Justice Care and Protection Act (“JJ Act”) and Rules made there under, submits that the evidence of the date of birth certificate from school is sufficient to prove age of the victim to be below 18 years at the time of occurrence of the incident. To support this submission, learned APP placed reliance on the Judgment of the Hon’ble Supreme Court in case of *Jarnail Singh vs State of Haryana*¹ and *Mahadeo s/o Kerba Maske vs State of Maharashtra & Anr.*² Learned counsel for the Appellant resisted the said contention by submitting that firstly, there is no evidence to indicate that the date of birth certificate is from the school victim attended first. It is his submission by referring to the evidence of PW-7 and, more particularly, cross-examination wherein he admits of there being overwriting in the form, so also, the form being not completely filled in. It is his submission that when the informant admits that she is illiterate and does not explain before

1 (2013) 7 SCC 263..

2 (2013) 14 SCC 637.

the Court that she is in a position to sign, any evidence indicating her signature deserves to be discarded.

8. On merit, learned APP and learned counsel for Respondent No. 2 submitted that the evidence of the victim is consistent and truthful and can become sole basis of conviction of the Accused. It is their further submission that having regard to the nature of offence and seriousness of the crime and since the prosecution has succeeded in proving the guilt of the Accused beyond reasonable doubt, this is not a fit case for acquittal of the Accused.

9. There cannot be two opinions with regard to the position of law in respect of assessment of the evidence of a victim of sexual assault, that the testimony of the victim if is truthful and free from doubt and is also consistent with her previous statement, then it can become a basis for the conviction of the Accused without seeking any further corroboration thereto. At the same time, it is the duty and obligation of the prosecution to prove the guilt of the Accused beyond shadow of reasonable doubt even in the trial under POCSO ACT. In a trial for said offences, the burden would be on the prosecution to first prove that the victim is below age of 18 years and, hence, a child within the meaning of section 2(d) of

the Act. It is only after the foundational facts are established by prosecution, Section 29 would come into play which would require the Accused to rebut the presumption of commission of the offence under the Act. Keeping in mind these principles of law, the evidence led by the prosecution is evaluated hereinafter.

10. In order to bring home guilt of the Accused for the offences punishable under POCSO Act, it is necessary for the prosecution to prove that the victim was minor at the relevant time. Informant in her evidence before the Trial Court states that the date of birth of victim is 10th April 2005. A specific cross-examination has been conducted in this regard by suggesting that the victim was major at the time of incident. No doubt, the said suggestion has been denied, however, the said suggestion indicates that the defence has taken exception to the statement of the informant with regard to the date of birth of victim. Similar is the evidence of victim herself, who claims her date of birth to be 10th April 2005 and she being 14 years of age at the relevant time. There is a cross-examination of victim to indicate that she was major and had completed 18 years of age at the relevant time. Informant, in her cross-examination has admitted that she had not handed over

Birth Certificate of the victim to the police. Thus, admittedly, there is no Birth Certificate of the victim in order to prove her age. Further, admittedly, no ossification test has been conducted in order to ascertain age of the victim at relevant time.

11. In this backdrop, it would be relevant to take note of the evidence of Mr Padvi, PW-7. He deposes that he is Principal of the school wherein the victim was studying. He states that the age of the student is recorded in the school record on the basis of Birth Certificate or on the basis of the entries made in the admission form. According to him, age of the victim was recorded as 10th April 2005 is on the basis of her age mentioned in the admission form submitted by her parents. In the cross-examination, the witness accepts that he is not aware as to whether the parents of victim are illiterate. He further states that there are no documents in the school record submitted by the parents of the victim in respect of her date of birth. He further accepts that there is overwriting in the place of birth, mentioned in the information provided by the parents in the application form (Exhibit-47).

12. Perusal of the said document indicates that it is claimed to have been signed by the mother of the victim. The mother of the

victim, i.e., informant, however, admits in clear terms that she is illiterate. As rightly argued by the counsel for the Appellant that there ought to have been an explanation provided by the informant that though she is illiterate, she is able to sign. In absence of any such specific evidence, it would be difficult to accept that the said form as produced before the Trial Court is signed by the mother of the victim.

13. At this stage, it would be relevant to take note of the Judgment in case of *Jarnail Singh* (Supra). In paragraph 22 of the said Judgment, the Hon'ble Supreme Court has held thus:

“22 On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of Age —(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the

juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

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

of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.” Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law.”

14. In paragraph 23, the Hon’ble Supreme Court went on to hold that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the Supreme Court was of the view that the aforestated statutory provision

should be the basis for determination of age even of a child who is a victim of the crime.

15. The said Judgment, therefore, indicates that for determination of age of a victim, the matriculation or equivalent certificate would be the first preference to be given and, thereafter, the date of certificate from the school attended first by the victim. Thus, it is mandatory for the prosecution to prove that the record of the school which is brought before the Trial Court is in respect of the school first attended. Apart from this, the Birth Certificate given even by the corporation or a Municipal Authority or Panchayat would be proof of the age of the victim. It is only in absence of any of these documents, the medical opinion will be sought from duly constituted medical board, which will declare the age of the child. Keeping in mind this Judgment, it is necessary to assess the evidence on the record.

16. In the instant case, the informant candidly accepts the fact that there is no birth certificate indicating the date of birth of the victim. The evidence led of PW-7, i.e., the principle of the school where the victim was studying does not state specifically that it was the first attended school of the victim. Apart from this,

reliance is placed upon a document which is purportedly signed by the mother of the victim to record the age of the victim. The informant admits that she is illiterate and as rightly argued on behalf of the counsel for the Appellant that there is no explanation from the informant that though she is illiterate, she is able to sign. Needless to say that the burden is upon the prosecution to prove all facts in issue beyond reasonable doubt. In any case, a doubt is created with regard to the evidence sought to be placed on record by the prosecution, as per the settled position of law, the benefit thereof would go to the Accused. Thus, in this case on the basis of evidence on record, it cannot be said that the prosecution has succeeded in proving that the victim was minor at the relevant time beyond doubt.

17. In this backdrop, it would be relevant to assist the evidence of the victim. The victim, before the Trial Court, in her examination-in-chief states that on 10th March 2019, at about 11:00 pm, she was roaming near the bridge, and Accused came there and asked her to accompany. When she refused for the same, he threatened her. She claims that she was scared and was taken to Tilak Nagar in an auto rickshaw. From there they went to

Govandi by train. They stayed at the house of the uncle of the Accused for a period of a week. He claims that during this period the Accused committed sexual intercourse with her. Thereafter, Accused took her to his native place at Uttar Pradesh. Since the father of the Accused did not allow them to reside in his house, they stayed in garden. Victim claims that at that place accused established forcible sexual relations with her. She claims that it was the Accused who called mother of the victim and, thereafter, police came and took them in custody.

18. In the cross-examination her attention is drawn to the statement recorded under Section 161 of Cr.P.C. Paragraph 8 of her evidence indicates that she refused to have made several material statements with regard to the incident, so also, the incident occurred prior thereto. PW-6, API, who recorded the said statement, however, categorically states that statement of victim being recorded as per her say. Victim in the statement recorded to the police states about three persons committing sexual assault on her. She also gives altogether different version of the incident in which she was abducted by the Accused. Apart from this, it is pertinent to note that the testimony of the Medical Officer

indicates that the history given by the victim at the time of her medical examination shows that she was intoxicated before abduction, however, in the substantive evidence she does not whisper anything in this regard. The inconsistencies in the statement of the victim are of material nature and they cannot be discarded by branding them as insignificant or immaterial. Thus, the evidence of the victim is not consistent with her previous statement. The Hon'ble Supreme Court in case of ***Nirmal Prem Kumar & Anr. vs. State represented by Inspector of Police***³ has held that sterling quality witness is the one who maintains consistency in the statement. If the statements made at earlier time by the witness are inconsistent to the statement recorded before the Court on oath, it cannot be said that the testimony of such witness is of a sterling quality.

19. Evidence of the victim indicates that she was taken in an auto rickshaw to Tilak Nagar and, thereafter, by train they went to Govandi. She stayed along with the Accused in the house of the uncle of the Accused for about a week. She accepts that in the same area the houses were located adjoining to each other. The

3 Criminal Appeal No. 1098 of 2024.

place where she resided for a week, it was a house of the uncle of the Accused wherein uncle himself with his wife 2 daughters and son was residing. In case she was forcibly taken by the Accused to the safe place, it was open for her to make a grievance about the same to these persons. It is not her case that she made grievance to the uncle of the Accused and he failed or refused to take cognizance thereof. Apart from this, her admissions indicate that they went to UP in a train and could notice police personnel in the train. She, however, does not make any complaint with regard to she being abducted to the police or any other person to whom she came across. All these facts clearly indicate that it is difficult to hold that she was forcibly taken by the Accused firstly to Tilak Nagar and then Govandi Chitta Camp and, finally, to Uttar Pradesh. It is pertinent to note that as admitted by the informant in her evidence that the victim had no mobile phone and she accepts that it was the Accused who called mother of the victim and, thereafter, the police came to UP and both of them were taken in custody.

20. The testimony of the victim, if considered as a whole, it creates doubt as to whether she was forcibly taken by the Accused

along with him. It also further creates it out as to whether he was subjected to forcible sexual intercourse by the Accused. The medical evidence though indicates that there was old ruptured hymen, in view of the inconsistent statement of the victim with regard to she being ravished by 3 persons, the said evidence is not conclusive to hold that the victim was subjected to forcible sexual relationship by the Accused. The entire evidence on record, therefore, does not prove beyond doubt that the victim was minor at the relevant time, and that she was abducted/kidnapped by the Accused from the lawful custody of her parents. Apart from this, the evidence of the victim being not found consistent and wholly reliable, in the facts of the case, it cannot be said that the prosecution has succeeded in proving the guilt of the Accused beyond shadow of reasonable doubt. He, therefore, deserves to be acquitted by giving benefit of doubt.

21. Consequently, the Appeal deserves to be allowed. Hence following order:

ORDER

(a) The Appeal stands allowed.

- (b) The conviction recorded against the Appellant/
Accused in POCSO Special Case No. 469 of 2019, by
Judgment and Order dated 20th November 2023 is set
aside.
- (c) Appellant/Accused stands acquitted of charges for the
offences punishable under Sections 363, 376 of IPC
and Section 4, 6, 8 and 12 of POCSO Act in
connection with C.R. No. 60 of 2019.
- (d) Fine amount paid, if any, be refunded to the
Appellant/Accused.
- (e) The Appellant be set free forthwith, if not required in
other crime.

22. In view of dismissal of the Appeal, pending Applications, if
any, stand disposed of.

(R. M. JOSHI, J.)