



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH AT NAGPUR**

CRIMINAL APPEAL NO. 04 OF 2024

Vishal Dnyaneshwar Kshirsagar,
Aged about - 23 years, Occu. - Nil,
R/o. Chikhli, Tahsil Samudrapur,
District : Wardha

... Appellant

.. Versus ..

1) The State of Maharashtra,
through Police Station Officer,
Police Station, Bela, District Nagpur.

2) Victim in Crime bearing No. 11/2020
at Police Station, Bela, District Nagpur.

...Respondents

Shri K.J.Topale, Advocate for appellant.
Ms. Sneha Dhote, APP for respondent/State.
Shri Anirudha Ananthakrushnan, Advocate (Appointed) for
Respondent no. 2.

CORAM : NEERAJ P. DHOTE, J.

DATE OF RESERVING THE JUDGMENT : 18/02/2026
DATE OF PRONOUNCING THE JUDGMENT: 25/03/2026

JUDGMENT

This is an Appeal under Section 374(2) of the Code
of Criminal Procedure, 1973 (for short, 'Cr.P.C.') against the

judgment and order dated 19/04/2023, passed by the learned Additional Sessions Judge, Special Court No. 2 (POCSO), Nagpur in Special POCSO Case No. 228/2020, convicting and sentencing the Appellant as follows:-

“i) The accused Vishal Dnyeshwar Kshirsagar, aged about 20 years, Occ. Labour, R/o. Chikhli, Tq. Samudrapur, Distt. Wardha is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable u/s. 4 of the POCSO Act, 2012, i.e. penetrative sexual assault arising out of Crime No. 11/2020 registered by Bela Police Station and sentenced to suffer for a term of 10 years and fine Rs. 1,000/- I/d. SI for one month.

ii) The accused Vishal Dnyeshwar Kshirsagar, aged about 20 years, Occ. Labour, R/o. Chikhli, Tq. Samudrapur, Distt. Wardha is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable u/s. 6 of the POCSO Act, 2012, and sentenced to suffer imprisonment for a term of 20 years and fine Rs. 2,000/-I/d. SI for three month.

iii) The accused Vishal Dnyeshwar Kshirsagar, aged about 20 years, Occ. Labour, R/o. Chikhli, Tq. Samudrapur, Distt. Wardha is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable u/s. 363 of IPC and sentenced to suffer imprisonment for a term of 5 years and fine Rs. 1,000/- I/d. SI for one month.

iv) The accused Vishal Dnyeshwar Kshirsagar, aged about 20 years, Occ. Labour, R/o. Chikhli, Tq.

Samudrapur, Distt. Wardha is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable u/s. 506 of IPC and sentenced to suffer imprisonment for a term of 3 months and fine Rs. 500/- I/d. SI for one month.

v) The accused Vishal Dnyaneshwar Kshirsagar, aged about 20 years, Occ. Labour, R/o. Chikhli, Tq. Samudrapur, Distt. Wardha is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable u/s. 376(2)(n)(j), 376(3) of IPC but in view of mandate of sec. 42 of the POCSO Act, 2012, the maximum punishment is awarded to the accused u/s. 4 and 6 of the POCSO Act, 2012, for the similar act, therefore, punishment i.e. sentence for the similar act is not permissible under the law.

vi) All the sentences shall run concurrently.

vii) The fine amount shall be paid to the victim after deposited by the accused person in the Court same shall be utilized for the purpose of medical, education and welfare of the child.

viii) The accused are entitled for set off from the punishment as contemplated u/s. 428 of Cr.P.C.

ix) The accused taken in custody and send to the Central Jail, Nagpur.

x)

xi)

2. The prosecution's case as revealed from the police report is as under:-

2.1 The victim aged 15 years was residing with her

parents and brothers at the given address. On 11/01/2020, the victim returned from school at 10.00 a.m. She accompanied her parents to the agricultural field. Her brother had gone to the Taluka place. As the victim was not feeling well, she returned home. When her brother came home at 04.00 p.m., he did not find the victim at home. Despite search, the victim was not found. The brother lodged the report with the Bela Police Station, District Nagpur against the unknown person and Crime bearing No. 11/2020 came to be registered for the offences punishable under Section 363 of the Indian Penal Code, 1860 (for short, 'I.P.C.').

2.2 During the investigation, the police found victim and the Appellant together. They were taken into custody. The victim was sent for medical examination. The victim's statement was recorded. On the statement of the victim, the offences punishable under Sections 376(2)(n)(j) & 506 of IPC and the offence punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') came to be added in the aforesaid Crime Number. The Appellant came to be arrested and sent for medical examination.

The spot panchanama was drawn. The statement of the witnesses were recorded. The victim was found pregnant. With the consent of her parents, the pregnancy was terminated. The samples of the victim, the Appellant and foetus came to be drawn and sent to the Laboratory for examination. The DNA report indicated that, the Appellant and the victim were the biological parents of the foetus. On completion of investigation, the Appellant came to be charge-sheeted.

2.3 The learned Trial Court framed the Charge against the Appellant vide Exh. 03 for the offences punishable under Sections 363, 376(2)(n) & (j), 376(3) and 506 of IPC and for the offences punishable under Sections 4 and 6 of POCSO Act. The Appellant pleaded not guilty and claimed to be tried. To prove the charge, the prosecution examined in all twelve (12) witnesses and brought on record the relevant documents in the evidence of the witnesses.

2.4 After the prosecution filed the evidence closure pursis, the learned Trial Court recorded the statement of the Appellant under Section 313(1)(b) of the Cr.P.C. The Appellant stated that, he was falsely implicated. After hearing both the sides

and appreciating the evidence available on record, the learned Trial Court passed the impugned judgment and order.

3. Heard the learned Advocate for the Appellant, the learned APP for the State and the learned Advocate for the victim. Scrutinized the evidence on record.

3.1 It is submitted by the learned Advocate for the Appellant that, the prosecution failed to prove that, the victim was below the age of 18 years. The birth certificate brought on record was issued after the crime was registered. No witness was examined to prove the date of birth and age of the victim. The evidence of the victim shows that, there was love affair between the Appellant and the victim. The other evidence on record was insufficient to prove the charge. The Appeal be allowed by setting aside the conviction and sentence.

3.2 It is submitted by the learned APP for the State that, the DNA report shows that, the Appellant was the biological father of the foetus. The victim deposed of the incident and her date of birth, which matches with the birth certificate. As there was no cross in respect of the age of the victim, the learned Trial Court has rightly convicted the Appellant and no interference was

called for in the impugned judgment and order, and the Appeal be dismissed.

3.3 It is submitted by the learned counsel for the Respondent no. 2-victim that, the victim's testimony remained unshaken in cross-examination. The victim's testimony was sufficient to prove the charge. The Appeal be dismissed.

4. As regards the age of the victim is concerned, the prosecution relies on the birth certificate brought on record at Exh. 43 in the evidence of the victim. Except this, there is no evidence in respect of the date of birth and the age of the victim. The victim's evidence in respect of her own date of birth would be inadmissible being hearsay. There is no challenge to the said Exh. 43 in the cross-examination. The evidence of P.W.-10 Investigating Officer shows that, the Exh. 43 - Birth Certificate was issued by the Chanoda Grampanchayat in response to a communication made by her. In absence of the challenge to the said public document, there is no reason to discard the same. The date of birth in the said Exh. 43 is shown as 23/08/2004. The crime is registered on 12/01/2020. This clearly goes to show that, the victim was a child as defined under Section 2(d) of the

POCSO Act at the relevant time i.e. below the age of 18 years.

5. It is the prosecution's case that, the victim was kidnapped and raped by the Appellant. To prove the charge, the victim's testimony is crucial. The victim is examined as P.W.-7. Her evidence shows that, during the Diwali vacation of 2018, she had been to the village of her maternal uncle, where she stayed for four (4) days. During that period, she got acquainted with the Appellant. They got friendly. After the victim returned to her native place, the Appellant used to visit her house. The Appellant used to come to the victim's house in absence of her parents. The Appellant did sexual intercourse with her multiple times at her house. On 11/01/2020, while she was returning from her agricultural field to her home as she was not feeling well, the Appellant came and forcibly took her on the motorcycle to Nagpur, which was at the distance of 80-90 km. She stayed with the Appellant at the house of Appellant's sister at Nagpur. Thereafter, the Appellant took her to Hinganghat. The Police apprehended them on the way and brought them to the Police Station. The victim was medically examined and found pregnant.

6. The evidence of the victim that, she was raped and

forcibly kidnapped by the Appellant, is required to be seen with doubt. It is strange that, though the Appellant came to the house of the victim and committed rape, nothing was disclosed by the victim to her parents. According to the victim, the Appellant threatened her to defame and therefore, she kept quite. It is further strange that, though the Appellant took her forcibly on the motorcycle to a long distance, she neither raised alarm nor any hue and cry. What the evidence of the victim goes to show is that, she was equally responsible for whatever happened with her. It is clear from the evidence of her brother who is examined as P.W.-1 that, the victim was a student of 10th standard. The victim's evidence goes to show that, she was a girl of mature understanding. Her evidence shows that, she went to the Police Station with her father and brother 5 to 6 days after she narrated the incident to them. The suggestion is given to the victim that, at the instance of her parents, she gave the statement to the police. The victim's evidence clearly shows that, she eloped with the Appellant. There cannot be any dispute that, being minor, her consent was immaterial. However, her evidence in respect of kidnapping and rape does not inspire confidence and is required to be seen with doubt.

7. The missing report was lodged by the brother of the victim. There is no other witness in respect of kidnapping and rape. The medical evidence in the nature of testimony of P.W.-9 Megha D. Dabile, the Medical Officer who examined the victim on 17/01/2020 shows that, her *introtus was patulous and admitted three (3) fingers. Hymen was torn, old healed tears were present, edges were regular, there was no bleeding and edema.* The medical evidence does not show any violent injury on the victim.

8. The other evidence on which the prosecution relied is the DNA report at Exh. 81 showing the Appellant and victim as the biological parents of abortus of the victim. It is the settled position under the law by way of judicial pronouncements in *Chandu @ Chandrashekhar Kesharao Chambhare V/s. State of Maharashtra 2025 DGLS (Bom.) 590* and *Nivrutti S/o Nagorao Hange V/s. The State of Maharashtra and another 2024 ALL MR (Cri.) 3445* that, before relying on the DNA report, it has to be established that, the samples were taken, preserved and examined as per the protocol set out for the same. Before accepting the DNA report, the possibility of

contamination of the samples is required to be completely ruled out. Only if the chain of handling the DNA report is established, the DNA report can be relied. The evidence of P.W.-9 Megha D. Dabile, the Medical Officer shows that, she collected the blood sample of the victim, sealed the same and handed over to P.W.-4 Dipali D. Bhagat. Her evidence shows that, during the medical examination of the victim, the victim was found pregnant of 21 weeks. The evidence of P.W. 4 Dipali D. Bhagat, the Woman Police Constable shows that, on 17/01/2020, she took the victim to the Government Hospital for medical examination. The Doctor had taken the samples of the victim for DNA in the DNA kit, sealed the same and handed over two (2) packets to her. However, her evidence does not show as to whom, she handed over the said samples. It was necessary to lead link evidence in that regard.

9. There is evidence of P.W.-5 Dr. Surbhi R. Udasi that, she was the Medical Officer in the Government Medical College. On 24/01/2020, the Appellant was brought for the medical examination. She medically examined him and found no surface injury on his body except skin infections on multiple regions. She

found the Appellant to be capable of performing sexual intercourse. Her evidence does not show that, the blood samples of the Appellant was drawn for DNA. Though Exh. 76-A, the Identification Form is brought on record in the evidence of P.W.-12 the Forensic Expert, there is no substantive evidence in respect of drawing the blood samples of the Appellant.

10. The evidence of P.W.-10 Snehal S. Thorat who investigated the crime shows that, she issued a letter to the Medical Officer with a request to collect the blood samples of the victim and foetus for DNA test. The DNA samples were handed over to P.W. 6 Thushar S. Salam, the Police Constable for depositing the same with Forensic Laboratory. The evidence of P.W. 6 Tushar S. Salam shows that, on 22/01/2020, he carried the samples of the blood of the victim and the Appellant to the Laboratory and on 27/01/2020, he collected the samples of foetus from the Medical College and submitted the same to the Laboratory.

11. Whatever evidence is brought on record by the prosecution, it falls short of establishing the chain of handling

the samples, which were collected for DNA testing, as required by the protocol. The evidence led by the prosecution do not establish that, the samples were drawn, preserved and carried out without there being any possibility of contamination. In absence of the evidence to rule out the possibility that, the integrity of the samples was maintained throughout, the DNA report showing the Appellant and the victim as the biological parents of the foetus, cannot form the basis to maintain the conviction and sentence. As per the above referred judgments, the DNA report is an opinion evidence.

12. As the victim's testimony is not found reliable and the other evidence on record falling short of proving the charge against the Appellant, it is not possible to maintain the conviction. In absence of establishing the foundational facts by the prosecution, there is no question of drawing presumption under Section 29 of the POCSO Act against the Appellant. The Appellant is thus entitled for acquittal. The Appeal, therefore, succeeds. Hence, the following order:-

ORDER

I) The Criminal Appeal is **allowed**.

II) The conviction and sentence recorded by the learned Additional Sessions Judge, Special Court No. 2 (POCSO), Nagpur against the Appellant in Special POCSO Case No. 228/2020, by the impugned judgment and order dated 19/04/2023, is hereby quashed and set aside.

III) The Appellant is acquitted for the offences punishable under Sections 363, 376(2)(n)(j), 376(3) and 506 of IPC and for the offences punishable under Sections 4 and 6 of POCSO Act.

IV) The Appellant is behind the bars. He be set at liberty, if not required in any other offence.

V) The fine amount, if paid by the Appellant, be refunded to him.

VI) Record and Proceedings be sent back to the learned Trial Court.

VII) For this Appeal, the fees of the learned Advocate appointed to represent the victim is quantified at Rs. 7,500/- [Rupees Seven Thousand Five Hundred Only], which shall be paid by the High Court Legal Services Sub-Committee, Nagpur.

(VIII) The Criminal Appeal stands **disposed of** accordingly.

[NEERAJ P. DHOTE, J.]