



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO. 21/2024

Surya @ Dadya Baburao Jambhulkar,
Aged about 20 Years., Occu. Private,
R/o Ajari-Majari, Parvatinagar,
Bit Chakrawati Society, Nagpur.
(IN JAIL)

... **Appellant**

- Versus -

1. State of Maharashtra,
through Police Station Sakkardara,
Nagpur.
2. XYZ,
Crime No.123/2021,
P.S. Sakkardara, Nagpur.

... **Respondents**

Mr. Atul R. Rawlani, Advocate for the Appellant.
Ms. Sneha Dhote, A.P.P. for the Respondent No.1/State.
Mr. A.S. Shukla, Advocate (appointed) for Respondent No.2.

CORAM: NEERAJ P. DHOTE, J.

DATE OF RESERVING THE JUDGMENT : 23.02.2026.
DATE OF PRONOUNCING THE JUDGMENT : 17.04.2026.

JUDGMENT:-

1. 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 30.11.2023 passed by the learned Additional

Sessions Judge, Nagpur in Special POCSO Case No.295/2021

convicting and sentencing the Appellant as follows:-

“i) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, R/o Ajari-Majari, Parvati Nagar, Bit Chakrawati Society, Nagpur is hereby convicted under Section 235(2) of Cr.PC. for the offence punishable under Section 4 of the POCSO Act, 2012, for penetrative sexual assault on victim ‘S’, minor girl below the age of 16 years (i.e. 15 years, 6 months & 26 days), arising out of Crime No.123/2021 registered by Sakardara Police Station, Nagpur and sentenced to suffer R.I. for a period of 20 (Twenty) years and to pay fine of Rs.2,000/- I/d to suffer R.I. for 3 months.

ii) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.PC. for the offence punishable under Section 6 of the POCSO Act, 2012, for aggravated penetrative sexual assault on the minor victim girl and sentenced to suffer R.I. for a period of 20 (Twenty) years and to pay a fine of Rs.2,000/- I/d to suffer R.I. for 3 months.

iii) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.PC. for the offence punishable under Section 10 of the POCSO Act, 2012, for aggravated penetrative sexual assault on the minor victim girl repeatedly or multiple times and sentenced to suffer R.I. for a period of 5 (Five) years and to pay a fine of Rs.1,000/- I/d to suffer R.I. for 2 months.

iv) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.PC. for the offence punishable under Section 363 of the Indian Penal Code and sentenced to suffer RI for a period of 4 (Four) years

and to pay fine of Rs.800/- I/d to suffer R.I. for one month.

v) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable under Section 344 of the Indian Penal Code and sentenced to suffer RI for a period of 2 (two) years and to pay fine of Rs.600/- I/d to suffer R.I. for 15 days.

vi) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable under Section 506(II) of the Indian Penal Code and sentenced to suffer RI for a period of 1 (Year) years and to pay fine of Rs.400/- I/d to suffer R.I. for 15 days.

vii) The accused Surya @ Dadya S/o Baburao Jambhulkar, aged 20 years, is hereby convicted under Section 235(2) of Cr.P.C. for the offence punishable under Section 323 of the Indian Penal Code for voluntarily causing hurt to the victim and sentenced to suffer RI for a period of 6 (Six) months and to pay fine of Rs.200/- I/d to suffer R.I. for 8 days.

viii) In view of mandate of Section 42 of the POCSO Act 2012, maximum punishment is awarded so the accused under POCSO Act, 2012 particularly under Sections 4, 6 and 10 of the POCSO Act, 2012 for the similar offences, therefore, the alternate punishment under Sections 376(2)(i)(j)(n) and Section 377 (carnal intercourse with the victim of IPC as this offence covered under Sections 4 and 6 of the POCSO Act) and therefore, the punishment cannot be imposed on accused arising out of the similar set of facts i.e. Crime No.123/2021.

ix) All the sentences shall run concurrently.

x)

xi)

*xii)
 xiii)
 xiv)
 xv)
 xvi)
 xvii)
 xviii)”*

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

- a) The Victim, aged 15 years, was studying in 11th standard. The Victim was residing with her grandmother and brother. On 03.03.2021, in midnight the Victim's grandmother had gone to hospital to see the relative. The Appellant came on the motorcycle and told the Victim that, her grandmother called her. The Victim went with the Appellant on the motorcycle. The Appellant took the Victim to one place where they stayed for 17 days. During the stay, the Appellant did forcible intercourse with the Victim. When the grandmother of the Victim made a phone call on the Victim’s mobile phone, the phone was received by the Appellant. The Appellant refused to let the Victim go home. But somehow the Victim managed to escape and came to the Police Station and disclosed the incident. The Crime bearing No.0123/2021 came to be registered with the Sakkardara Police Station, Nagpur City for the offence punishable under Sections 376(2)(i), 376(2)(n), 363, 344, 506 and 323 of the Indian Penal Code, 1860 (for short “I.P.C.”) and for the offence

punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”).

- b) The Victim was sent for medical examination. The Spot-Panchanama was done. The Appellant came to be arrested. The clothes of the Appellant and of the Victim came to be seized. The Appellant was medically examined. The statement of witnesses were recorded. The seized articles were sent for chemical analysis. The necessary documents were collected. On completion of investigation, the Charge-sheet came to be filed. The learned trial Court framed the Charge against the Appellant for the offence punishable under Section 363, 344, 376(2)(i) and (n), 376(2)(j), 377, 506 and 323 of the I.P.C. and for the offence punishable Sections 4 and 6 of the POCSO Act below Exh.18. The Appellant pleaded not guilty and claimed to be tried. To prove the Charge, prosecution examined in all 9 witnesses and brought on record the relevant documents. After the prosecution filed the evidence closure pursis, the statement of the Appellant came to be recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”). The Appellant stated that, he was falsely implicated. Appreciating the evidence on record, the learned trial Court passed the impugned judgment and order.

3. Heard the learned Advocate for the Appellant, the learned A.P. P. for the State and the learned Advocate appointed for the Victim. Scrutinized the evidence.

- a) It is submitted by the learned Advocate for the Appellant that, the incident was out of love affair between the Appellant and the Victim. The medical evidence shows that, the injury was possible by other reasons. The Reports from the Chemical Analyzer are not incriminating. Though the Victim deposed of going to *Yashodhara* Police Station, no Report from said Police Station was brought on record. The spot where the Appellant and the Victim stayed, was the residential area. The Victim never tried to raise hue and cry or escape. The friends of the Appellant who came on the spot are not examined. There was delay in lodging the Report. The Victim was not reliable witness. The date of birth and the age of Victim was not proved. The impugned judgment and order be quashed and set aside. In support of his submissions, he relied on the decisions in *State (GNCT of Delhi) V/s. Vipin alias Lalla*, **2025 SCC OnLine SC 78**, in *Nirmal Premkumar and Anr. V/s. State Rep. by Inspector of Police in Criminal Appeal No.1098/2024* by the Hon'ble Apex Court dated 11.03.2024 and in *Gulab @ Gullya S/o Tippaji Dukare V/s. State of Maharashtra, through P.S., Panchpaoli, Nagpur*, **2018(5) Mh.L.J. (Cri) 211**.
- b) It is submitted by the learned A.P. P. that, the Victim was taken by the Appellant on the false pretenses. She was kept under threat and not allowed to call or go anywhere. The Appellant raped the Victim. The medical evidence

shows injuries on the Victim. The Victim denied the suggestions of love affair. The single omission in the evidence of Victim was not material. The Victim's testimony was consistent. The suggestions are denied. The Charge was proved beyond reasonable doubt and the learned trial Court has rightly passed the impugned judgment and order and the Appeal be dismissed.

- c) The learned Advocate for the Victim submitted that, she adopts the submissions made by the learned A.P P

4. When the Charge is for the penal sections of POCSO Act, it becomes necessary for the prosecution to prove the date of birth and age of the Victim to establish that, on the date of crime, the Victim was a 'child' as defined under Section 2(d) of the POCSO Act i.e. below the age of 18 years. In *Gulab @ Gullya (supra)* the provisions of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 were considered and there was no explanation from the prosecution as to why the certificate of the Victim from the school first attended by her was not produced. It was held that, the prosecution failed to prove the age of Victim.

5. In the case at hand, to prove the date of birth and the age of Victim, the prosecution examined PW.9 Mahesh Choudhary

who was working as the Clerk in the Middle School by name Shri Gajanan Vidyalaya, Subhedar Nagar, Nagpur where the Victim was admitted in the 5th standard on 03.05.2014. His evidence shows that, the Victim was admitted in the school by name Bhartiya Dyanpith Primary School which was managed by the same education society where the Victim studied till 4th standard. This witness brought on record the document from the Middle School where the Victim was subsequently admitted. According to this witness the entry in respect of the Victim was made on the basis of the birth certificate which was received from the first school attended. Undisputedly, the prosecution did not examine the witness from the primary school first attended by the Victim. Though the Management of both the schools was the same, it is clear from the evidence of this witness that, the establishment of the primary school and middle school are different. There is no evidence to show as to on what basis the details of the Victim were entered in the record of first school attended. Exhibit 65 is the copy of the birth certificate of the Victim which was brought from first school attended. The said document was exhibited in the evidence of P.W.8 Investigating Officer and an objection was raised by the defence for exhibiting the same. The evidence of the Investigating Officer shows that, he did not record

the statement of the employee of the middle school from where he brought the bonafide certificate of the Victim. In absence of the evidence to show as to on what basis the date of birth of the Victim was recorded in the first school attended, which was the basis to record the date of birth in the record of second school, the evidence of P.W.9, Mahesh Shivshankar Chaudhari, is of no help to the Prosecution to prove the age and date of birth of the Victim. The evidence on record is not sufficient to prove the date of birth of the Victim. Though the Victim deposed that, her date of birth was 08.08.2005, it would be inadmissible being hear say for the Victim. Suggestion is given to P.W.1, grandmother of the Victim, to the Victim and to P.W.8, Investigating Officer, that the Victim was above 18 years of age. The prosecution failed to prove the date of birth and consequently to establish that the Victim was the child.

6. The prosecution's case largely hinges on the testimony of the Victim who is examined as P.W.2. Her evidence shows that, she knew the Appellant. She got acquainted with the Appellant through the Facebook. They became friends. At 11:30 p.m. on 03.03.2021 when her grandmother had gone to the hospital and she was waiting for her grandmother, the Appellant came on the motorcycle and told

that, her grandmother was waiting for her on the square and she was called. Therefore, she sat on the motorcycle and the Appellant took the motorcycle speedily to one hut on the Kamptee Road. The Appellant took her mobile phone. The Appellant raped her. The Appellant used to put lock on the door when he used to go out. Till 28.03.2021 the Appellant raped her. The Appellant committed carnal intercourse with her against the order of nature. Her grandmother made the phone call on her mobile and asked the Appellant to bring the Victim. The Appellant threatened. Once, the friends of the Appellant came to the said hut and they had a party, that time, she managed to escape and met one unknown lady through whom she went to the Yashodhara Police Station and lodged the Report. The Police from the Yashodhara Police Station dropped her home. Thereafter she went to Sakkardara Police Station and lodged the Report below Exh.31 and F.I.R. below Exh.32 came to be registered. She was medically examined and her blood samples were taken.

7. The cross-examination of the Victim shows that, in the month of March 2021 there was the spread of Corona Virus and the people used to stay at home. It has come in her cross-examination

that, one do not accompany unknown person and she was having faith in the Appellant. She admitted that, while on the way, she did not raise any hue and cry. She admitted that, while in the hut, she did not raise alarm or tried to come out of the hut. Her cross-examination shows that, her evidence that, the Appellant used to lock the door while going out and she was frightened due to high speed of the motorcycle were the omissions, which are proved through the evidence of P.W.8 Investigating Officer. Though the Victim denied that, there were houses surrounding the hut, it has come in the evidence of P.W.8 Investigating Officer that, there were houses surrounding the hut which was the spot of incident and there was road in front of the said hut. Though the Investigating Officer deposed that, he recorded the statement of two persons residing nearby the hut, they are not examined. The history given by the Victim as is clear from Exh.54 the medical examination report of the Victim brought on record in the evidence of P.W.7 - Dr. Shaswati Swapan Ghosh was that, *she knew the Appellant through the Facebook and she went with him to the room at Katol Road* goes contrary to the evidence of Victim that, the Appellant took her with him on the pretext of taking her to meet her grandmother on the square.

8. From the overall evidence of the Victim, it is not possible to rely on her testimony. For 17 days the Victim was with the Appellant without any hue and cry though it was the residential area where they stayed. The statement given by the Victim to Yashodhara Police Station is not brought on record. The said statement was the first version given by the Victim. Therefore, adverse inference is to be drawn that, the said statement was not favourable to the prosecution. The statement which is treated as the F.I.R. was the subsequent statement by the Victim to Sakkardara Police Station. The evidence of P.W.3, brother of the Victim, deposed that, on the day of the incident, after he slept, the Victim left somewhere. In the light of the above discussion, the evidence of the Victim that, she was kidnapped, raped and subjected to carnal intercourse by the Appellant is required to be seen with doubt.

9. There is medical evidence on record. P.W.5, Shubham Dilip Mondhe, the Junior Resident Doctor of the Government Medical College, Nagpur, in his evidence, deposed of examining the Victim on 21.03.2021, and he found the evidence of red, inflamed area on the medial aspect of both thighs, and he referred the Victim

for further examination by Dr. Shaswati Swapan Ghosh (PW7). The cross-examination of PW5 – Dr. Shubham Dilip Mondhe shows that, there was no other external injury on the person of the Victim. The evidence of PW7 - Dr. Shaswati Swapan Ghosh, who was the Assistant Professor at the Government Medical College at Nagpur, shows that the Victim was examined on 21.03.2021 and it was found that hymen injuries were present, edges were irregular and the tear at 7 O' clock, and he expressed that, the possibility of sexual assault cannot be ruled out. However, he admitted in the cross-examination that, the age of injury on the Victim was not mentioned and there were other causes for such injury, such as masturbation, sports activities like swimming, cycling, horse riding and also due to falling on the hard surface. The other possibilities for causing such injuries dilutes the prosecution's case that the said injuries were due to sexual assault on the Victim. Therefore, the medical evidence on record by itself will not be sufficient to prove the Charge.

10. The evidence of PW.4 - Rakesh Suresh Nimbarte shows that, he acted as the Panch for Spot Panchanama and seizure of the articles from the Spot Panchanama, however, his cross-examination shows that, before seizure of the clothes, they were already kept at

one place. The C.A. reports at Exhs. 56 and 57 shows that the blood group of the Appellant and the Victim was “O”. Therefore, the C.A. report below Exh. 55, showing blood of group “O” and semen stains on the mattress of group “O”, will not be of any assistance to prove the Charge in the absence of a DNA report.

11. The evidence of PW.1 (grandmother of the Victim) and PW.3 (brother of the Victim) is of no help to the Prosecution as they are not eye-witnesses to any incident. Though they deposed in their evidence that, when the phone call was made on the mobile phone of the Victim, it was answered by a person who gave his name as Jambhulkar i.e. the Appellant, it takes the case of Prosecution nowhere in the light of the Victim’s testimony.

12. In *State (GNCT of Delhi) (supra)*, it was the Appeal against Conviction for the offence of rape and for the offence punishable under POCSO Act. The testimony of the Prosecutrix therein did not inspire confidence and it is observed that nevertheless when a person can be convicted on the testimony of a single witness, the Courts are bound to be very careful in examining such a witness and thus the testimony of such a witness must inspire

confidence of the Court. In *Nirmal Premkumar & Anr.* (supra), the term 'sterling witness' is considered and three categories of witness are stated, such as, (i) wholly reliable, (ii) wholly unreliable, (iii) neither wholly reliable nor wholly unreliable.

13. Undoubtedly, the Victim is not the witness of sterling quality. Her testimony do not inspire confidence and she is not the reliable witness. The other corroborative evidence do not take the case of prosecution towards establishing the Charge. Therefore, there is no question of invoking presumption under Section 29 of the POCSO Act against the Appellant. The age of the Appellant at the relevant time was 19 years. The evidence on record clearly shows the consensual relationship between the Appellant and the Victim. The above discussed evidence in the case at hand do not prove the Charge against the Appellant. Thus, the Conviction and Sentence recorded by the learned Trial Court against the Appellant is liable to be set aside.

ORDER

[i] The Appeal is allowed.

[ii] The Conviction and Sentence recorded by the learned Additional Sessions Judge, Nagpur, *vide* Judgment and Order

dated 30th November, 2023 passed in Special POCSO Case No.295/2021, is quashed and set aside.

- [iii] The Appellant is acquitted of the offences punishable under Sections 4, 6, 10 of the Protection of Children from Sexual Offences Act, 2012 and 363, 344, 506(II) and 323 of the Indian Penal Code.
- [iv] The Appellant is behind the bars, he be released if not required in any other offence.
- [v] The fine amount, if paid by the Appellant, be refunded to him.
- [vi] The fees of the learned Advocate appointed to represent the Victim is quantified at Rs. 7,500/- [Rupees Seven Thousand Five Hundred), which shall be paid by the High Court Legal Services Sub Committee, Nagpur.
- [vii] R&P be sent back to the learned Trial Court.

[NEERAJ P. DHOTE]
JUDGE