IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 112 OF 2024
WITH
CRIMINAL APPLICATION NO. 2509 OF 2025

Sagar Gautam Sable,
Age. 25 years, Occ. Labour work,
R/o. Takshshil Nagar, Near Batco Transport,
Juna Monda, Dist. Aurangabad. ...Appellant

Versus

1. The State of Maharashtra,
Through Police Inspector,
Police Station Pundliknagar,
Tq. and Dist. Aurangabad.

2. XYZ ...Respondents

...

Advocate for Applicant : Mr. Ghanekar Nilesh S.
APP for Respondent No. 1 : Ms. Ashlesha S. Deshmukh
Advocate for Respondent No. 2 : Mr. Vishal A. Chavan (appointed)

...

CORAM : RAJNISH R. VYAS, J.
DATE : 12TH JANUARY, 2026

ORAL JUDGMENT :

1. Heard respective learned counsels.

2. By that instant appeal, the original accused/appellant has challenged his conviction awarded by, Special Judge (POCSO), Aurangabad, in Special Case (POCSO) No. 383/2021, dated 12.12.2023, by which, the appellant was convicted for commission of offence punishable under Section 363 of Indian Penal Code (herein after would

be referred to as ‘the IPC’ for sake of brevity), and was directed to suffer rigorous imprisonment of three years and pay fine of Rs. 5,000/- in default to suffer simple imprisonment for one month.

3. The appellant was also convicted for commission of offence punishable under Section 376-AB of the IPC and directed to suffer rigorous imprisonment for 20 years and pay fine of Rs. 20,000/- in default to suffer simple imprisonment for four months.

4. The appellant was also convicted under Section 354-A (2) of the IPC and directed to suffer rigorous imprisonment for one year and pay fine of Rs. 1,000/- in default to suffer simple imprisonment for two years.

5. He was also convicted for commission of offence punishable under Section 4 (2) of Protection of Children from Sexual Offences Act, 2012 (herein after would be referred to as ‘the Act of 2012’ for sake of brevity) and directed to suffer rigorous imprisonment for twenty years and pay fine of Rs. 25,000/- in default to suffer simple imprisonment for five months.

6. He was also convicted for commission of offence punishable under Section 8 of the Act of 2012, and directed to suffer rigorous imprisonment for three years and pay fine of Rs. 5,000/- in default to suffer simple imprisonment for one month. All these sentences were

ordered to run concurrently.

7. Furthermore, a fine of Rs. 56,000/- was imposed upon the appellant, out of which Rs. 25,000/- was directed to be paid to the victim under Section 4 (3) of the Act of 2012.

8. A criminal law was set in a motion on the basis of information supplied by PW-2 / mother of victim who was examined by the prosecution at exhibit 24. PW-2 has, in her evidence, deposed that at the relevant time, she was residing along with her father, mother and three daughters. The victim of the crime / PW-1 is her daughter. The incident took place prior to two-three days of lodging first information report. On that day, when PW-1 had been to attend her work at about 10:00 am and returned at about 01:00 pm to 01:30 pm, at that time, mother of PW-2 met her on the way and disclosed that victim was missing from the house. PW-2, thereafter, visited various places in order to search her daughter but was unsuccessful. She then made a telephonic call to her relatives and since victim was not traced, she filed a report with the police station.

9. The said information culminated in registration of First Information Report below exhibit 26 dated 11.10.2021, for commission of offence punishable under Section 363 of the IPC, against the unknown persons. Consequently, criminal law was set in a motion.

10. According to PW-2 / mother, after two days to lodging of report i.e. 13.10.2021, victim was found. According to her, two to three women along with mother of accused and accused brought her daughter, at which time, daughter was crying and was not in a condition to talk. PW-2 further deposed that then a phone call was made to police and police took daughter to the police station.

11. This narration of the incidence has resulted in charging the accused under various Sections. During investigation, the birth certificate of the victim was seized along with the clothes worn by the accused and the victim. The accused was arrested on 14.10.2021. After completion of investigation, final report was filed against appellant. Co-accused was also chargesheeted but was shown absconding. Learned Trial Court on 12.12.2023, charged the accused for commission of offence punishable under Sections 363, 376-AB, 354-A (2) of the IPC and Section 4 (2) of the Act of 2012, so also Section 8 of the same act. In order to bring home the charge, prosecution in all has examined five witnesses.

12. As already discussed, PW-2 was the mother who has lodged the report. The narration of the testimony is already mentioned in the above part of the judgment. So far as cross-examination of PW-2 is concerned, suffice it to say that the suggestion was given by the defence

was that victim was not in the company of anyone, she left house of her own. It was also suggested to her that she has produced certified copy of birth extract and that her bother had given papers for the victim's birth registration to the Municipal Corporation. She was unable to answer which papers were given by her brother. A suggestion regarding giving false evidence was also given to her.

13. It is necessary to mention here that, so far as age of the victim is concerned, it has not been seriously contested by way of cross-examination. Exhibit 27 i.e. birth certificate is proved by PW-2 which clearly shows that date of birth of victim was 19.09.2010. Even PW-1 in her examination-in-chief has specifically stated that her date of birth is 19.09.2010. From record, it would be crystal clear that no suggestion was given denying the date of birth. In that view of the matter, I come to conclusion that the date of birth of victim was 19.09.2010, thus was minor at the time of commission of offence.

14. Since the accused was charged and convicted for commission of offence punishable under Section 363 of the Indian Penal Code, it is necessary to reproduce Section 361 of the IPC, which reads as under :

> *"361. Kidnapping from lawful guardianship. - Whoever takes or entices any minor under sixteen years if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the*

lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

15. If the testimony of PW-1 is perused, she had categorically deposed that in the year 2021, she was in 6th standard in a school and she knew the accused. According to her, she had been with her maternal aunt to vegetables market, at that time, the appellant met her and since then she knew the appellant. She deposed that the appellant had given his phone number to victim for making calls and on the next date, she made phone call to him from the mobile of her maternal aunt. According to PW-1/victim on phone he said "We would go for outing." Thereafter, accused came along with vehicle on Jalna road in front of High Court gate, where she was standing. The accused at the relevant time, was accompanied by one of his friends. The accused, at that juncture, said to victim "We would go together to Karnpura for darshan." Thereafter, she along with the appellant and his friend went together to Karnpura on motorbike which was driven by the appellant.

16. If the cross-examination of the aforesaid witness is perused, it would be clear that so far as this particular incidence is concerned, nothing has been brought on record to disbelieve the story of prosecution. In paragraph no. 4, of cross-examination what has been stated is that on particular day, it was victim who has made a phone call

to the appellant in the morning at about 11:00 am. The cross-examination further shows that she did not inform her family members that she was going for outing and when she came to Jalna road in front of High Court gate, she had a phone of her mother and for two-three days that phone was with her, but it was not working as it fell in water. Thus, regarding taking away of the victim, no effective cross-examination has been conducted by the defence.

17. Learned counsel for the appellant submitted that the Trial Court ought not have convicted the appellant for offence punishable under Section 363 of the IPC. According to him, offence of kidnapping stands on two legs. One is taking away and other one is enticing. So far as enticing is concerned, it is not even a case for the prosecution that it was the appellant who had at any point of time enticed the victim. Therefore, the offence of kidnapping cannot be made applicable to him. As far as "takes" is concerned, he submitted that he had not even taken the victim from lawful guardianship. He submitted that earlier there was a phone call and he had only said that they would go for outing. According to him, the victim could have very well denied his request. He further submitted that there was no forceful act on his part to take the victim with him.

18. In order to buttress his contention, he has relied upon the

judgment of Hon'ble Apex Court passed in Criminal Appeal No. 46/1963 decided on 09.09.1964, in the case of **S. Varadarajan Versus State of Madras, AIR 1965 SC 942,** more particularly on paragraph nos. 7 and 8, which read as under :

> *"7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal Code :*
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> > *"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."*
>
> *8. It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here,*

we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful L2Sup./64--3 guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan ,She still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. …….”

19. In the aforesaid background, he submitted that there was no question of taking away of the victim from lawful guardianship, since by cogent and reliable evidence, same has not been proved. He further submitted that in criminal law previous and subsequent conduct of the

accused plays very important role. He, in order to take this contention to the logical end, submitted that appellant's previous conduct in taking the victim to the Karnpura, and thereafter, to his house clearly shows that he had no intention of taking her away. According to him, when he along with the victim reached the appellant's house, his mother and family members were questioning the victim about where she had come from. They were trying to drop the victim at her house but it was the victim who told them that her mother had been to Pune. Thus, he submitted that offence of kidnapping cannot be attributed to him.

20. Per contra, learned APP and learned counsel for respondent no. 2, submitted that victim was minor and was taken from the custody of lawful guardianship. In this background, if examination-in-chief of PW-1 (page 26 is perused), it would be crystal clear that initial proposal to go outside was from the appellant on telephone to victim and it was the accused who took the victim to Karnpura along with his friend. The testimony further shows that friend was dropped at Karnpura and, thereafter, the victim with the appellant came to appellant's house. It is difficult to understand the reason for taking the victim to the appellant's house and dropping the friend at Karanpura. The appellant being 25 years old could have very well dropped 11 years girl to her place.

21. In that view of the matter, I come to conclusion that the

appellant has taken away the victim from lawful guardianship and, therefore, offence under Section 363 of the IPC, is rightly made out.

22. The appellant is also convicted for commission of offence punishable under Section 376-AB of the IPC and directed to suffer imprisonment for period of 20 years. Section 376-AB of the IPC, read as under : -

> *"376AB. Punishment for rape on woman under 12 years of age. - Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:*
> *Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:*
> *Provided further that any fine imposed under this section shall be paid to the victim."*

23. At this juncture, the definition of rape is required to be taken into consideration. Section 375 of the IPC, speaks about a man committing rape if he penetrates, inserts, manipulates or applies his mouth to urethra or anus of a woman or makes her to do so with him or any other person. Thus, the Section clearly speaks about these acts

which are narrated above.

24. The testimony of the witness i.e. PW-1 is important. She, in her examination-in-chief, has stated as under :

> *"In the evening, I took dinner and went to sleep with his mother. On the next morning, his mother said that she will leave me at my house. I refused it for the reason I was frightened of my mother. Then I stayed there on that day also. I was sleeping near his mother. At that time, he woke up me and took to down room and tried to have physical relations with me. I refused for it. Then, he attempted to make forceful physical relations with me. On the next morning, I took bath, wore clothes of his sister and then went I was left to my house."*

25. There is one more aspect which is clear from conducting of cross-examination i.e. paragraph no. 2 in examination-in-chief which reads as under :

> *"2. It was happened that he removed my clothes after bringing me in down room and had forceful physical relations with me."*

26. At this juncture, it is necessary to mention here that the said answer was given in the examination-in-chief which, *prima facie*, is outcome of the question put by the learned prosecutor therein. (Paragraph no. 25 of judgment).

27. PW-5 is the Medical Officer who has medically examined the victim. She in her examination-in-chief, has stated that on 13.10.2021, she was working as a RMO at GMCH, Aurangabad, on that date, after obtaining consent from victim and her mother, her medical examination was conducted. The consent form was proved by this witness at exhibit 39. The relevant portion of her examination-in-chief is as under :

> *"After recording sexual assault history narrated by the survivor, I conducted her physical and genital examination. On physical examination, I found that there was no injury on her person. On genital examination, I found no evidence for fresh injury, abrasion, etc. There was no injury on hymen."*

28. If the deposition of PW-1 is tested in the light of deposition of PW-5 and even separately, it would reveal that nothing has been uttered by this witness about the penetration, insertion or manipulation. In order to answer the leading question, she has stated that "*It was happened that he removed my clothes after bringing me in down room and had forceful physical relations with me.*"

29. On the basis of aforesaid evidence and testimony of PW-5, opining that a possibility of sexual intercourse cannot be ruled out, learned Trial Court has convicted the appellant for commission of

offence under section 376-AB of IPC and suffer rigorous imprisonment for 20 years.

30. Learned APP Ms. Deshmukh, submitted that learned Trial Court had rightly convicted the appellant, since the age of victim was only 11 years. She further submitted that absolutely no corroboration is required when prosecution has come with a case that prosecutrix was subjected to sexual intercourse and the prosecutrix has deposed the said fact in the Court. She has invited my attention to the law laid down by Hon'ble Apex Court in case of **Ganesan Versus State Represented by its Inspector of Police, AIR 2020 SC 5019,** more particularly, paragraph no. 9.3, which is reproduced as under :

> *"9.3 Who can be said to be a "sterling witness", has been dealt with and considered by this Court in the case of Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21. In paragraph 22, it is observed and held as under:*
>
> *"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant*

would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have corelation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the

said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

On evaluating the deposition of PW3 – victim on the touchstone of the law laid down by this Court in the aforesaid decisions, we are of the opinion that the sole testimony of the PW3 – victim is absolutely trustworthy and unblemished and her evidence is of sterling quality.

Therefore, in the facts and circumstances of the case, the learned trial Court has not committed any error in convicting the accused, relying upon the deposition of PW3 – victim. The learned trial Court has imposed the minimum sentence provided under Section 8 of the POCSO Act. Therefore, the learned trial Court has already shown the leniency. At this stage, it is required to be noted that allegations against the accused which are proved from the deposition of PW3 are very serious, which cannot be permitted in the civilized society. Therefore, considering the object and purpose of POCSO Act and considering the evidence on record, the High Court has rightly convicted the accused for the offence under Section 7 of the POCSO Act and has rightly sentenced the

accused to undergo three years R.I. which is the minimum sentence provided under Section 8 of the POCSO Act."

31. She submitted that since the version of PW-1, is trustworthy there is absolutely no reason to disbelieve her testimony. According to her, the deposition of said witness was of sterling quality, and therefore, the conviction may not be upset.

32. Learned counsel for respondent no. 2/victim has also supported the stand taken by the prosecutor and has submitted that the testimony must be read holistically. He submitted that there was no reason for the victim to falsely implicate the appellant.

33. Mr. Ghanekar, learned counsel for the appellant challenged victim's testimony so far as conviction under Section 376-AB is concerned. He submitted that since the fundamental principle of criminal law is to prove the case beyond reasonable doubt, considering the testimony of PW-1, it cannot be said that the said burden has been discharged by the prosecution. He submitted that there is nothing in the testimony of the witness which shows that the act which would constitute the offence was committed. So far as paragraph no. 2 of the deposition of the PW-1 which states that the appellant removed her clothes after bringing her to the down room and had forcible physical relations with the victim is concerned, same being outcome of leading

question asked in examination-in-chief, without even obtaining permission of the Court, is required to be ignored. He submitted that the method and manner in which the witness is required to be examined has to be strictly in consonance with the provisions of the Evidence Act. The said act of putting leading question in examination-in-chief and giving answer without obtaining permission of Court is unknown in criminal law. He thus submits that his conviction under Section 376-AB of the IPC, be disturbed.

34. I have given thoughtful consideration to the arguments advanced by the learned counsel for the appellant as well as the learned prosecutor and learned counsel for the victim. In her cross-examination, the prosecutrix has stated that when she was sleeping near the mother of the appellant, the appellant woke her up and took her to room and tried to do physical relations with her, which was refused by her, then, he attempted to make forcible physical relations with her. The aforesaid fact clearly shows the act of rape was not committed. So far as the answer given in paragraph no. 2 in examination-in-chief is concerned, suffice it to say that it cannot be considered since it seems to have been given with reference to a leading question put. Thus, I come to conclusion that there is no enough evidence to say that the victim was subjected to forcible sexual intercourse.

35. As far as conviction of the appellant under Section 4 of the Act of 2012 is concerned, it is necessary to peruse Section 4 (2) of the Act of 2012. Section 4 speaks about punishment for penetrating sexual assault. Penetrating sexual assault is defined under Section 3 of the Act of 2012, which is on a somewhat similar line of Section 375 of the IPC. Suffice it to say that in view of the discussion made above regarding applicability of Section 376-AB of the IPC, even offence under Section 4 (2) of the Act of 2012, is not made out, since there is neither penetration, insertion or manipulation or applying of mouth.

36. This takes me to the conviction of the appellant under Section 8 of the Act of 2012, which speaks about punishment of sexual assault. The sexual assault is defined under Section 7 of the Act of 2012, which reads as under :

> "*7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.*"

37. It is necessary to mention here that this witness i.e. victim/PW-1 in her testimony has categorically stated that when she was sleeping near the mother of appellant, at that time, the appellant woke

her and took her to room and tried to have physical relationship which was refused, then he attempted to make forcible physical relations with her.

38. Learned prosecutor Ms. Deshmukh, submitted that offence under Section 8 of the Act of 2012, so also, offence under section 354-A (2) of the Indian Penal Code, is clearly made out. She submitted that the aforesaid part of deposition of PW-1 clearly makes out ingredients of the aforesaid two Sections. She further invited my attention to provisions of Section 354-A (2) of IPC, which is reproduced as under :

> *"Section 354-A. Sexual harassment and punishment for sexual harassment. -*
>
> *(1) A man committing any of the following acts –*
> *(i) physical contact and advances involving unwelcome and explicit sexual overtures; or*
> *(ii) a demand or request for sexual favours; or*
> *(iii) showing pornography against the will of a woman; or*
> *(vi) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.*
>
> *(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.*
>
> *(3) Any man who commits the offence specified in*

clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

39. Learned counsel for respondent no. 2/victim has also supported the stand taken by the prosecutor and submitted that the manner in which the accused has acted clearly shows that there was a sexual intent.

40. Learned counsel Mr. Ghanekar, for the appellant submitted that there was absolutely no sexual intent since the testimony advanced by the prosecution is not trustworthy. According to him, it was the family members of the appellant who had shown their willingness to take the victim of the crime to her house. He further submitted that, had he been really involved in the commission of the crime, he would have been arrested on 13.10.2021, when he, along with the other members of the family went to the house of the victim to drop her off. There was absolutely no reason for the police authorities to arrest the appellant on the next date i.e. 14.10.2021.

41. Mr. Ghanekar may be right in his submission but the testimony of PW-1 regarding taking her in a room and the appellant causing sexual harassement, cannot be ignored in absence of effective cross-examination. Thus, I come to conclusion that the prosecution has proved offence punishable under Section 354 -A (2) of the IPC and

Section 8 of the Act of 2012.

42. It is pertinent to mention here that the testimony of PW-1 and PW-2 is truthful so far as aforesaid two Sections are concerned, and in answer to the queries made by the Court while examining the accused under Section 313 of Code of Criminal Procedure, no convincing explanation for false implication was given by the accused. An attempt could have been made by the appellant to rebut the presumption required to be revised under Sections 29 and 30 of the Act of 2012, either through cross-examination or by examining witnesses. Having not done so, I do have any option but to come to the conclusion that the offence of sexual assault under Section 8 of the Act of 2012 and Section 354-A of the IPC are proved by the prosecution beyond reasonable doubt. Accordingly, I pass the following order :

ORDER

A. Criminal Appeal is partly allowed.

B. So far as conviction of present appellant for commission of offences punishable under Sections 363, 354-A (2) of IPC and Section 8 of POCSO Act is concerned, same is maintained.

C. The appellant is acquitted for the commission of offence punishable under Section 376-AB of the IPC, Section 4 (2) of Protection of Children from Sexual Offences Act.

D. At this stage, the word of appreciation is required to be noted for learned Advocate Mr. Vishal Chavan, who was appointed by the Legal Aid, in order to put forth the case of victim. Mr. Chavan, without seeking any adjournment has vehemently opposed the prayer made by the learned counsel for the appellant. He has invited my attention to various provisions of law. The High Court Legal Services Sub-Committee, Aurangabad, is directed to quantify his fees according to the Rules.

E. Pending Criminal Applications, if any, stand disposed of.

(RAJNISH R. VYAS, J.)

SPC