2026:BHC-AUG:16833

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 723 OF 2025

. Balwant Natthu Nikam (Patil)
Age: 56 years, Occu.: Waiter,
Resident of 52, Krushi Colony,
Deopur, Tal. & Dist.Dhule. ….Appellant
(Orig. Accused)

Versus

1. The State of Maharashtra
Through the Police Station,
Investigating Officer, Deopur Police Station,
Tal. & Dist. Dhule.

2. XYZ (victim) …..Respondents

…..

Advocate for Appellant : Mr.Shivaji Bhimrao Bhapkar a/w.
Mr.Vinod Patil with Mr.B.R.Rathod
APP for Respondent no.1 : Mr.N.S.Tekale
Advocate for Respondent no.2 : Mr Jayshree Yogesh Sonawane
(Appointed)

…..

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 16 APRIL , 2026
PRONOUNCED ON : 20 APRIL, 2026

JUDGMENT :

1. In this appeal, there is challenge to judgment and order dated 25-08-2025 passed by learned Special Judge (POCSO) and Additional Sessions Judge, Dhule, in Special Case No.45 of 2022, thereby convicting appellant for offence under Section 376(3) of the

Indian Penal Code (IPC) and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act (POCSO Act).

BRIEF FACTS OF THE CASE

2. In brief, prosecution case in trial Court was that, informant's granddaughter PW3, aged 6 years, was playing on the terrace of her own house. Accused, a tenant, called the child on the pretext of offering snacks and it is alleged that after making her sleep on the bed, he disrobed her, removed his own clothes, slept over her and twice inserted his male organ in the private part of the victim. Victim returned home and complained of irritation to the private part and also narrated the episode of sexual assault to her grandmother, who approached Police and set law into motion, on the basis of which after registration of crime, investigation was carried out by PW9 and finally, accused came to be chargesheeted and tried by learned Special Judge (POCSO) and Additional Sessions Judge, Dhule, who on appreciation of evidence, accepted the case of prosecution and returned the guilt for above offence. There is challenge to the said judgment and order of conviction by way of instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Mr.Bhapkar, learned counsel for appellant took this Court

through the entire evidence adduced by prosecution in trial court and he would submit that, case of prosecution cannot be said to be proved beyond reasonable doubt. Though, he at the outset stated that there is no serious challenge to the age of victim, he takes strong exception to the prosecution evidence and its manner of appreciation.

4. His first criticism is on the manner of investigation. He would point out that though crime was said to be cognizable and serious one, and inspite of occurrence taking place in the afternoon, crime is surprisingly shown to be recorded at 22:09 hours, more particularly, when Police Station was in the same area where incident has allegedly taken place. According to him, delayed FIR creates doubt about veracity of prosecution case. At this point, he submitted that, FIR is at the instance of grandmother, who has mere hearsay information allegedly narrated by victim. He took this Court through cross-examination of informant and would point out to specific defence taken by accused, though denied by the victim, regarding house of informant being mortgaged to accused and no payment being made to the accused nor his house being vacated and as such, it is his submission that in such backdrop, there is every possibility of

false implication to avoid return of money as well as house.

5. It is his next submission that, here, inspite of statements of several witnesses recorded by Investigating Officer, only chosen few i.e. only relatives like grandmother, mother are examined. Father has not been examined, who allegedly accompanied the victim to Police Station as well as for medical examination.

6. His second attack on the prosecution case is on the point of no timing reflected in the FIR or seizure panchanamas of clothes of accused as well as victim and he even pointed to the answers given by panchas as well as Investigating Officer in that regard. According to him, surprisingly investigation seems to have commenced even prior to registration of the FIR and therefore, it is his allegation that possibility of false implication cannot be ruled out by creating the evidence which suits prosecution.

7. Fiercely criticizing the testimony of victim, he would submit that, from entire tenor of examination-in-chief as well as cross-examination of victim, it is abundantly clear that child was tutored. He pointed out that, on the day of examination-in-chief conducted

i.e. on 12-06-2024, victim has not at all supported prosecution and he took this Court through questions posed by prosecution and answers given by victim from question no.33 onwards and he would submit that repeatedly attempt is made to compel the victim witness to answer in the manner desired by the prosecution even when victim was categorically stating that nothing had happened with her. He criticized such approach of prosecution and would submit that two days after 12-06-2024 i.e. on 14-06-2024, when victim was examined further, this time she had supported prosecution and it is his specific accusation that the two days gap has been utilized to tutor the child, who has also admitted that she was tutored by her mother. For such reasons, it is his submission that, testimony of very prosecutrix comes under shadow of doubt and it is his submission that though it is settled law that there is no need for independent corroboration to the testimony of prosecutrix, according to him, case in hand warrants sufficient corroboration as the child was demonstrated to be tutored to depose.

8. Questioning the credibility of scientific evidence, he submitted that, medical reports and DNA reports negate prosecution allegation. He pointed out that, sole piece of evidence is a hair found on the

cloth of victim, but according to him, there are several reasons for hair to be there and more particularly, when seizure panchanama is not timed, he expresses possibility of planting and further he would submit that even otherwise, it is a weak type of evidence. According to him, medical evidence also does not wholeheartedly support prosecution story as there are no injuries on the person of victim or accused. Thus, according to him, there is no corroboration to the testimony of victim.

9. Lastly, he would submit that only near and dear ones of victim are examined. That, there is no explanation for not examining independent witnesses like neighbours and therefore, he urges for drawing adverse inference. While criticizing the judgment, he would submit that, it was based on assumptions, presumptions and surmises and against tenor of prosecution evidence. Consequently, he submits that such judgment cannot be allowed to be sustained.

On behalf of Respondent no.1/State :

10. In answer to above, learned APP, while canvassing in favour of impugned judgment and supporting it, would submit that though there are nine witnesses examined by prosecution, according to him,

relevant witnesses are victim, followed that of her grandmother, mother and medical examiner. He also relied on the DNA analysis, which according to him is confirming the occurrence.

11. While answering the criticism of learned counsel for appellant/accused about child to be tutored, he would submit that, it is not so and rather according to him, though on the first day of examination-in-chief, the child did not open up and freely answered, it is his submission that, her mental state should also be taken into account. According to him, on 14-06-2024, the child narrated the entire episode suffered by her. He would submit that, immediately after prompt FIR, statement of victim is also recorded under Section 164 of the Cr.P.C. and therefore, even if at some point of time while giving evidence in the Court, the child did not clearly narrate the incidence, there is corroboration to her testimony from medical evidence, which is independent and free from all biases. According to him, both mother and grandmother have also deposed what they have heard from victim herself and as such according to him, there is no reason to disbelieve them. According to him, answers given by victim, more particularly to question nos.74, 81, 83 and 84, pins down the accused to be the perpetrator of the crime. He pointed out

that, scientific evidence also confirms the prosecution story and therefore, he justifies trial Court employing Section 29 of the POCSO Act to draw presumption, which according to him, accused failed to rebut.

On behalf of Respondent No.2/victim :

12. Learned counsel for victim also supported the verdict of trial Court and prays to dismiss the appeal for want of merits.

13. After hearing the above submissions, the fundamental grounds raised in appeal could be summarized as **firstly** FIR to be untimed, **secondly** investigation commenced even prior to registration of FIR, **thirdly** child witness to be tutored and **fourthly** no corroboration to the testimony of prosecutrix.

BRIEF ACCOUNT OF EVIDENCE ADDUCED IN TRIAL COURT

14. **PW1** Informant/grandmother of victim deposed that they resided on ground floor whereas accused, their tenant, resided on first floor since 17 years. She deposed that, on 19-02-2022 at around 10:00 a.m. her granddaughter, aged 6 years, went to play on terrace as usual. That time, accused, who was alone in the house as his wife

was gone for work, called her granddaughter in his house on the pretext of giving snacks, made her sleep on the bed, removed her clothes as well as his own, slept over the person of victim, he inserted his private part twice in the private part of victim and committed rape, which victim narrated to her. That, at around 1:30 p.m. even wife of accused came and her granddaughter narrated the incident to her also and they went to Police Station to lodge FIR. She identified the FIR as well as accused.

While under **cross-examination**, she is asked about the situation of the house, number of rooms, its locations, and then she is questioned about house being mortgaged to the accused for Rs.50,000/- to which she admitted and also admitted about not repaying the loan amount to the tune of Rs.6,00,000/- to Rs.7,00,000/- till date. She denied lodging false FIR to avoid return of money.

15. **PW2** Rajendra Patil is pancha to seizure of clothes, who deposed about panchanama exh.32 pertaining to clothes of accused, exh.33 pertaining to clothes of victim and exh.34 spot panchanama to be drawn in his presence. He also identified the articles seized and shown to him in the Court.

While under **cross-examination**, he admitted that he did not take entry in the office register while leaving. He answered that on 19-02-2022 he left the office at around 10:00 – 10:30 a.m. and he is unable to state who all were present in the Police Station, but stated that accused was sitting in another room of Police Station and he also answered that he remembers the description of the clothes of accused as well as victim. He admitted about not enquiring about owner of the spot. He answered that there were no written orders by his superior to go and act as pancha.

16. **PW3** is victim and she is examined at exh.36. Her examination-in-chief is in question-answer form. Upto question no.56 is the examination-in-chief and thereafter upto question no.85 is the cross-examination. Relevant questions and answers would be dealt at appropriate place.

17. **PW4** is mother of victim and she deposed that accused resided in the upper floor of their house. According to her, incident took place in February at approximately 11:00 a.m. when her victim daughter had been to play on terrace and had come down for urination but could not pass it and complained of pain to her private

part. She deposed that, at that time, only her mother-in-law was in the house and by that time, tenant of upper floor Sarla Patil and Mangla had returned from the work. When her husband made enquiry, she claims that victim told that when she had gone to play on the upper floor, Baba removed her pant, removed his pant too, slept on her person, and touched his private part on her private part and asked her whether she is feeling smooth or not and she further told that he committed sexual intercourse with her and further said that they will do it again after some time. She clarified Baba to be accused.

While under **cross-examination** she admitted about good relations with tenant. She is unable to state when victim left house and returned home. She admitted that her daughter was making complain of irritation to private part. That her mother-in-law informed to Police, who had come. She denied that since previously her daughter complaining of irritation to private part. She is unable to give time when her victim daughter informed her grandmother. Rest is all denial.

18. **PW5** Maruti Somnath Ghuge is the Chemical Analyzer, who deposed at exh.40 about receiving communication from Police for

supply of DNA kit and accordingly, providing it and again on 23-02-2022 receiving muddemal with letter and about receiving blood samples of victim, that of accused, a small hair found on her cloth and its analysis being done. He deposed that, on complete analysis, he found DNA profile obtained from exh.2 i.e. hair is of male origin and it matched with DNA profile obtained from exh.1 i.e. blood sample of accused.

While under **cross-examination**, he answered that samples can be preserved for a year if properly preserved and admitted about not making remark to that extent in the report. However, he volunteered that samples were received by Laboratory and its analysis was done. To a question as to which chemicals are used for preserving, he answered that DNA kit already contains E.D.T.A. preservative chemical. He admitted that samples were received on 23-02-2022 and analysis commenced on 19-08-2022 and he assigned reason that he had to complete DNA profile in another cases. He volunteered that DNA kits were preserved in freezer. He admitted not taking special education in Human DNA Inspection and Analysis. To a question whether there was acknowledgment of receipt of three DNA kits, he gave detailed answer that register is maintained carrying details of crime, name of the Police Station, who demanded kit and

to whom handed over. He answered that he did not carry register. He answered that approximately 10-20 hairs of victim were found. To a question whether kit, if removed from refrigerator, comes in contact with sunlight, gets spoiled, he denied. Rest is all denial except admission that hair of a person can be found on the person of another if they live together in the same house.

PW6 Mahendra and **PW8** Rakhi are the carriers.

19. **PW7** Dr.Nagsen is the Medical Officer, who deposed about Deopur Police forwarding victim for examination with requisition letter, victim's grandmother narrating the history, and on examination, not noticing external injuries, but on local examination of genitals, the same were found with inflamed labia majora and fresh abrasion on left side labia minora admeasuring 0.5 cm, hymen to be intact. He deposed about issuing report exh.59.

While under **cross-examination**, medical expert admitted that there can be inflammation due to bacterial infection in labia majora and that he did not find any marks of assault on the person of victim. He denied issuing false report and to a question whether in case of bacterial infection, patient has fever, he answered in affirmative, but to a further question whether victim had fever, he denied by

answering it in negative.

PW9 Sachin Namdeo Bendre is the Investigation Officer, who narrated all the steps taken by him during investigation till filing of chargesheet.

ANALYSIS

20. Re-appreciated the evidence, more particularly in the backdrop of grounds raised in appeal reproduced above.

FIRST AND SECOND GROUNDS :

21. The fundamental and foremost grounds raised in this appeal are that FIR does not carry time and that in the light of deposition of pancha to seizure, even prior to FIR, investigation had commenced.

In the light of above submission, record is put to scrutiny and it is noticed that, FIR at the behest of PW1 informant is of 19-02-2022, but as pointed out, admittedly there is no timing of recording of crime. However, occurrence of morning 10:00 a.m. is finally learnt by informant grandmother in the afternoon and thereafter, she had approached Police Station but on the same day. On mere failure on the part of Police Station Officer (PSO) to note the timing on a typed

report, no advantage could be derived by defence unless what prejudice has been caused by such lacuna to his case is demonstrated by the accused.

Law is fairly settled that mere commencement of investigation prior to formal registration of FIR is always not fatal to prosecution. On this point, this Court takes support of judgment of the Hon'ble Apex Court dated 25-11-2016 passed in Criminal Appeal No.298 of 2006 (***Anjan Dasgupta v. The State of West Bengal and Others***). In paragraph 16 of the judgment, the Hon'ble Apex Court has observed that "….*The receipt and the recording of First Information Report is not a condition precedent for setting in motion of a criminal investigation.*" Such proposition by the Hon'ble Apex Court is on the strength of its earlier judgment in the case of of ***Apren Joseph Alias Current Kunjukunju and Others v. The State of Kerala****, 1973 (3) SCC 114*, wherein paragraph 11 reads as under "*As observed by the Privy Council in K.E. v. Khwaja, the receipt and recording of information report by the Police is not a condition precedent to the setting in motion of criminal investigation*."

In series of judgments, time and again, the Hon'ble Apex Court has reiterated and echoed the views that defective investigation is not automatically fatal to the prosecution and that, flaws or defects in the

investigation on the point of timing does not vitiate the entire prosecution which is otherwise shown to be credible and reliable.

Unless accused demonstrates what prejudice has been caused to him on account of failure of PSO to specifically note the timing of FIR, he cannot be allowed to derive the benefit.

Consequently, though, here, there is no timing on the report lodged by PW1 informant, complaint is lodged on the same day and FIR is recorded in the night itself. Considering the gravity of allegations, delay if any in such cases even otherwise is not of much significance. Here, there is no allegation by appellant that FIR is ante timed. Therefore, both above grounds have no force.

THIRD AND FOURTH GROUNDS :

22. In the light of allegation that victim was tutored and she having admitted to that extent, it needs to be seen whether indeed it is so and whether testimony of prosecutrix is worthy of credence and reliable. Consequently, her testimony before trial Court is visited and appreciated.

On carefully going through her examination-in-chief, it is noticed that the same is undertaken by posing questions initially by learned APP and cross-examination is by posing questions by

defence. Victim PW3 is initially questioned about her details so as to allow her to get acquainted with the trial process. Learned trial Court itself seems to have posed general questions to victim i.e. upto question no.27 and got itself satisfied that the victim understands the questions and in position to give rational answers. Thereafter, learned Public Prosecutor is permitted to conduct examination-in-chief and she answered that their house has two floors, they live on ground floor, upper floor to be rented to accused. She answered that she used to play on the ground as well as on terrace. She answered that incident happened in the afternoon. To the question who was present at that time, she named accused as well as his wife and to the next question she answered that wife was washing utensils. Then she answered that she was taken to the hospital and when asked for what reason, she answered that she was having irritation to private part and to the question about reason for irritation, she answered it to be general. She denied anybody doing anything with her, she falling down and flatly denied that accused did anything with her. To the question whether she told anything about what accused had done, she answered that she does not know. To question no.49 whether she remembers anything about incident, she answered in negative. Thereafter, recording of evidence for the day seems to have

ended and trial Court has noted "**further examination-in-chief is adjourned as the child witness is not feeling comfortable**"

Her examination-in-chief to above extent was concluded on 12-06-2024 and it was resumed on 14-06-2024 and to question no.50 which was starting point of examination-in-chief that day, when she was asked what did accused do with her, she answered that he called her for giving sweet, gagged her mouth with cloth and to further question, she answered that he removed her clothes, slept on her person, touched his private part on her private part, therefore, she had irritation to private part. To a question as to whom she told the incident, the child answered that to mother and to Police.

Thereafter, further questions are posed by defence in **cross-examination** commencing from question no.57 and to such questions, she has answered and admitted that informant is father's mother, she admitted that she listens and obeys her grandmother. To question no.70 in cross-examination as to whether her grandmother tutored her about incident, she answered that mother tutored her. Similarly to question no.74 whether grandmother tutored her about the incident, she denied, but she admitted that she stated before Police as tutored by her mother and grandmother. To specific question no.81 that she was deposing false that Baba called her for giving sweets,

gagged her mouth with cloth, removed her clothes, and slept over her and touched his private part to her private part, she flatly answered in negative and also identified accused.

23. True it is that on 12-06-2024 when victim was examined, while answering question no.37, she has answered that, accused was present with his wife and though wife is not examined, no adverse inference can be drawn. At times she does seem to have answered that she is unable to remember and has also at one point to a question as to did anything happen, she answered in negative. In similar manner, she also answered to question nos.46 and 49.

However, it is pertinent to note at this juncture that, learned trial Court has noted what is observed by it and remarked that, "further examination-in-chief adjourned as child witness is not feeling comfortable". Therefore, such remark and noting shows that trial Court was on guard and was taking note of the demeanor of the witness and finding child witness in discomfort, further examination-in-chief was deferred and it was admittedly resumed after two days i.e. on 14-06-2022 and on this day, she answered that, accused called her for giving sweet, gagged her mouth, removed her clothes, slept on her person, touched his private part on her private part.

Therefore, her such deposition, though after two days, is consistent and in tune with the contents of FIR. Moreover, as pointed out by learned APP, it is also in tune with statement under Section 164 of the Cr.P.C.

24. It needs to be noted that a child of six years had faced the proceedings of trial Court though in camera, at such tender age, the child may have hesitated to give answers to direct questions posed to her about the incident. Further, merely to a specific question whether accused did anything with her that day, she has answered in negative, but immediately thereafter, trial Court noted the child to be uncomfortable and has paused the process of examination-in-chief. Such circumstances also need consideration. Though after two days, the child has narrated the acts of accused in the similar manner in which her grandmother and her mother have deposed. Even her statement under Section 164 of the Cr.P.C. is on similar lines. Resultantly, part of examination-in-chief cannot be selectively chosen to declare the witness to be tutored.

At this juncture, it would be profitable to take reference to and rely on the judgment of Hon'ble Apex Court in the case of ***State of M.P. v. Ramesh***, *(2011) 4 SCC 786* and the relevant observations in

para 13 are as under "*Part of the statement of the child witness, even if tutored can be relied upon, if the tutored part can be separated from the untutored part, in case of such remaining untutored part inspires confidence. In such eventuality, the tutored part can be believed or atleast taken into consideration for the purpose of corroboration as in the case of hostile witness*". Consequently, in the light of above judicial precedent, here, even if victim's testimony is shown to be tutored, it can still be relied upon if the same is found to be believable after separating the tutored part from the untutored part.

Further, recently the Hon'ble Apex Court in the case of ***State of Rajasthan v. Chatra****, (2025) 8 SCC 613*, has held that "*child victim deposing nothing about offence, but merely shedding silent tears during an examination, and remaining silent, would not accrue to the benefits to the accused*".

In above referred case, the Hon'ble Apex Court has dealt with principles to be borne in mind while appreciating evidence of child victim i.e. on the basis of judicial precedent laid down in the case of ***Dattu Ramrao Sakhare v. State of Maharashtra*** *(1997) 5 SCC 341*; ***Hari Om v. State of U.P.,*** *(2021) 4 SCC 345*; ***State of Himachal Pradesh v. Sanjay Kumar,*** *(2017) 2 SCC 51*; *Pradeep v. State of*

Haryana, (2023) 19 SCC 221 and deduced the following principles.

> *"23.1 No hard and fast rule can be laid down qua testing the competency of child witness to testify at trial.*
>
> *23.2 Whether or not given child witness will testify is a matter of trial Judge being satisfied as to the ability and competence of the said witness. To determine the same, the Judge is to look to the manner of the witness, intelligence or lack of, as may be apparent; and understanding of distinction between truth and falsehood etc.*
>
> *23.3 Non-administration of oath to child witness will not render their testimony doubtful or unusable.*
>
> *23.4 Trial Judge must be alive to the possibility of child witness being swayed, influenced or tutored or being their innocence, such matters are of ease for those who may wish to influence the outcome of the trial in one direction or another.*
>
> *23.5 Seeking corroboration therefore of the testimony of child witness is well placed practical wisdom.*
>
> *23.6 There is no bar on cross-examination of child witness. If the witness withstood the cross-examination, prosecution would be entirely within its rights to seek conviction even solely relying thereon."*

25. Bearing above principles in mind, here, initial examination-in-chief and answers given by victim on 12-06-2024 are apparently when the witness was not comfortable with the Court proceedings and therefore, recording of evidence was suspended and resumed after two days i.e. on 14-06-2024 and this time, victim reproduced the events occurred with her. Her such testimony cannot get redumberated.

26. Even otherwise, here, even if it is considered that child has shown to be tutored and she admitted to that extent, in the considered opinion of this Court, there is corroboration from medical evidence because medical expert PW7 Dr.Nagsen, has noted inflammation to labia majora with fresh abrasion on left side labia minora. That examination is done on the day of occurrence itself. Though medical witness attributed inflammation also to bacterial infection, defence itself has by further questioning the expert brought on record that victim had no fever and therefore, there is confirmation that the inflammation and abrasion was result of acts of accused and nothing else. Resultantly, here, there is corroboration to the testimony of victim from medical expert, which appellant was insisting for.

27. Further investigating machinery collected DNA samples of both accused and victim and on analysis by PW5 Maruti Somnath Ghuge, reports are brought on record. This expert has categorically stated that, on completion of analysis, he found DNA profile obtained from exh.2 i.e. hair to be of male origin and it to be matching with DNA profile of obtained from exh.1 which is blood sample of accused. Hair of accused was found on the clothes of victim, which must have got stuck due to his physical contact with victim while he slept over her. Only on close physical contact, there could be transfer of hair of accused on her clothes. Such scientific and forensic evidence also puts the final nail and confirms the acts of accused. Resultantly, in the light of above discussion, prosecution has discharged its burden of proving sexual assault on victim by accused.

28. Though, as submitted, there are no independent witnesses, in cases of such nature, it is obvious that there would be testimony of victim and her family members only and therefore, as tried to be submitted by appellant, no adverse inference need to be drawn for non-examination of independent witnesses like neighbours, friend of victim or wife of accused, more particularly, when there is sufficient

evidence on behalf of prosecution. It is the quality of evidence that matters and not the quantity, is settled position. It is total prerogative of prosecution to chose the witnesses they intend to examine. Material evidence of victim, her mother, grandmother and Doctor is sufficient to decide the fate of prosecution case.

29. Perused the judgment under challenge. It is pertinent to note that, it is the very Court, which has recorded the evidence, had occasion to even deal with the trial and decide the case and therefore, there is double reinforcement to the quality of output. As no patent perversity or illegality is brought to the notice of this Court, this Court refrains from interference. Accordingly, following order is passed :

ORDER

(I) Criminal Appeal is dismissed.

(II) Fees of the learned counsel appointed for respondent no.2 is to be paid through the High Court Legal Services Sub-Committee, Aurangabad, as per Rules.

(**ABHAY S. WAGHWASE**)
JUDGE

SPT