



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.98 OF 2022

Amol s/o Jayram Landge,
Age : 19 years, Occu.: Labour,
R/o Tq. Kalamnuri, Dist. Hingoli **Appellant**

VERSUS

1. The State of Maharashtra
2. XYZ **Respondents**

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Mr. Dhanraj S. Ingole, Advocate for the Appellant (Appointed).
Mr. S. P. Sonpawale, APP for Respondent No.1- State
Mr. A. S. Usmanpurkar, Advocate for Respondent No.2 (Appointed)

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**WITH
CRIMINAL APPEAL NO.818 OF 2025**

The State of Maharashtra **Appellant**

VERSUS

1. Amol s/o Jayram Landge,
Age : 19 yrs., Occu.: labour
R/o Annabhau Sathe Nagar,
Kalamnuri, Dist. Hingoli.
2. XYZ **Respondents**

....

Mr. S. P. Sonpawale, APP for the Appellant-State
Mr. Dhanraj S. Ingole, Advocate for Respondent No.1 (appointed).
Mr. A.S. Usmanpurkar, Advocate for respondent No.2 (Appointed).

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**CORAM : SANDIPKUMAR C. MORE AND
ABASAHEB D. SHINDE, JJ.**

RESERVED ON : 22.01.2026

PRONOUNCED ON : 21.04.2026

JUDGMENT : (PER SANDIPKUMAR C. MORE, J.)

1. The appellant, Amol Jayram Landge, the original accused in Special Case (POCSO) No. 34 of 2019, has filed Criminal Appeal No. 98 of 2022 challenging his conviction recorded by the learned Special Judge and Additional Sessions Judge-2, Hingoli (hereinafter referred to as "*the learned trial Judge*") under judgment and order dated 17/01/2022 for the offences punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "*the POCSO Act*") and also under Sections 376(2)(i), 376(2)(n), 366-A and 363 of the Indian Penal Code. The appellant-accused has been sentenced by the learned trial Judge as under:

- i) The accused is hereby convicted for the offence under Section 6 of the POCSO Act and section 235(2) of the Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for 10 years and fine of Rs.2000/-. In default of payment

of fine, he shall suffer rigorous imprisonment for 6 months.

- ii) The accused is convicted for the offence punishable under Section 376(2)(i) of the IPC, vide Section 235(2) of the Code of Criminal Procedure and sentenced for rigorous imprisonment for 10 years and fine of Rs.2000/-. In default of payment of fine, the accused shall suffer rigorous imprisonment for 6 months.
- iii) The accused is convicted for the offence punishable under Section 376(2)(n) of the IPC, vide Section 235(2) of the Code of Criminal Procedure and sentenced for rigorous imprisonment for 10 years and fine of Rs.2000/-. In default of payment of fine, the accused shall suffer rigorous imprisonment for 6 months.
- iv) The accused is convicted for the offence punishable under Section 366-A and 363 of the IPC, vide Section 235(2) of the Code of Criminal Procedure and sentenced for rigorous imprisonment for 7 years and fine of Rs.1000/-. In default of payment of fine, the accused shall suffer rigorous imprisonment for 7 months.
- v) All sentence shall run concurrently.

2. On the other hand, Criminal Appeal No. 818 of 2025 has been preferred by the appellant-State against the same judgment

and order seeking enhancement of the sentence of imprisonment imposed upon the accused. Since both these appeals are directed against the same judgment and order; one seeking setting aside of the conviction and the other seeking enhancement of the sentence, we have taken up both the appeals for disposal by this common judgment.

3. Background facts leading to the appeals:

The informant Subhadrabai is the maternal grandmother of the victim. After the death of the victim's mother, the victim and her sister were residing with the informant. At the time of the incident, the victim was studying in the 8th standard. The accused used to wander in the lane of the informant and on earlier occasions, the informant had made inquiries with him for the same.

On 24/10/2019, the informant had gone out for labor work and returned at approximately 6:30 p.m. The elder sister of the victim informed her that the victim was missing since noon. The informant then searched for the victim in the nearby area and also at the house of the victim's maternal uncle. They even visited the house of the accused, but the victim was not found there.

Consequently, the informant was compelled to lodge a report with the Kalamnuri Police Station.

The police initially registered the crime under Section 363 of the IPC. During the investigation, the police recovered both the victim and the accused from the house of a relative of the accused at Pimpalgaon. Both were brought to Kalamnuri Police Station, where the victim narrated how the accused had committed forcible sexual intercourse with her under the promise of marriage.

Subsequently, offences under Section 376 of the IPC and the provisions of the POCSO Act were added. After completing the investigation, the investigating officer submitted a charge sheet against the accused for offences punishable under Sections 6 and 12 of the POCSO Act, as well as Sections 363, 366-A, 376(2)(i), and 376(2)(n) of the IPC.

The learned trial judge conducted the trial and ultimately convicted the accused under the aforementioned sections. Hence, this appeal has been filed.

4. Learned counsel, Mr. Ingole, appearing for the appellant – accused, submits that although the victim was approximately 13 years and 4 months old at the time of the incident, her evidence is contrary to the medical evidence on record. According to him,

though the victim alleged that the accused committed sexual intercourse with her, the medical officer, Dr. Deepmala Bhalchandra Patil (PW-7), deposed that the hymen of the victim was found intact. Further, the learned counsel for the appellant – accused also pointed out that the Chemical Analysis (CA) Report does not support the prosecution case, as it did not reveal anything suggestive of sexual intercourse with the victim. According to him, since the medical evidence on record does not indicate the commission of sexual intercourse, at most, the appellant can only be convicted for an offense under Section 7 of the POCSO Act. For that purpose he has relied on following judgments.

- A) Prakash vs. State of Maharashtra, 2021 4 MhLJ(Cri) 700 &*
- B) Kishor Shankar Palve vs. The State of Maharashtra, through the Police Inspector, Nagar Taluka Police Station, Ahmednagar, 2023 ALLMR(Cri) 3901;*
- C) Criminal Appeal No.388 of 2024 (Ravindra Mohan Koparge vs. State of Maharashtra), delivered on 01/04/2025;*
- D) Praksh vs. State of Maharashtra, 2021 4 MhLJ(Cri) 700 &*
- E) Suresh Angloswami Naidu vs. State of Maharashtra, 2020 Supreme(Bom) 961.*

5. On the contrary, the learned APP strongly opposed the submissions made on behalf of the accused – appellant. According to him, the learned trial court has not imposed an appropriate

sentence of imprisonment on the accused – appellant. He pointed out that the provisions of Section 376 of the IPC, under which the accused was convicted, were amended on 21/04/2018, whereby Clause 2 (i) was omitted and Sub-Section (3) was added, providing that the minimum punishment for rape of a woman below sixteen years of age shall not be less than twenty years, which may extend to life imprisonment. He further submitted that under Section 6 of the POCSO Act, the same minimum sentence of not less than twenty years was prescribed by the amendment effective from 16/08/2019. He emphasized that the incident in the instant case took place on 24/10/2019, i.e., after both these amendments. Therefore, the learned trial judge should have imposed rigorous imprisonment on the accused for a period of not less than twenty years. Accordingly, he prayed for the dismissal of the appeal filed by the accused and for the enhancement of the sentence of imprisonment. He has also relied upon the following judgments:

- A) Pradip vs. The State of Maharashtra, MANU/MH/4203/2022 &*
- B) Judgment of the Hon'ble Apex Court in case of Sachin vs. State of Maharashtra, arising out of SLP (Cri.) Nos.4795-4797 of 2025.*

6. With the able assistance of the learned counsel for the accused as well as the learned APP, we have carefully perused the

entire evidence on record along with the proceedings and records of the original case.

7. So far as Criminal Appeal No.818 of 2025 filed by the appellant-State is concerned, it is for enhancement of the sentence of imprisonment imposed upon the appellant/accused. Admittedly, the appellant/accused had been held guilty for the offence under Sections 363 and 366-A of I.P.C. and sentenced to suffer 7 years rigorous imprisonment alongwith fine. Likewise, he has also been convicted under Section 376 (2) (i) and 376 (2) (n) of I.P.C. and sentenced to suffer rigorous imprisonment of 10 years alongwith fine. Accused is also convicted under Section 6 of POCSO Act and sentenced to suffer rigorous imprisonment for 10 years alongwith fine. For the punishment under Sections 363 and 366-A of I.P.C. the State has not raised any objection that it being insufficient, but so far as imprisonment for the offence under Section 376 of I.P.C. and under Section 6 of POCSO Act is concerned, the State is claiming that the learned trial Judge ignored the provisions to the extent of sentencing the accused and despite there being provision of minimum imprisonment of 20 years, he was sentenced to suffer lessor imprisonment for 10 years.

8. Admittedly, the incident took place on 24/10/2019, but prior to that there was amendment in Section 376 of I.P.C. w.e.f. 21/04/2018 whereby Section 376 (2) (i) was deleted and in that place Section 376 (3) was introduced. Though for the offence under Section 376 (2) (n) of I.P.C. the minimum imprisonment of 10 years remained as it is, but under Section 376 (3) effective from 21/04/2018, the minimum imprisonment of 20 years was provided. We would like to reproduce Section 376 (3) of I.P.C. for quick reference herein-below.

“(3) Whoever, commits rape on a woman under sixteen 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 shall also be liable to fine”:

Thus, the learned A.P.P. submits that the learned trial Judge should have convicted the appellant/accused for the offence under Section 376 (3) of I.P.C. for 20 years and not for 10 years. Admittedly, considering the date of incident being 24/10/2019, Section 376 (2) (i) of I.P.C. was not in existence, being already deleted. Therefore, apparently the conviction under that section by the learned trial Judge appears illegal. However, though such

conviction was illegal, but under sub-section (3) of Section 376 of I.P.C. which replaced the earlier Section 376 (2) (i), was very much effective at the time of incident, and therefore, without being the charge altered, the learned trial Judge could have awarded imprisonment for the period of 20 years to the appellant/accused under Section 376 (3) of I.P.C.

9. Same is the case with conviction under Section 6 of POCSO Act which had undergone substitution by Amendment Act 25 of 2019. Under the unamended Section 6 of the POCSO Act, there was punishment of rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life alongwith fine. However, as per the amended Act which came into force from 16/08/2019, stricter punishment was introduced for the offence under Section 6 and the punishment provided now is rigorous imprisonment for a term which shall not be less than 20 years, but it may extend to imprisonment of life which shall mean imprisonment for the remainder of natural life of that person, alongwith fine. Thus, considering the date of incident i.e. 24/10/2019, it appears that the learned trial Judge acted contrary to the amended Section 6 of the POCSO Act and granted lessor punishment of 10 years than the applicable punishment of

imprisonment of 20 years at the relevant time. Therefore, we find the submission of learned A.P.P. that the learned trial Judge should have imposed punishment upon the appellant/accused for a term not less than 20 years, quite reasonable and in consonance with the amendments in I.P.C. as well as POCSO Act, as mentioned above.

10. However, the learned counsel for the appellant in appeal against conviction, has vehemently argued that no such offence of rape or offence under Section 6 of POCSO Act has been established by the prosecution beyond reasonable doubt, since there is complete absence of medical evidence in this matter as regards sexual intercourse with the victim girl by the accused. He pointed out that though the victim girl stated about such forcible sexual intercourse by the accused with her, but she had also admitted that she was having love affair with the accused, and therefore, on her own she might have gone with the appellant/accused. Learned counsel for the appellant/accused further submits that even the medical evidence and scientific evidence is silent on the aspect of committing forcible sexual intercourse, and therefore, the prosecution could not establish the ingredients of offence of rape under I.P.C. as well as offence of aggravated penetrative sexual

assault under Section 6 of POCSO Act. Though the learned counsel for the appellant/accused prayed for clear-cut acquittal of the appellant, but in the alternative he suggested that in view of absence of medial or scientific evidence, the appellant/accused, at the most, can be held guilty under Section 7 of the POCSO Act which provides imprisonment which shall not be less than 3 years, but may extend to 5 years, alongwith fine as per Section 8 of POCSO Act. Therefore, in the light of submissions made by learned counsel for the appellant/accused as well as learned APP, we are of the opinion that if the appellant/accused succeeds, then the appeal filed by State for enhancement of sentence, shall definitely fail. On the contrary, if the appeal of appellant/accused is dismissed, then the State will definitely succeed and the appellant/ accused can be convicted for rigorous imprisonment not less than 20 years. Under such circumstances, we have to scrutinize the entire evidence minutely to ascertain whether the appellant / accused is guilty for the offences under Sections 376(2) (n) and 376 (3) of I.P.C. as well as Section 6 of the POCSO Act.

11. The prosecution has examined in all 14 witnesses in this matter and on going through the impugned judgment, it appears that the learned trial Judge has observed that though there was no

presence of semen on the private part of the victim and her hymen found intact, but the testimony of victim inspired confidence, and therefore, the offence was proved. The learned trial Judge also held that the victim was below the age of 16 years, and therefore, even if it is presumed that she had consented, then also her consent was immaterial which would give no benefit to the accused. So far as age of the victim at the time of incident is concerned, it is claimed by the prosecution that she was 13 years old at the relevant time. The documentary evidence to that effect i.e. birth certificate of the victim at Exh. 56 and her school extract at Exh.34 has clearly indicated her date of birth as 27/05/2006. Moreover, the evidence of PW-1 i.e. grandmother of the victim as well as PW-5 who is the sister of victim, is consistent on the fact that the victim, at the time of incident, was in 8th Standard and around 13 years old. Not only this, but the victim herself had also stated so. It is significant to note that the aforesaid birth certificate (Exh.56) was produced by PW-10 Devratan who is the Office Superintendent of Municipal Council. Moreover, the school extract (Exh.34) has also indicated that the victim was studying in 8th Standard at the relevant time. Therefore, no further proof regarding the age of victim is required and the finding of learned

trial Judge that the victim was below 16 years at the time of incident, appears quite reasonable and conclusive.

12. So far as offence under Sections 363 and 366-A of I.P.C. is concerned, though the victim admitted that she was in love with accused, but admittedly due to her age being of 13 years, it cannot be held that there was no forcible act of the appellant while taking her away and it was a case of mutual consent and adolescent love. Therefore, the observation of learned trial Judge holding the appellant/accused guilty under both these sections, is definitely proper. Therefore, the main question before us in these appeals is, whether the prosecution has succeeded in proving the act of the appellant/accused of committing forcible sexual intercourse with the victim.

13. So far as conviction of the appellant/accused under Section 376 (2) (i) of I.P.C. as well as under Section 6 of POCSO Act is concerned, the learned trial Judge has based it on two things. First, the testimony of victim girl i.e. PW-11 was reliable and she being under the age of 16 years, her consent was immaterial. Therefore, even though there was lack of semen in C.A. report and absence of injuries on the person of victim girl, it was treated not fatal to the prosecution case. Secondly, the learned trial Judge

treated the statement made by the appellant/accused to Medical Officer at the time of his medical examination about disclosure of his physical relationship with the victim girl at the time of incident, as reliable. So far as victim's testimony viz-a-viz report of her medical examination is concerned, we will discuss it subsequent to the second thing i.e. statement of appellant/accused before the Medical Officer.

14. Admittedly, in the evidence of PW-8 Dr. Abhijit Bangar it has come on record that the appellant/accused was capable of doing sexual intercourse. There is no dispute about the same. However, PW-8 Dr. Bangar has specifically stated that the appellant/accused, while giving history, had made a statement and thereby admitted his sexual intercourse with the victim girl on 02/10/2019 and 26/10/2019. This fact is also evident from the report of medical examination of appellant/accused at Exh.50 wherein, in the column of history as stated by accused, it is mentioned that he had committed sexual intercourse with the victim on 02/10/2019 and 26/10/2019. Further, it has also come in the evidence of the said witness that the accused stated to him that he inserted his penis many a times and ejaculated in vagina. However, this fact is not specifically mentioned in the report

(Exh.50). Therefore, it is to be seen that whether such admission / confession of the appellant/accused is sufficient to prove the allegation against him about committing forcible intercourse with the victim. It is to be noted that the learned trial Judge observed that there was own admission on the part of appellant/accused by disclosing the aforesaid fact to the Medical Officer (PW-8), and therefore, such type of confession is sufficient to prove his guilt. This issue can be discussed in the light of the judgment of High Court of Gujarat at Ahmedabad in Criminal Appeal No. 2238 of 2008. In the said judgment the Gujarat High Court has referred various judgments of the Hon'ble Apex Court as follows :

In the case of *Kanda Padayachi vs State of Tamil Nadu*, the Hon'ble Apex Court observed that the statement of admission of any fact is not barred under Section 26 if it is not a full confession. Further, in the case of *State of Assam vs Anupam Das*, it is observed that confession to a Doctor in police custody is hit by Section 26. In case of *Salim vs State of Kerala*, it is observed that confession to a Doctor in custody, is inadmissible, because it would defeat the safeguard of Section 26 of the Indian Evidence Act. In the case of *Trikambhai @ Tiko Ravajibhai Thakor vs State of Gujarat*, it is observed that if the facts of the case suggest

admissibility of the statement of accused, then in that case, such confession specially in police custody, is inadmissible.

15. The issue before this Court in the instant case is whether the admission/confession made by appellant/accused before the Medical Officer while in police custody, is admissible in evidence to convict him. For this purpose certain relevant legal provisions in the Indian Evidence Act, 1872 are required to be discussed. It is already provided in Section 25 of the Evidence Act that confession made to a police officer is inadmissible in the evidence. However, we are not dealing with the case whether the confession is made by the accused to a police officer. Further, Section 26 of the Evidence Act states that though the confession made by a person while in police custody is inadmissible, but if it is made in immediate presence of Magistrate, that can be considered. Section 27 of the Evidence Act is in nature of proviso to Sections 25 and 26 wherein it is provided that only the part of information from the accused in police custody, which leads to the discovery of a fact, is admissible. Not only this, but the High Court of Gujarat in the aforesaid case has also compared admissions with confessions. Under Section 21 of the Evidence Act, though the admissions are held generally admissible against the maker, but a confession which is a type of

admission, is subject to the restrictions under Sections 24 to 26 of the Evidence Act. By discussing these provisions, the High Court of Gujarat has laid down certain principles, according to which, there is distinction between confession and admission and if a statement amounts to a confession relating to admission of guilt made before the police officer, it is barred. However, if it is merely an admission of guilt, but not a full confession of crime, it may be admissible.

16. Here in this case the appellant/accused was admittedly in police custody when he gave history of the incident to the doctor. The history given by the appellant/accused in the instant case was regarding admission of his guilt of committing forcible sexual intercourse with the victim. The appellant had specifically narrated to the Medical Officer that on which dates he performed the alleged criminal act with the victim. Thus, when the aforesaid admission of the appellant/accused about his guilt was relating to the criminal act alleged against him, it can certainly be considered as “confession”, and therefore, it is subjected to restrictions under Sections 24 to 26 of the Indian Evidence Act. It is held in the aforesaid case that a confessional statement made by the accused to Medical Officer while in police custody, is inadmissible under

Section 26 of the Evidence Act. There is nothing on record to show that the history was given by the appellant/accused to the Medical Officer (PW-8) in the immediate presence of Magistrate. Therefore, for that purpose also it cannot be held admissible. It is to be noted that even though statement was made to a doctor and not to a police officer, it cannot be held that it is exempted from the bar of Section 26 of the Evidence Act. Considering these aspects we are of the opinion that the statement made by appellant/accused before the Medical Officer (PW-8) while giving history before his medical examination, cannot be treated as admission of his guilt as held by the learned trial Judge, since the said statement is clearly inadmissible in the evidence. In view of the same, we are not in agreement with the learned trial Judge for using such admission of appellant/accused for holding him guilty for the alleged criminal act.

17. Now we come to the evidence of prosecution as regards the main criminal act of the appellant/accused. Though the prosecution has examined in all 14 witnesses to establish the guilt of the accused, but for the alleged act of performing sexual intercourse with the victim, the evidence of her grandmother is not of that much importance, because it was the victim who narrated

her the incident. Therefore, the evidence of victim i.e. PW-11 is vital to ascertain whether the accused had committed sexual intercourse with her. Further, from the point of corroboration to the evidence of victim, the evidence of PW-7 Dr. Deepmala Bhalchandra Patil, who had examined her, is to be seen. PW-11 victim in her evidence has deposed that her friend Komal introduced her with the appellant and thereafter she was in love with him. She has deposed that the appellant had also assured her that he would marry her. Further, she has deposed about earlier incident of sexual intercourse and stated that her friend Komal carried her at the house of appellant/accused where the accused had physical relation with her. She further narrated that after about 15 days of the first incident, Komal again asked the victim to accompany her and then she was taken to bus stand. Accused was also there and by giving her proposal of marriage, he forcibly took her to his aunt's house at Pimpalgaon Kota in S.T. Bus. She has deposed that at there also appellant/accused had sexual intercourse with her, but police came there and she was brought to Kalamnuri Court. Apart from that, she also deposed that how she narrated the incident to Lady Police and also gave clothes to the police which she identified during the trial. Thus, from the Chief Examination of the victim it is revealed that

according to her the appellant/accused performed sexual intercourse with her at least on two occasions. Though in cross-examination the victim deposed that she did not raise any alarm at the time when appellant/accused carried her to his aunt's house and that she was loving the accused, but as stated above, these cannot be circumstances from which the appellant/accused can be benefited for charge against him under Sections 363 and 366-A of I.P.C. since the victim was aged only 13 years. However, from the cross-examination of the victim it reveals that both of them were in love with each other and the victim might have gone with the appellant/accused suo-moto. But these statements cannot absolve the accused from the act of performing sexual intercourse with the victim, as her consent was immaterial at the relevant time, because of her minor age.

18. Though the victim has stated so about physical relationship between herself and the appellant/accused, but the corroborative medical evidence is also to be taken into consideration to verify as to whether the victim is telling the truth. We are definitely conscious of the fact that conviction under the provisions of POCSO Act can be based solely on the testimony of victim, if it inspires confidence. We are also conscious of the fact that there

are number of judgments of the Hon'ble Apex Court wherein the sole testimony of victim has been relied upon for convicting the accused under POCSO Act even in the absence of corroborative medical evidence, at times. To test the veracity of the evidence of victim, we find it necessary to go through the evidence of medical officer which is relied by the learned counsel for the appellant/accused. Learned counsel for the appellant is claiming that though the victim has deposed against the appellant/accused, there is absolutely no evidence by the prosecution to substantiate the version of victim of committing forcible sexual intercourse with her by the appellant/accused.

19. As per the evidence on record, PW-7 Dr. Deepmala Bhalchandra Patil had examined the victim on 25/10/2019 under the direction of Kalamnuri police station. From her evidence it reveals that the victim had told her that on 24/10/2019 at about 12.00 p.m. she ran away with the appellant/accused and went to Pimpalgaon and stayed there at the house of his relative, but they were caught by police on 25/10/2019 at 4.00 a.m. The victim had also told PW-7 Dr. Patil that she had performed sexual intercourse with the appellant/accused in the intervening night of 24/10/2019 and 25/10/2019 and even earlier also preceding four months.

However, the evidence of PW-7 Dr. Patil clearly indicates that she did not find any injury on the body of victim. Moreover, no hymen injury was present. For quick reference, we would like to reproduce the part of the evidence of PW-7 Dr. Patil, which relates to examination of victim, as below:

“So also, upon general physical examination, the mental condition of victim was found well oriented about time, place and person. The Blood Pressure was 110/80, minimum pulse rate was 78, Respirations 16/ per min. Height 137 cm. Weight 29 kg. Gait of victim was normal. Per abdominal was soft. There were no any injury was found on the body of victim. Local examination, the pubic hairs were present, labia Majora was normal and healthy; Labia Minora was normal and healthy, Clitoris were normal and healthy and Fourchette and Introitus/Vagina was normal and healthy. Hymen injury was absent. No perinea l tear, urethra was normal, PS normal and healthy, Anus was also normal, Oral cavity was within normal limit, no other findings”.

It is most important to note that this witness has in clear terms stated as per her final opinion at the time of examination according to laboratory report and clinical examination there was possibility of sexual assault on the victim. However, this witness, in the cross-examination, has admitted that she did not find the sexual intercourse sign during her examination of victim. Thus,

though the victim had stated that the appellant/accused performed sexual intercourse with her, but in her medical examination no signs of sexual intercourse with her were found. The absence of injury to hymen clearly indicates that there was no penetration. We are definitely aware of the fact that even partial penetration amounts to aggravated sexual assault or rape, but here in this case everything was normal and nothing suggested that the victim was subjected to forcible sexual intercourse at the hands of appellant/accused. Thus, even though the victim has stated that the appellant/accused had sexual intercourse with her, but considering the medical evidence on record coupled with evidence of PW-7 Dr. Deepmala, who had examined the victim, it is evident that nothing has come on record to infer that there was penetrative sexual intercourse by the appellant with the victim. As such, we are of the opinion that the prosecution has failed to establish the case of aggravated penetrative sexual assault on the victim by the appellant/accused. However, we are also of the opinion that even though the aggravated penetrative sexual assault on the victim is not proved, but the victim cannot be outrightly disbelieved. The victim, due to pressure of family members, might have stated that the accused committed sexual intercourse with her. However, the fact cannot be denied that she was found in the bed of the

appellant/accused when the police got information about her and appellant/accused being present in the house of his relative.

20. Learned counsel for the appellant/accused vehemently argued that since the medical evidence failed to establish the penetrative sexual intercourse with the victim, his conviction needs to be converted to the offence under Section 7 of the POCSO Act, which reads thus :

“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”.

On plain reading of the aforesaid section, it is evident that the present act of the appellant/accused can be covered under the aforesaid definition since the penetrative sexual intercourse is not established. However, when the victim was found with the accused in his bed, there is scope to hold that he had physical contact with her with sexual intent though without penetration. Moreover, PW-7 Dr. Deepmala has clearly stated in her evidence that though she did not find signs of penetrative sexual intercourse, but the possibility of sexual assault could not be ruled out. Therefore,

considering the definition of sexual assault given in Section 7, the appellant/accused can be punished for sexual assault as per Section 8 of the POCSO Act, which provides imprisonment of either description for a term which shall not be less than three years, but which may extend to five years and shall also liable to fine.

21. Useful reference can be taken from the judgment dated 01.04.2025 in Criminal Appeal No.388 of 2024 alongwith Criminal Appeal No.389 of 2024 wherein this Court was dealing with the charges against the appellant therein of having been committed aggravated sexual assault with the victim therein of tender age i.e. 6 years. In that case also though the allegation of aggravated sexual assault was there, but considering the absence of medical evidence, this Court had converted the conviction of the appellant therein from the offence under Section 6 to one under Section 8 read with 18 of the POCSO Act and imposed sentence of rigorous imprisonment for five years and to pay fine of Rs. 5,000/-. In the present case also, on the basis of evidence on record, it has been established that no offence under Section 6 of the POCSO Act or under Section 376 (3) of I.P.C. is made out. However, the appellant/ accused can still be convicted under Section 8 of the POCSO Act for committing sexual assault without penetration.

22. Considering all above-discussed aspects, we are of the considered opinion that the prosecution has not established either the offence under Section 6 of the POCSO Act or under Sections 376 (2) (i), 376 (2) (n) or 376 (3) of I.P.C. However, the prosecution has definitely established the offence punishable under Section 8 of the POCSO Act against the appellant alongwith other remaining sections. It is to be noted that the appellant/accused was hardly 19 years old at the time of incident and it has also come on record that there was love affair between the victim and himself. However, merely because the victim was minor and her consent being immaterial, the aforesaid offence appears to be established against the appellant/ accused. Under such circumstances, we find it proper to sentence the appellant/accused with rigorous imprisonment for five years for the offence punishable under Section 8 of the POCSO Act. In the result, we pass the following order.

ORDER

- (i) Criminal Appeal No. 98 of 2022 is hereby partly allowed.
- (ii) The impugned judgment and order dated 17/01/2022 in Special Case (POCSO) No. 34 of 2019 passed by learned Additional Sessions Judge-2, Hingoli is hereby set aside only to the extent of

conviction of the appellant under Sections 376 (2) (I) and 376 (2) (n) of I.P.C. as well as under Section 6 of the POCSO Act and he stands acquitted of the said offences. However, the appellant/accused is convicted for the offence punishable under Section 8 of the POCSO Act and is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 5,000/-, which is to be adjusted from the fine amount which he already deposited.

- (iii) Rest of the order shall remain as it is. Appellant be set at liberty if he has already undergone the sentence of imprisonment and not required in any other case.
- (iv) Needless to state that Criminal Appeal No. 818 of 2025 filed by the State of Maharashtra for enhancement of the sentence, stands dismissed.
- (v) In both the appeals, the fees of the learned counsel Mr. Ingole appointed to represent the appellant/accused is quantified to Rs. 10,000/- (Rupees Ten Thousand) for each appeal. Fees of the learned counsel Mr. Usmanpurkar appointed to represent respondent No.2-victim is also quantified to Rs. 10,000/- (Rupees Ten Thousand).
- (vi) Fees of the appointed counsel, as mentioned above, be paid to them by High Court Legal Services Sub-Committee, Aurangabad as expeditiously as possible.

(vii) Both appeals are accordingly disposed of.

(ABASAHEB D. SHINDE, J.)

(SANDIPKUMAR C. MORE, J.)