

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

CRIMINAL APPEAL NO. 192 OF 2017

Pandurang Narayan Jadhav,
Age: 37 years, occu. Private Job,
R/o: Sonoshi, Tq. Sindkhed Raja,
Dist Buldhana
At present in Jail

...APPELLANT

VERSUS

State of Maharashtra
Through Investigating Officer
Police Station Chhawani,
Aurangabad.

...RESPONDENT

...
Mr. R.D. Bhalerao, Advocate for appellant
Smt. D.S. Jape, Advocate for respondent -State
...

CORAM : K.K. SONAWANE, J.

RESERVED ON : 12th FEBRUARY, 2019.

PRONOUNCED ON : 12th APRIL, 2019.

JUDGMENT

1. This appeal takes exception to the impugned Judgment and order of conviction and resultant sentence passed by the Special Judge (POCSO Act), Aurangabad in Sessions Case No. 368 of 2013, thereby convicting the present appellant for the offence punishable under Section 10 read with Section 9(f) of the Protection of Children From Sexual Offences Act, 2012 ("POCSO Act") and awarded the sentence of Rigorous Imprisonment for five years and to pay a fine of Rs.2000/- in default to suffer

further Rigorous Imprisonment for two months. Being dissatisfied with the impugned finding of conviction and resultant sentence, the appellant taking recourse of remedy under section 374 of the Code of Criminal Procedure ("Cr.P.C.") approached to this Court for redressal.

2. The scenario of the prosecution case in short compass is that, the appellant was the teacher of "Sanskrit" subject and during the relevant period of incident in the year 2013, he was employed in the school known as "Onkar Vidyalaya" located at Vanjarwadi, Aurangabad. The prosecutrix girl, her cousin brother Parmeshwar, resident of village Karodi" Ta. and District Aurangabad, were taking education in the appellant's School namely, "Onkar Vidyalaya". The timing of the school was from 8.00 a.m. to 1.00 p.m for 5th standard to 9th standard. In all four students from village "Karodi" of prosecutrix - girl used to attend the school by vehicle School Van. The prosecutrix – was the adolescent girl, 13 years old, studying in 7th standard at the time of alleged incident.

3. According to prosecution, on the day of incident i.e. on 16-08-2013, prosecutrix – girl, her cousin Parmeshwar and minor boy Rohit from her village studying in 3rd Standard, all attended the school at 7.30 a.m. as usual by vehicle School Van. The school timing of minor Rohit was 10.00 a.m. to 3.00 p.m. and both prosecutrix – adolescent girl and her cousin used to take

home minor Rohit daily with them in the School Van. It has been alleged that on the day of incident, after school timing prosecutrix – girl and her cousin both were remained in the classroom waiting for minor Rohit to return to home. Meanwhile, the appellant-accused came in the classroom of the prosecutrix – girl. He called the prosecutrix – girl and asked to show her notebook. The appellant - accused gave advise to the prosecutrix – girl to improve her handwriting. During the conversation, he caught hold hand of prosecutrix – girl and pulled her towards him. He pressed her breasts and attempted to rub her cheek. However, appellant-accused noticed presence of the cousin Parmeshwar in the classroom. Therefore, he asked her cousin Parmeshwar to bring chalk box from the classroom of 8th Standard. The conduct and demeanour of appellant/accused raised suspicion in the mind of prosecutrix. Therefore, she herself left the classroom under the pretext of brining chalk box from classroom of 8th standard. But, the appellant/accused followed her in the classroom of 8th standard. According to prosecutrix, the appellant-accused attempted to close the door of the classroom, but any how she managed to get escape from the clutches of appellant-teacher. She came to her cousin Parmeshwar in the classroom and started weeping. The appellant- teacher again came near the prosecutrix girl under the pretext of giving advise to improve her handwriting and then went away. Thereafter, at

about 2.30 p.m. they collected the minor Rohit and returned to home. The prosecutrix - adolescent girl narrated the incident to her mother, who had further disclosed about the incident to father of the prosecutrix and other relatives. On the following day, the parents visited to the school, but the appellant - accused was not found available in the School. The prosecutrix and her parents ventilated the grievance against the appellant-teacher to the headmistress of the School. Eventually, the report about the alleged incident came to be lodged to the Police of cantonment Police Station for penal action against the miscreant teacher.

4. Pursuant to FIR of the prosecutrix girl, the Police of Cantonment Police Station registered the crime No. 219 of 2013 under section 354 of the IPC and set the penal law in motion. Investigating Officer (IO) visited to the spot of incident and drawn *panchnama* of scene of occurrence. He recorded the statements of witnesses acquainted with the facts of the case. IO apprehended the appellant-accused for investigation. The IO applied section 9(f) read with section 10 of POCSO Act and after due investigation IO preferred charge-sheet against the appellant-accused. The charge was framed against the appellant, but he did not plead guilty and claimed for trial. In order to bring home guilt of the appellant/accused, prosecution examined in all four witnesses in this case. The learned trial Court recorded statement of the accused under Section 313 of the Cr.P.C. The

appellant/accused denied the incriminating circumstances put to him and claimed his false implication in this case. The learned trial Court after concluding the proceeding, appreciated the entire oral and circumstantial evidence on record. The learned trial Court held the appellants/accused guilty for the charges of aggravated nature of sexual assault as envisaged under Section 9(f) punishable under Section 10 of the POCSO Act. Accordingly, the learned trial Court passed the impugned Judgment and order of conviction and resultant sentence as indicated above, the validity, legality and propriety of which is the subject-matter of present appeal.

5. The learned counsel appearing for the appellant vehemently submits that the impugned Judgment and order of conviction and resultant sentence passed by the learned trial Court is erroneous, illegal and not within the ambit of law. The learned trial Court did not appreciate the evidence on record in its proper perspective, which resulted in failure of justice. The learned counsel gave much more emphasis on the issue of discrepancies in the name of prosecutrix girl herself and her father in the FIR and School record. The learned counsel further argued that there was delay in lodging the FIR. The prosecution did not examine the eye witness Parmeshwar – cousin of prosecutrix in this case. He was present in the classroom at the time of alleged incident. According to learned counsel, at the

relevant time of incident, there were other teachers, students and staff members available in the school. But, no one else came forward to depose against the appellant/accused. The school record about the age of prosecutrix is also not reliable and proved properly as per law. The learned counsel explained the circumstances on record in detail and urged that the evidence adduced on record is not sufficient to nail the appellant-accused in this case. The learned counsel in support of his submissions /arguments relied upon in the case of **John @ Vivek Ramesh Jadhav Vs. The State of Maharashtra** reported in **2015 All MR (Cri) 4053** and in the case of **Nitin Sampatrao Maske and another Vs. The State of Maharashtra and another in Criminal Appeal No. 9 of 2019 dated 7th March, 2019**.

6. The learned APP raised the objection to the arguments advanced on behalf of appellant-accused and submits that the learned trial Court has correctly appreciated the factual aspects of the matter in proper manner. He harped on the legal issue of presumption under Section 29 of the POSCO Act available for prosecution in this case. According to learned APP the appellant-accused did not succeed to disprove the prosecution case. There is no legal infirmity or illegality in convicting the appellant /accused for the serious charges pitted against him. In support of arguments, learned APP relied on the judicial precedents in the case of **Vijay @ Chinees Vs. State of Madhya Pradesh**

reported in (2010) 8 Supreme Court Cases 191, State of Uttar Pradesh Vs. Chhoteylal, reported in **2011 AIR SC 697, State of Maharashtra : Stree Atyachar Virodhi Parishad Vs. Chandra Prakash Kewal Chand Jain and another** reported in **1990 AIR (SC) 658 and State of Madhya Pradesh Vs. Anoop Singh** reported in **2015 AIR (SC) (Supp.) 1819.**

7. Before embarking into the merits of the matter, it may be desirable to make a reference of the relevant provisions of Sections 7, 9(f) and 10 of the POCSO Act, which are reproduced below:

"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.*

This clause defines the offence of sexual assault. It provides that a person is said to commit sexual assault if he 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. (Notes on clauses)

9. Aggravated sexual assault- *(a) whoever, being a Police Officer, commits sexual assault on a child-*

- (i) xxxx
- (ii) xxxx
- (iii) xxxx
- (iv) xxxx
- (b) xxxx
- (c) xxxx

(d) xxxx

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

10. Punishment for aggravated sexual assault- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

This clause provides for punishment for aggravated sexual assault. It provides that whoever commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. (Notes on clauses)

8. In the matter in hand, in order to bring home the guilt of the accused, prosecution examined prosecutrix – girl and her father in this case. The prosecutrix - adolescent girl deposed that at the time of incident, she was studying in the 7th standard in “Onkar Vidyalaya” located at Wanjarwadi, Aurangabad. Her cousin Parmeshwar was taking education in 6th Standard in the same school. The appellant - accused was also employed as teacher for Sanskrit subject in the school. On the the day of incident i.e. on 16-08-2013, after school timing prosecutrix – girl and her cousin were in the classroom waiting for minor boy - Rohit from their village to return to the home. Meanwhile, the applicant-accused arrived in the classroom. The prosecutrix alleged that he came near her and asked to show her note-book.

The accused advised prosecutrix- girl to improve her handwriting by doing practice of writing. Thereafter, he caught hold her hand and pulled adolescent prosecutrix towards him. It has brought on record in the evidence of prosecutrix that the appellant-accused ventured to press her breast and also pulled her cheeks. However, accused noticed the presence of her cousin in the classroom. Therefore, accused asked the cousin Parmeshwar to bring chalk box from the classroom of 8th standard. The prosecutrix further testified that she herself proceeded to classroom 8th standard for brining chalk box, but the appellant-accused followed her. In the classroom, the accused-teacher attempted to close the door, but the adolescent prosecutrix anyhow succeeded to make her escape good from the clutches of the accused-teacher. Thereafter, she came to her cousin and started weeping. According to prosecutrix-girl, the accused-teacher again came near her under the pretext to give advice to improve the handwriting and thereafter he went away. The prosecutrix-girl further added that on returning to home, she narrated the incident to her mother and consequently father as well as other relatives. Thereafter, she filed the FIR (Exhibit-14).

9. P.W.2, father of the prosecutrix fortify the allegations nurtured on behalf of his minor daughter against appellant-accused. He stated that the prosecutrix was his adolescent daughter of 13 years old and during relevant period she was

taking education in 7th Standard in "Onkar Vidyalaya" located at village Wanjarwadi area. He came to know about the alleged incident of objectionable behaviour of accused-teacher from his adolescent daughter. Therefore, on following day, he visited to the school, but accused was not found available in the school. Thereafter, a report about the incident came to be lodged in the Police Station Cantonment, Aurangabad.

10. P.W.4-Anil Potdar, Headmaster of the alleged "Onkar Vidyalaya, Wanjarwadi" stepped into witness box and produced the relevant documents of Admission Register (Exhibit-27), Attendance Register of the prosecutrix-girl (Exhibit-28), in the school on record. These documents were maintained and preserved with School Authority during the course of official function. These documents indicate that the date of birth of prosecutrix was recorded as 28-03-2001. He has also produced a letter addressed to the concerned Police Authority written by erstwhile Headmistress of the School about the grievance of misbehaviour by the appellant-accused with the adolescent prosecutrix in the school.

11. The evidence of all these prosecution witnesses categorically demonstrate that during the relevant period, the appellant-accused was employed as a teacher for Sanskrit subject in the "Onkar Vidyalaya"/School wherein adolescent prosecutrix was taking education in 7th standard. It is not in

dispute that adolescent prosecutrix and the appellant-accused being teacher and student had an acquaintance with each other. The Attendance Register (Exhibit-28) also fortify the contentions of the prosecutrix that on the day of incident i.e. 16-08-2013, she had been to the school for attending the class. It is also not seriously put in question that P.W. 1- adolescent prosecutrix was the child as defined under section 2(d) of the POCSO Act and at the relevant time she was obviously below the age of 18 years. Therefore, there is no impediment to appreciate the evidence of P.W. 1-adolescent prosecutrix, as evidence of the child witness in this case.

12. There would not be any controversy on the legal issue that the evidence of prosecutrix – girl in the criminal trial for the charges of sexual assault against the accused needs no corroboration, as the victim of sexual offences cannot be put at par with accomplices and the Indian Evidence Act, 1872 nowhere contemplates that her evidence cannot be accepted unless it is corroborated on material particulars. Undisputedly, the prosecutrix - girl is a competent witness under Section 118 of the Indian Evidence Act, 1872 and her evidence must receive same weightage, as is attached to the evidence of injured witness in the case of physical violence. It is settled rule of law that credibility of the evidence of prosecutrix in the matter of sexual assault must necessarily depend on the facts of each

case and the degree of proof required must not be higher than is expected from an injured witness. However, while dealing with evidence of prosecutrix the Court must be conscious of the fact that it is dealing with the evidence of person, who is interested in the outcome of the charge levelled by her.

13. In the matter in hand, it is reiterated that the prosecutrix during the relevant period of incident was the adolescent girl of 13 years old school going student studying in 7th standard. It would be presumed that at the relevant time she had an age of understanding to realize the consequence of the alleged act committed on the part of accused. The conduct and demeanour of the prosecutrix - girl disclosing the mischief of the accused-teacher immediately to her mother, is relevant under illustration (j) of Section 8 of the Indian Evidence Act. Therefore, there is no impediment to appreciate the version of P.W.1-adolescent prosecutrix for the charges pitted against the accused in this case.

14. There is also a letter of Headmistress of the School addressed to the concerned Police, produced on record (Exhibit-29), which lend supports to the story of prosecution about objectionable behaviour of the appellant-accused with adolescent prosecutrix. The evidence of P.W.2-father of prosecutrix and other circumstances on record buttress the allegations cast on behalf of prosecutrix girl against accused for the offence of

aggravated sexual assault committed by the appellant-accused with her.

15. Now, crucial issue which required to be dealt with in this case, is in regard to presumption under Section 29 of the POCSO Act, which reads as under:-

"29. Presumption as to certain offences- *Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.*

This clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provision under clauses 3, 5, 7 and 9 of the proposed legislation, and where the victim is a child below the age of sixteen years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved. (notes on clauses).

16. Bare glance of the aforesaid provisions of section 29 of the POCSO Act, manifestly made it clear that, if the accused persons is prosecuted for committing or abetting or attempting to commit the offence under Sections 3, 5, 7 and Section 9 of the Act, it is mandatory for the Special Court to presume that such person has committed or abetted or attempted to commit the offence unless contrary is proved. It is to be noted that in order to draw the presumption in favour of prosecution, it is necessary to establish that the accused is prosecuted for the offence enumerated in Section 29 of the POCSO Act.

17. In view of aforesaid provision of Section 29 for presumption under the POCSO Act, it is evident that initial burden is upon the accused to show that he is not involved in the said crime and once he succeeded to raise doubt about genuineness or veracity of the allegations nurtured on behalf of prosecution or he succeeded to show his innocence by preponderance of probabilities, then the burden to prove charges against accused for the allegation of sexual assault, will be shifted upon the prosecution to prove the guilt of the accused.

18. At this juncture, it is imperative to take into consideration the difference in between provisions of presumption provided under Section 139 of the Negotiable Instruments Act, 1881 or under Section 20 of the Prevention of Corruption Act, 1988 and Section 29 of the POCSO Act. It is to be borne in mind that under Section 139 of the Negotiable Instruments Act or Section 20 of the Prevention of Corruption Act, 1988 presumption can be raised on proof of certain facts which are specified in Section 138 of the Negotiable Instruments Act or Section 20 of the Prevention of Corruption Act, 1988. But, under the POCSO Act, there is no other requirement to be complied with by the prosecution to raise presumption except to show that the accused has been prosecuted for any of the offences as enumerated under section 29 of the POCSO Act.

19. In the matter in hand, it is not in dispute that appellant - accused is arraigned for the offence of aggravated mode of sexual assault as envisaged under section 9(f) of the POCSO Act, punishable under Section 10 of the POCSO Act. It would be reiterated that at the relevant time, the appellant - accused was employed as teacher in the educational Institution. P.W.1 adolescent - prosecutrix verbalized the entire episode of sexual assault committed with her by the accused who was one of the member of the staff of educational Institution. Definitely, the act committed by appellant - accused could be termed as an act of one of the member of staff of the educational Institution being a teacher. Obviously, the alleged sexual assault committed by the appellant is essential to be appreciated as aggravated kind of sexual assault for which punishment is prescribed under Section 10 of the POCSO Act. Therefore, in the present case, prerequisite conditions required to raise presumption under Section 29 of POCSO Act, seems to be satisfied and accordingly, the onus to prove innocence or to disprove the allegations cast on behalf of prosecution came to be shifted on the appellants-accused in this case.

20. Ironically, the appellant/accused did not step into the witness box nor he had taken efforts to adduce any sort of evidence to disprove the allegations nurtured on behalf of prosecution against him. In the cross-examination, there were

endeavour to bring on record that the prosecutrix attempted to embroil him by making false allegations as accused did not respond to her advances. The prosecutrix in her cross-examination straight-way denied that she had an attraction of the accused. I find this kind of defence propounded on behalf of accused appears to be fallacious and preposterous one. This ridiculous defence appears to be rest on figment imagination and such kind of defence put-forth by the matured handicapped teacher to rebound the allegation cast on behalf of adolescent – prosecutrix is incomprehensible and unacceptable in this case. It would be an stigma on the sacred bonding of teacher – student in an educational Institution. In the statement under section 313(1) (b) of the Cr.P.C. the appellant - accused maintained silence and did not explain the cause for his false implication on the allegation nurtured on behalf of prosecution witnesses against him.

21. In the present case, I do not find any infirmity or perversity in the findings recoded by learned trial Court for adverse inference against the appellant/accused. In contrast, the evidence of prosecution witnesses appears credible, believable and deserves to be accepted. Moreover, it would be significant factor for consideration that there was no serious endeavour on the part of appellant-accused to rebut the presumption under section 29 of the POCSO Act or to disprove the allegations of the

prosecution for sexual assault with the adolescent prosecutrix in this case. The feeble attempt on behalf of the appellant-accused to bring on record some sort of defence in the cross-examination of witnesses found not sufficient to cause any serious dent in the veracity of allegations nurtured on behalf of prosecution. It is true that prosecution did not examine the witness Parmeshwar – a minor cousin of prosecutrix or any other independent witness in the case. But, in view of nature of the subject-matter, when the appellant-accused did not succeed to discharge his burden of presumption under section 29 of the POCSO Act, all these circumstances are not much mean for consideration being an circumstances having devastating effect on the prosecution case. The textual facts in the judicial precedents relied on behalf of appellant and the quality of evidence on record in this case, are clearly distinguishable and of no avail to the appellant. In the result, I am not inclined to accept the argument advanced on behalf of appellant to exonerate him from the charges levelled on behalf of prosecution in this case.

22. In the above premise, I find that the conclusion drawn by learned trial Court is just, proper and reasonable one. Therefore, same is liable to be made confirm and absolute. The quantum of punishment imposed on the appellant-accused is also found reasonable and justifiable to meet the ends of justice. It is to be noted that the incident of sexual assault with the adolescent girls

are increasing day by day and it is high time to deal with the such kind of heinous activities with the iron hand. Therefore, I am not prepared to cause any interference in the impugned findings of conviction and resultant sentence passed by the learned trial Court. Therefore, the present appeal being devoid of merit, deserves to be dismissed.

23. In sequel, the appeal stands dismissed. No order as to costs.

Sd./-

[K. K. SONAWANE]
JUDGE

MTK.