

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

CRIMINAL APPEAL NO.440 OF 2019

Sohel Abdul Rauf Pathan,
Age 29 years, Occu. Service,
R/o Katkat Gate, Nehru Nagar,
Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
(Copy to be served on the
Public Prosecutor, High Court of
Judicature of Bombay, Bench
at Aurangabad)

... RESPONDENT

.....
Shri N.S. Ghanekar, Advocate for appellant
Mrs. Geeta L. Deshpande, A..P.P. for respondent
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 11th February, 2022

Date of pronouncing order : 7th July, 2022

J U D G M E N T :

The challenge in this appeal to an order of conviction and resultant sentence, dated 10/4/2019, passed by learned Additional Sessions Judge-11, Aurangabad in Special Case Child Prot. No.41/2018. Vide impugned order, the appellant has been convicted and sentenced as stated below :-

Sr. No.	Offence under Sections	Sentence	Fine (Rs.)	I/d sentence
1	354 I.P.C.	R.I. for 5 years	1000/-	R.I. for 3 months
2	323 I.P.C.	R.I. for 1 year	500/-	R.I. for 15 days
3	5(f)(l)(m) r/w 6 of POCSO Act	R.I. for 14 years	2000/-	R.I. for 1 year
4	7 r/w 8 of POCSO Act	R.I. for 5 years	1000/-	R.I. for 3 months

2. Facts in brief giving rise to this appeal are as follows :-

The appellant was serving as a Teacher with Zilla Parishad School, Khamgaon. P.W.2 "A" - victim was 4th Standard student, taking education in the school in which the appellant was serving as a Teacher. The appellant was one of the Teachers teaching the victim and other students of 4th Standard. It is the case of the prosecution that, during class hours, the appellant would ask all the students to close their eyes. He would also ask them to bow down their heads. The victim would sit on back bench. The appellant would go close to her. He would show her pornographic pictures in the cell phone. He would ask her to press his private part. He would make her hold his private part by hands and in mouth as well.

One of the classmates of the victim related such happenings to the mother of the victim (P.W.1 "T"). She (victim's mother), therefore, approached the concerned police station and lodged the F.I.R. (Exh.38). The crime vide C.R. No.7/2018 for offences punishable under Sections 354, 354-A and 323 of the Indian Penal Code and Sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012, therefore, came to be registered. The appellant was arrested. Scene of offence panchanama was drawn. The victim was medically examined. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing charge sheet.

3. Learned Additional Sessions Judge framed the charge (Exh.53). The appellant pleaded not guilty. His defence was of false implication.

4. To establish the charge, the prosecution examined 11 witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the trial Court convicted and sentenced the appellant as stated above.

5. Heard Mr. Ghanekar learned counsel for the appellant and Mrs. Deshpande, learned A.P.P. for the respondent. Learned counsel for the appellant would submit that, it is a case of no evidence. None of the prosecution witnesses has stood by the prosecution. Moral conviction is alien to criminal jurisprudence. According to learned counsel, statement recorded under Section 164 of the Code of Criminal Procedure is not substantive piece of evidence. He, therefore, urged for allowing the appeal.

6. The learned A.P.P. would, on the other hand, submit that, the appellant being a Teacher of the victim, was like a father figure for her. He betrayed the confidence of his pupil. According to learned A.P.P., the trial Court has rightly convicted the appellant. She relied on judgment of this Court in case of **Salim Khan s/o Noor Khan Vs. State of Maharashtra [2019 ALL MR (Cri) 1148]**.

7. Considered the submissions advanced. Perused the entire evidence in the case. In view of this Court, it is a case of no evidence at all. P.W.1 - "T" (informant) testified that, when she returned home from the field, she came to know from the villagers that the appellant had outraged

modesty of her daughter (victim). So she along with her relative Hausabai went to the police station. She lodged the F.I.R. (Exh.38). It is further in her evidence that, the friend/classmate of the victim did not relate her what the appellant did with her daughter.

8. Since the witness did not stand by the prosecution, she was subjected to searching cross-examination. Close reading of her answers to the questions put to her during her cross-examination, there is nothing incriminating against the appellant. In response to the questions put to her by the Advocate for the appellant, she testified that what had been learnt by her was a gossip in the village.

9. P.W.2 "A" (victim) testified that she was studying in 4th Standard during relevant days. Her school timing was from 9.00 a.m. to 4.00 p.m. Shri Patil, Shri Waghmare and the appellant were her teachers. The appellant would teach the subjects – Mathematics, English and Hindi. According to her, the appellant did nothing wrong with her. She too was subjected to searching cross-examination, but nothing incriminating could be elicited against the appellant herein. In

response to the questions put to her by learned counsel for the appellant, she testified that, there were 30 students in her class, 15 girls and 15 boys. One bench used to be shared by two of the students. A class room had two windows. The windows remained open.

10. P.W.3 Mangalatai Kapre was working as a Member of Women Vigilance Cell (महिला दक्षता समिती). She too did not stand by the prosecution. It is in her evidence that, when she had been to the police station, nobody was present there except P.S.I. Archana Patil and Smt. Gade. It is in her evidence that, she put her signature on the papers already written.

11. P.W.4 Alfiya, P.W.5 Shifa Javed and P.W.6 Shubhangi are the witnesses who were classmates of the victim. These all the three witnesses testified that the appellant was their Teacher. The victim was their classmate. The appellant did nothing with the victim.

12. P.W.7 Panchashila, P.W.8 Mamta, P.W.9 Archana and P.W.10 Narayan are the police officials. Their evidence does not further the prosecution case except to the extent

that P.W.1 accompanied by the victim had been to the police station to lodge the F.I.R. The F.I.R. was recorded as narrated by P.W.1. The crime, therefore, came to be registered and investigated as well.

13. P.W.11 Dr. Rani Nimbalkar is Medical officer, in whose presence Dr. Shagupta Fatema had examined the victim. According to him, on examination of the victim, no external injuries were noticed on her person. There was evidence of hymenal rupture. No evidence of edema and induration. Blood sample, vaginal swab, oral swab were obtained.

14. The evidence of Medical Officer is of little assistance for the prosecution since it is not the prosecution case that the appellant committed penetrative sexual assault.

15. It is reiterated that, neither the victim nor the mother or the classmates of the victim support the prosecution case and even the member of Women Vigilance Cell. The evidence of police officials and that of the Medical Officer do not further the prosecution case.

16. It needs no mention, the statement under Section 164 of the Code of Criminal Procedure can only be used for corroboration or contradiction of the maker thereof. It cannot partake character of a substantive piece of evidence. In view of this Court, each case has to be decided on its peculiar facts and circumstances. Reliance on the judgment of this Court in case of Salim Khan (supra) would, therefore, be of no assistance for the prosecution.

17. In view of this Court, the trial Court ought not to have convicted the appellant based on such evidence. It is, however, hoped that, the appointing authority or the Chief Executive Officer of the Zilla Parishad must have initiated departmental enquiry against the appellant. It is also hoped that the same would be taken to its logical conclusion.

18. For the reasons given hereinabove, the Criminal Appeal succeeds. Hence the following order :-

ORDER

(i) The Criminal Appeal is allowed.

- (ii) The judgment and order dated 10/4/2019, passed by learned Additional Sessions Judge-11, Aurangabad in Special Case Child Prot. No.41/2018 is set aside. The appellant is acquitted of the offences punishable under Sections 354, 354-A, 323 and 376(2)(f)(i)(n) of the Indian Penal Code and Sections 5(f)(l)(m), read with 6, Section 8 and Section 11(i)(iv) read with 12 of the Protection of Children from Sexual Offences Act, 2012.
- (iii) Fine amount, if paid, be refunded to him.

**(R. G. AVACHAT)
JUDGE**

fmp/-