

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

CRIMINAL APPEAL NO.577 OF 2021

Shrikant s/o Vitthal Sonawane,
Age; 33 years, Occ; Driver,
R/o; Gut No. 3, Ektanagar, Jatwada Road,
Harsul, Tq. & Dist. Aurangabad. ...Appellant

VERSUS

1. The State of Maharashtra,
Through Harsool Police Station,
Taluka Aurangabad, Dist. Aurangabad.
2. XYZ,
Under Guardianship of mother
Asha w/o Mansaram More,
Age; 35 years, Occ; Housewife,
R/o; At post Ghatnandra,
Tq. Sillod, Dist. Aurangabad. ...Respondents

...
Advocate for Appellant : Mr. Syed Azizoddin R.
APP for Respondent-State : Mr. N.T.Bhagat
Advocate for Respondent No. 2 : Mr. P.B.Jadhav (appointed) (**Absent**)
...

CORAM : R. G. AVACHAT, J.

DATE : 09.03.2023.

ORAL JUDGMENT :

1. Heard. This is an appeal from conviction.

2. The appellant has been convicted in a Special Case bearing No. 78 of 2018 vide the judgment and order dated 04.10.2021. The details of the conviction and consequential sentences are as under :

Sr. No.	Sections	Sentence of Imprisonment
1)	U/s.354A(2) of IPC	R.I. for 3 yrs. & fine of Rs. 500/-, in default S.I. for 8 days.
2)	U/s. 354B of IPC	R.I. for 5 yrs. And fine of Rs. 1,000/-, in default S.I. for for 15 days.
3)	U/s. 506 of IPC	R.I. for 2 yrs, and fine of Rs. 500/-, in default S.I. for 8 days.
4)	U/s.8 of POCSO Act	R.I. for 5 yrs, and fine of Rs. 1,000/-, in default S.I. for 15 days.
5)	U/s.12 of POCSO Act	R.I. for 3 yrs, and fine of Rs. 500/-, in default S.I. for 8 days.

All the substantive sentences have been directed to run concurrently.

3. The appellant was a driver on the School bus bearing No. MH-20-CT-4093. He would ferry children to and fro the School. The victim, at the relevant time was little over 13 years old. She was one of the students traveling in the bus, on which the appellant was a driver. It is the case of the prosecution that the appellant caught hold the hand of the victim to make her occupy the front seat in the

Cabin of the Van. He then touched her breast.

4. The victim gave her evidence consistent with her statement under Section 164 of the Code of Criminal Procedure, 1973. It is in her evidence that the appellant had a cutter with him. He told the victim that he would cut his hand if she did not talk to him. It is further case of the victim that the appellant met her at her tuition class on 06.03.2018. The appellant asked her to board the bus. He then took the victim to Jatwada Road. It is further in her evidence that on the next day i.e. on 07.03.2018, she went to tuition. The tuition Madam was not there, so she was on her way back home. The appellant met her on the way under the pretext of giving the victim lift in the school bus, so as to reach her home. The appellant took her to Jatwada Road. The tuition teacher contacted the victim's mother and inquired whether she has returned home. After having realized that the victim was in the company of the appellant, and on her return home her mother made inquiry with her. The victim then shared everything with her mother and other family members. Then she lodged the First Information Report ("F.I.R.") Exh. 16 against the appellant.

5. During her cross-examination, she was confronted with the photographs Exh. 26. The photographs were snapped while the

appellant and victim were at some mountain place. The victim unequivocally admitted that it was she who took the appellant with her at that place.

6. As such, it is the case of consensual relationship. True, the victim being below 18 years of age, her consent was immaterial. The appellant at the relevant time was a school bus driver. The victim was one of the school child traveling in the said bus. The appellant took advantage of the same. The fact remains that the evidence of the victim undoubtedly make out a case that the appellant caught hold of her hand and touched her breast. The trial Court was therefore, right in convicting the appellant for the offences of sexual assault punishable under Section 8 and 12 of the Protection of Children from Sexual Offences Act, 2012, for short ("POCSO") Act. The trial Court has also convicted the appellant for the offences punishable under Sections 354A (2) and 354B of the Indian Penal Code, for short ("I.P.C."). Section 354B reads as under -

"Assault or use of criminal force to woman with intent to disrobe :- Any man who assaults or uses criminal force to any woman or abets such act with the intention to disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine."

7. For conviction of the offence punishable under Section

354B of the IPC an assault or use of criminal force to any woman must be with an intention to disrobing or compelling her to be naked. It is not the case of the victim that the appellant did any such act with her with an intention or compelling to undress her. The trial Court, therefore, ought not to have convicted the appellant for the offence punishable under Section 354B of the IPC.

8. The appellant, therefore, is entitled for acquittal of the offence punishable under Section 354B of the IPC. So far, as regards his conviction for the offence punishable under Section 506 of the IPC is concerned, this Court is of the view that the victim's evidence in this regard needs to be disbelieved, since she was a consenting party. The appellant is also, therefore, entitled for acquittal for the offence punishable under Section 506 of the IPC.

9. The punishment for the offence punishable under Section 8 of the POCSO is imprisonment of either description for a term which shall not be less than 3 years, which may extend to 5 years. While punishment for the offence punishable under Section 12 of the POCSO is imprisonment which may extend to 3 years and shall also be liable to fine.

10. The appellant is in jail for little over one and half year.

He has a wife and two children to be looked after. Although the consent of the victim was immaterial on account of she being below 18 years of age, the fact that it was consensual relationship is a mitigating factor for the quantum of sentence. The Court has to ensure that the appellant undergoes minimum sentence of three years prescribed for the offence punishable under Section 8 of the POSCO Act. In the result, the appeal partly succeeds. Hence the order :-

ORDER

(a) The appellant's conviction recorded by the learned Special Judge (POCSO), Aurangabad in Special Case No. 78 of 2018 vide Judgment and order dated 04.10.2021 for the offence punishable under Section 354A (2) of the IPC and for the offence punishable under Section 8 and 12 of the POCSO Act is hereby maintained.

(b) The appellant's conviction for the offence punishable under Section 354B and 506 of the IPC is hereby set aside and the appellant stands acquitted thereof.

(c) The quantum of sentence imposed for the offence punishable under Section 8 of the POCSO Act is reduced from 5 (five) years to 3 (three) years.

(d) The fine amount paid, if any, by the appellant in

respect of the offences punishable under Section 354B and 506 of the IPC be refunded to him.

(e) Rest of the terms of the impugned order of the conviction and consequential sentence passed by the trial Court to stand unaltered.

(R. G. AVACHAT)
JUDGE

mahajansb/