

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

CRIMINAL APPEAL NO.1249 OF 2019

Balaji s/o Dashrath Mundhe
Age: 52 years, Occ. Head Master,
R/o. Margalwadi, Tq. Gangakhed,
Dist. Parbhani.

...Appellant

Versus

- 1) The State of Maharashtra,
Through: Police Station, Sonpeth,
Tq. Sonpeth, Dist. Parbhani
- 2) ABC
- 3) XYZ

...Respondents

...

Mr. Sudarshan J. Salunke, Advocate for Appellant
Mr. A.V. Deshmukh, APP for Respondent No.1 – State
Mr. N.B. Garje, Advocate for Respondent Nos. 2 and 3 (Appointed)

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 27th FEBRUARY, 2023

JUDGMENT :

1. By this appeal, appellant impugns judgment and order dated 03/12/2019, of his conviction passed by learned Additional Sessions Judge (Special Judge), Gangakhed, Parbhani, in Special Case (POCSO) No.10/2016, thereby convicting appellant/accused for offence punishable under section 354(A) of the Indian Penal Code and sentencing to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/-, for offence under section 9(c) punishable under section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'), and sentencing

to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/-, for offence under section 9(f) punishable under section 10 of the POCSO Act, and sentencing to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/-, for offence under section 9(m) punishable under section 10 of the POCSO Act and to pay fine of Rs.2,000/-.

2. It is the case of prosecution that informant is mother of the victim. Age of the victim at the time of incident was 09 years and she was taking education in 4th standard in Zilla Parishad Primary School, Lasina, Tq. Sonpeth, Dist. Parbhani. On 09/08/2016, at about 08:00 p.m. victim disclosed to the informant that her teacher/accused used to keep her hand on his urinating organ of the body. He used to behave indecently in the same manner with her other schoolmates. Informant disclosed the said incident to her husband. On 10/08/2016, since 08:00 a.m. in the morning her husband made inquiry with parents of 08 schoolmates of the victim. They came to know that accused has also behaved indecently with those girls. They along with other villagers went to the school and made inquiry and ascertained the same. Then the informant lodged report with Sonpeth Police Station, which was registered at Crime No.143/2016, for offence punishable under sections 354(A) of the Indian Penal Code and sections 9(c), 9(f) and 9(m) punishable u/s. 10 of the POCSO Act.

3. Investigation was conducted and charge-sheet was filed against the accused. Charge under section 354(A) of IPC and sections 9(c), 9(f) and 9(m) punishable u/s. 10 of the POCSO Act was framed. The accused pleaded not guilty.

4. Prosecution examined five witnesses in support of it's case. The trial Court found the appellant/accused guilty and sentenced him as above. Hence, the present appeal.

5. Heard learned advocate for appellant, learned Additional Public Prosecutor for State and learned advocate for respondent Nos.2 and 3 victims. Perused the record and written notes of arguments along with compilation of citations submitted by learned advocate for appellant.

6. Learned advocate for appellant submits that vague allegations are levelled against appellant in the present case. Prosecution has failed to prove exactly when the incidents had taken place. No specific date and time of the alleged incidents are brought on record by the prosecution in evidence, therefore, version of the prosecution needs to be disbelieved. Prosecution is also not clear about the place of alleged incident. Spot of incident as shown by PW1 informant is Headmaster's office, whereas in deposition prosecution witnesses i.e. victim girls have stated that they went in the office room and they did not specifically mention

the spot of incident as office of the Headmaster. According to him, PW3 victim herself has not specifically said that incident had taken place in the office. There is no evidence that the students went to the office of Headmaster. By relying on the evidence of defence witness he submits that defence witness teacher is colleague of the accused. They both used to sit in the office in lunch hours. Therefore, allegation of prosecution cannot be believed. According to him, accused was teaching 1st and 2nd standards, whereas defence witness was teaching 3rd and 4th standards. Therefore, the accused had no occasion to call the victims by asking them to bring their notebooks for inspection. Further submission is that evidence of defence witness is cursorily discarded by the trial Court and the same is not properly appreciated. So also, the prosecution has failed to prove foundational facts and therefore, no presumption under section 29 of the POCSO Act can be drawn. According to learned advocate for appellant, on the basis of evidence led by the prosecution two views are possible and therefore, the view which supports the case of defence is required to be accepted and benefit of doubt needs to be given to the accused.

7. In the alternate, he submits that the accused be released on sentence already undergone. He submits that so far the accused has undergone sentence of 03 years and 04 months. In

support of his submissions he relied on following citations:-

- 1) *Pandurang Sitaram Bhagwat Vs. State of Maharashtra, AIR 2005 SC 643;*
- 2) *Hemendrasingh Mehtabsingh Vs. State of Madhya Pradesh, 2022 Cri.L.J. 4361;*
- 3) *Panchhi and Others Vs. State of U.P., AIR 1998 SC 2726;*
- 4) *Reena Hazarika Vs. State of Assam, AIR 2018 SC 5361;*
- 5) *Dudh Nath Pandey Vs. State of U.P., AIR 1981 SC 911;*
- 6) *Mohan Ambadas Meshram Vs. State of Maharashtra, 2018 ALL MR (Cri) 4362;*
- 7) *T. Subramanian Vs. The State of T.N., 2006 Cri. L.J. 804;*

8. Learned Additional Public Prosecutor for State, on the other hand, submits that prosecution by leading evidence of two victim girls and mother of the victim has proved the charge beyond reasonable doubt. No material is brought on record by the defence in cross-examination of all these witnesses. By proving spot panchanama, spot of incident i.e. office of Headmaster, is proved by the prosecution. Trial Court has rightly appreciated the evidence and has convicted accused on the basis of evidence led by the prosecution.

Further submission is that though the defence witness has stated that accused and he used to sit in the office during school intervals, that by itself is not sufficient to create doubt in the prosecution case, in as much as it has not come on record as to exactly when accused used to call victims and do the act in

question. In that view of the matter, evidence of defence witness does not help the case of accused. He submits that accused has miserably failed to discharge his burden of proving his defence and repealing the presumption under section 29 of the POCSO Act. By relying on *Attorney General for India Vs. Satish and Another, 2022 (5) SCC 545*, he submits that the trial Court was justified in convicting the accused.

9. Learned advocate for victims supported the impugned judgment and order. According to him, trial Court has rightly appreciated the evidence and was justified in convicting accused. He submits that the evidence of victims inspire confidence and therefore, the accused is rightly convicted. In support of his submission, he relied on *State of Punjab Vs. Gurmit Singh and Others, AIR 1996 SC 1393*.

10. I have carefully considered the rival submissions and have gone through the appeal memo, written notes of arguments, notes of evidence and the record.

11. Prosecution has examined the informant i.e. victim's mother as PW1. She has stated in her deposition that incident is dated 09/08/2016. At that time, her daughter was studying in 4th standard at Zilla Parishad Primary School. Date of birth of victim is 07/11/2007. On the day of incident, in the night, victim told her

that her teacher (accused) used to catch hold of her hand and used to keep it on his urinating part. She also told that he does the same thing with other girls too. Thereafter, PW1 told the same to her husband and he discussed with parents of other girls. At that time, they came to know that accused has committed the obscene acts with other girls too. Therefore, they went to police station and lodged the report (Exhibit-33). She showed the place of incident to police. Her statement under section 164 of Cr.P.C. was recorded by the learned Judicial Magistrate First Class.

12. In cross-examination, she has deposed that she does not remember as to whether accused was teaching upto 1st and 2nd standards and defence witness was teaching to 3rd to 5th standards. She did not have any knowledge as to how many teachers were teaching in the said school. She admitted that all the students from 3rd and 4th standards were sitting in one and the same class and defence witness Shri Gutte sir was teaching them. She also admitted that at the time of incident 02 female servants were engaged for cooking. She also gave their names. She also admitted that both these two ladies used to come at school at about 10:00 a.m. and used to return back at 02:00 p.m. She told her father-in-law's name as Arun Kadam. She feigned ignorance as to whether her father-in-law used to go to school for lunch along with the

teachers. She also did not know whether her husband was on the Education Committee of Zilla Parishad School. She denied that since her husband was in Education Committee, he was not having good relation with the accused. She denied that her husband had forcibly taken two Quintal rice of the school and since accused was asking for giving back two Quintal rice, otherwise he was to lodge report against her husband, accused was falsely implicated in the crime and that she was instigated by her husband to lodge the present crime against accused. According to her, nobody was present when the victim narrated the incident to her. She admitted that, at the time of lodging complaint 05 to 50 persons from their village accompanied her. She denied that her husband narrated the contents of complaint to the police and she only put her signature thereon. She denied having any relation with Koushalaya Kadam, Radjha Nivrutti Kadam, Yeshoda Kadam, Lata Kadam and Adti Kadam. She denied rest of the suggestions given by the defence that accused is implicated in false case.

13. PW2 is the victim. She gave her birth date as 07/11/2007. She was taking education in Primary School at village Lasina in 4th standard. On 09/08/2016, accused was moving her hand on his urinating part and she was being called in the office. He was calling her by asking her to bring notebook of homework. He

was not reading her notebook of homework. Prior to this also, accused used to do the same act with her. Thereafter, she told name of the accused to her mother. Her mother then narrated the same to her father. Her statement was recorded in the Court at Sonpeth.

14. In cross examination, she denied that Gutte sir used to teach them mathematics. She, however, admitted that Gutte sir was her class teacher. She also admitted that class of 3rd to 5th standards used to be held in one room. School used to open at 10:30 a.m. and there was interval at 12:30 p.m. She denied that in the afternoon, she used to go to her home for lunch. She volunteered that in the interval period she used to eat 'Khichadi' in the school and thereafter used to go to home. She could not tell number of students taking education in 3rd, 4th and 5th standards. According to her, on 09/08/2016, Gutte sir could not come in the school. She denied that she did not attend school on 09/08/2016. She further stated that on that day her parents had been in the school along with parents of other 08 students. On that day, she remained in the school up to 11:00 a.m. On that day, accused was in the school for one hour. On that day, no one taught them. On that day, they saw accused and Gutte sir, however, they did not meet each other. When her statement was recorded in the Court at

Sonpeth, her parents were not present in the Court hall. She specifically denied that her parents had tutored her as to what statement was to be given in the Court. She admitted that accused used to teach to the students of 1st and 2nd standard and in the interval, accused and Gutte sir used to sit in the office room. She denied that class rooms of 1st, 2nd, 3rd, 4th and 5th standards were situated adjacent to each other. She denied that she is stating falsely that accused was placing her hand at the place of his urinating part and she narrated the same to her mother. She further denied that accused was not teaching her and he never called her with notebook of homework. In re-examination she has stated that incident took place on the earlier day of 09/08/2016 and her parents went in the school on 09/08/2016.

15. In cross-examination, she has stated that she did not state the date of incident either to police or in the Court. So also, she did not state that incident took place on the earlier day of 09/08/2016.

16. Another victim is examined as PW3. She stated her date of birth as 18/08/2007 and at that time she was taking education in 6th standard at Lal Bahadur Shastri Vidyalaya at village Lasina. Accused and Gutte sir were teaching her while she was in 4th standard. Accused used to teach them mathematics and rest of the

subjects were used to be taught by Gutte sir. Accused used to hold her hands and touch it to her chest as well as to his place of urinating part. This was being done by the accused when he used to call her with her notebook. She had told the same to her mother. Her statement was recorded in the Court at Sonpeth.

17. In cross-examination, she denied the suggestion that she was not taking education of 4th standard in Zilla Parishad school. She admitted that accused was teaching to the students of 1st and 2nd standards. She denied that she was deposing false that accused used to get her hand and used to touch it to his place of urinating part and that she had narrated the said fact to her mother. She further denied that accused was not teaching her mathematics and that on the day of her deposition her parents tutored her as to what statement is to be given and she had deposed accordingly and that she was deposing false.

18. PW4 Umakant Panchal is panch to the spot panchanama Exhibit-42. He has proved the spot of incident. Spot of incident was shown by PW1 and police prepared panchanama in respect of room of Headmaster of the school in his presence. He admitted that at that time another panch Prakash Nirmale was present with him.

19. In cross-examination, he deposed that his duty starts at 09:30 a.m. and police had not given letter in respect of

panchanama. He admitted that in their school office logbook is maintained and during working hours if one has to go outside then entry has to be taken in the logbook. He had not made entry in the logbook on the day on which spot panchanama was prepared. He denied that for leaving office written permission of senior officer is required. On the date of panchanama, he left office at about 10:00 a.m. and he required 10 to 15 minutes to reach the spot of incident. He admitted that prior to preparation of spot panchanama he was not knowing PW1. He denied that no panchanama was prepared in his presence and police simply obtained his signature in the office and since he did not leave his office on 11/08/2016, he has not made entry in the logbook. He denied that he was deposing falsehood.

20. PW5 is the investigating officer. On 10/08/2016 he was attached to Sonpeth Police Station as API. On that day, Crime No.141/2016 registered in the police station was handed over to him for investigation. He narrated the steps taken during the course of investigation and the correspondence made with the authorities in that behalf.

21. In cross-examination he has stated that he did not call information from the office of B.D.O. or Panchayat Samiti Office as to which teacher teaches which subjects and to which standard. He

did not know if the accused was not teaching to the students of 3rd and 4th standards. He denied that as accused was not teaching to the students of 3rd and 4th standards, he has not collected record of the same. He admitted that during the course of investigation he had not recorded statements of Abidabee and Sharda. He denied that he has conducted false investigation and submitted false final report against accused and that he was deposing false.

22. On careful scrutiny of the prosecution evidence, it is clear that the FIR Exhibit-33 is promptly lodged by PW1, to whom incident is disclosed by the victim. PW1 narrated the incident to her husband, who has verified about the same from other villagers whose daughters were taking education in the same school.

23. Victims i.e. PW2 and PW3 have categorically narrated the exact act of sexual assault committed by the accused. Narration of the incident by victims clearly establishes that the accused has committed sexual assault as contemplated under section 7 of the POCSO Act. Evidence of both victims and PW1 inspires confidence and there is nothing on record to create any doubt or disbelieve their version. The defence has miserably failed to effectively cross-examine the victims and prosecution witnesses and to elicit some material favourable to the defence.

24. Learned advocate for appellant has tried his level best

by arguing multiple points. However, he was helpless due to the manner in which the case was conducted and cross-examination was conducted in the trial Court. The defence could not elicit any admission and/or favorable answers from the prosecution witnesses, whose depositions inspire confidence.

25. Nothing is brought on record to support the theory of defence that accused was falsely implicated in the present crime. Admittedly, the accused was Headmaster. According to him, father of the victim had taken away 02 bags of rice from the school which were meant for mid-day meal of students. There is no complaint lodged by him in this behalf. So also, no report was made of such incident to any higher authorities or Zilla Parishad authorities. Therefore, the said defence is totally unacceptable. Another submission of the learned advocate for appellant that there was a private school in the village and parents of the students were asking for transfer certificate and since accused was not ready to give them transfer certificate, he was falsely implicated, is also liable to be rejected in absence of any material brought on record in that behalf.

26. As is noted above, evidence of both the victims inspires confidence and there is nothing to suggest that they are tutored witnesses. Trial Court has properly appreciated the evidence and

has rightly convicted the accused. Trial Court was justified in drawing presumption under section 29 of the POCSO Act against accused. Since prosecution in the present case has proved the foundational facts, presumption under sections 29 and 30 is liable to be drawn against the accused and accused has failed to rebut the said presumption during cross-examination or by leading defence evidence.

27. Accused has tried to create doubt in the prosecution case by examining DW1 Gutte, his colleague, who was teaching to 3rd to 5th standard students. However, in his evidence he only stated that he used to sit with the accused in office during intervals. He has further stated that on the date of incident he and accused were sitting in the office in the period of short interval and long interval. Except this, he has not stated anything else. He did not support the defence theory that father of the victim had taken away 02 bags of rice and accused was asking to return the same and therefore, accused was falsely implicated in the present crime. He also does not support the case of defence on the point that since parents of the students were asking for transfer certificate for taking admission in private school, which is run by the relative of victim's father and as accused was not handing it over to them, accused was falsely implicated in the crime.

Though learned advocate for appellant was right in contending that no specific time, date and place of alleged incident is mentioned by the prosecution, however, that by itself would not be sufficient to raise doubt about prosecution case. In fact, the particular incident of sexual assault by the accused on victims is vividly stated by them in their evidence.

28. Learned Additional Public Prosecutor was right in relying on ***Attorney General for Indian*** (supra) in support of his argument that prosecution has categorically proved the sexual assault committed by the accused on victims. Observations in the said decision support the case of prosecution.

29. Citation relied upon by learned advocate for respondent Nos. 2 and 3 i.e. ***Gurmit Singh and Others*** (supra) is also applicable to the facts of the present case.

30. Learned advocate for appellant has relied on ***Pandurang Sitaram Bhagwat*** (supra), wherein it is held:-

"16. The approach of the learned Trial Judge as noticed supra that ordinarily a lady would not "put her character at stake" may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under Sections 376 and 354 of IPC have been found to have been falsely advanced."

In the case in hand, there is ample corroboration to the

version of victim PW2 by evidence of victim PW3.

31. In *Hemendrasingh Mehtabsingh* (supra) it is held that prosecutrix in the complaint lodged by her did not mention when, where and at what time alleged acts were committed with her. The alleged incident was not disclosed by prosecutrix to anyone for about four months. Therefore, without any corroboration only on the basis of prosecutrix's statement allegations levelled against appellant were held to be not proved beyond reasonable doubt.

32. In the present case, since the evidence of PW1, PW2 and PW3 inspires confidence, merely because the time is not mentioned as to when exactly the incidents took place, that by itself is not sufficient to discard the otherwise truthful version of the victims and PW1.

33. In *Panchhi and Others* (supra), which was a murder case, there was hostility between two neighbouring families. In the facts of that case it was held that if the evidence of child witness is found reliable, it cannot be rejected. However, a note of caution was given that *"The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring. Courts have laid down that evidence of a child witness must find adequate*

corroboration before it is relied on. It is more a rule of practical wisdom than of law." This exposition is well settled proposition of law.

In the present case, there is ample corroboration to the evidence of victims i.e. PW2 and PW3.

34. In ***Reena Hazarika*** (supra) it was held that defence of accused under section 313 of Cr.P.C. must be considered by the trial Court.

35. In ***Dudh Nath Pandey*** (supra) it was held that defence witnesses are entitled to equal treatment with those of prosecution.

In the present case, defence of the accused is properly considered by the trial Court and this Court has also considered it and dealt with it in foregoing paragraphs. Even the evidence of defence witness is scrutinized and it was not found to be sufficient to dislodge the prosecution case.

36. In ***Mohan Ambadas Meshram*** (supra), learned Single Judge of this Court held that prosecution must prove basic foundational facts of it's case beyond reasonable doubt, then only presumption under section 29 can be attracted. In the present case, prosecution has proved the foundational facts and therefore, the accused is rightly convicted by the trial Court.

37. In *T. Subramanian* (supra) it is held that if two views are possible from the very same evidence, then benefit of doubt needs to be given to the accused.

In the case in hand, only view possible is that accused is guilty of the offence charged against him and he is rightly convicted by the trial Court.

38. The trial Court has properly appreciated the evidence and has rightly found the appellant guilty for commission of the offence.

Section 10 of the POCSO Act prescribes minimum sentence of five years, which is imposed by the trial Court. Hence, there is no merit in the alternate submission of learned advocate for appellant.

39. For the aforestated reasons, no merit is found in the appeal. Appeal is, therefore, dismissed.

40. Fees of the learned advocate appointed to represent respondent Nos.2 and 3 victims is quantified at Rs.5,000/-. High Court Legal Services, Sub-Committee, Aurangabad, to pay the same withing four weeks.

(NITIN B. SURYAWANSHI, J.)