

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 158 OF 2019**

Ishvar Nagurao Kamble

..Appellant.

Versus

The State of Maharashtra & Anr.

..Respondents

---

Ms. Neha Maru i/b. Kuldeep S. Patil for Appellant.

Mr. S. R. Agarkar, APP for State/Respondent No.1

Smt. Megha Bajoria (Appointed Advocate) for Respondent No.2.

---

**CORAM : SARANG V. KOTWAL, J.**

**DATE : 13 JANUARY 2023**

**JUDGMENT :**

1. The Appellant has challenged the Judgment and order dated 04/01/2019, passed by learned Special Judge, Raigad-Alibag, in Special (POCSO) Case No.61 of 2015. The Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s.354(1)(i) of the I.P.C. (as is mentioned in Clause 1 of the operative part of the impugned order) and was sentenced to

suffer R.I. for 5 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for 3 months.

- ii) The Appellant was also convicted for commission of offence punishable U/s.9(f) of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for three months.
- iii) The Appellant was also convicted for commission of offence punishable U/s.7 r/w. 8 of the POCSO Act, but no separate sentence was imposed in view of the sentence imposed U/s.9(f) of the POCSO Act.
- iv) The Appellant was acquitted from the charges of commission of offence punishable U/s.9(l) r/w. Section 10 of the POCSO Act.

Out of the fine amount of Rs.4000/-, amount of Rs.2000/- were directed to be paid to the victim.

All the substantive sentences were directed to run concurrently. The Appellant was given set off U/s.428 of the Cr.p.c.

2. Heard Ms. Neha Maru, learned counsel for the Appellant, Shri. Agarkar, learned APP for the State/Respondent No.1 and Smt. Megha Bajoria, learned appointed advocate for the Respondent No.2.

3. The prosecution case is that, the victim was aged about 9 years on the date of incident. Her date of birth was 19/05/2006. She was studying in a Zilla Parishad Primary school. The Appellant was a teacher in that school. Between the period of January 2015 to 16/03/2015 he used to take the victim to a store room. It is alleged that, on those occasions, he committed the offence of sexual assault as defined U/s.7 of the POCSO Act and of outraging the modesty. On 19/03/2015, some villagers went to the school because there were complaints from other students of sexual harassment at the hands of the appellant. On 25/03/2015, the

F.I.R. was lodged by the victim vide C.R.No.53 of 2015 at Khalapur police station. The appellant was arrested. The investigation was carried out. After completion of the investigation, the charge-sheet was filed and the case was committed to the Special Court.

4. The defence of the appellant was of total denial. According to him, he was doing good work, but he was falsely implicated. Some part of the school building was given to the police for police chowky and, therefore, the villagers had falsely involved him due to political reasons. According to him, he was belonging to a scheduled caste and, therefore, the villagers deliberately implicated him falsely. According to him, he was popular amongst the children, but he is falsely implicated in this case.

5. During trial, the Charge was specifically framed U/s.354(1)(i) of the I.P.C. However, as can be seen, there is no such section under the Indian Penal Code. The description of the offence mentioned under that particular head is in respect of Section 354-A(1)(i) of the I.P.C. It is clearly a typographical error

while framing of charge and also in the operative part of the Judgment and order. However, the ingredients of Section 354-A(1) (i) of the I.P.C. are spelt out in the charge, therefore, it can be corrected. At the highest it is an irregularity and not an illegality.

6. During trial, the prosecution examined six witnesses including the victim, another class teacher, the father of another victim, the Centre Head of the school and the investigating officer.

7. The first informant is the victim. She is examined as PW-2. At the time of deposition, she was 13 years of age. Her deposition was recorded on 27/09/2018. Before recording her examination, learned Trial Judge put some preliminary questions to her and then recorded that she was able to understand the questions and, thereafter administered oath to her. She has deposed that, her date of birth was 19/05/2016. She was staying with her maternal uncle for taking education in Mahad. She studied there upto the 3<sup>rd</sup> standard in Z.P. school. There were two teachers in the school; PW-1 Anita and the Appellant. The school timing was between 10.30a.m. to 5.30p.m. There were three

rooms in the school. In the year 2015, she was studying in the 3<sup>rd</sup> standard. The 1<sup>st</sup> standard students would also sit in the same classroom. Anita madam was her class teacher. The Appellant used to teach for 2<sup>nd</sup> and 4<sup>th</sup> standard students. If either of the teachers was absent, the other one used to teach all the classes. The students were given *khichadi* in the school. The ingredients required for preparing the *khichadi* were stored in the store room. If anything was required from there, the Appellant used to take one of the girls to that store room to bring those ingredients. In January 2015, the Appellant had taken PW-2 to the store room to bring *masala*. When she started looking for *masala* the Appellant sat on a chair. He made her to sit on his lap. He hugged her. He moved his hand all over her body. He kissed her on her lips. He told her not to disclose that incident to anybody. Then she went to her class room. She further deposed that, the said incident was repeated with one of her friends; who told about it to her father. PW-2's friend's father came to the school on the next day. The other teacher Anita inquired with the girls as to whether the Appellant had done anything wrong with any of the girls. At that

time, PW-2 told her about the incident in which she had suffered. PW-2 then went home and told her maternal aunt about the incident. Her maternal aunt took her to the police station. PW-2 narrated the incident to the police. Then the F.I.R. was registered. It was produced on record at Exhibit 15. PW-2 identified the appellant. She has further deposed that, she had showed the spot of incident to the police and her statement was recorded U/s.164 of the Cr.p.c.

In the cross-examination, she stated that, there were only 11 to 12 students studying in 3<sup>rd</sup> standard. The *khichadi* was cooked by some lady in her own house. It was not near the school. That lady used to bring *khichadi* to the school, but she did not come to school everyday to collect the ingredients. She further deposed that the appellant did not come to the school after her friend's father had visited the school. She also admitted that, till her friend's father had come to the school, she had not disclosed the incident to anybody. Her maternal uncle had not come to the school on that day. Apart from that, some minor omissions from her F.I.R. were brought on record, but those did not really go to

the root of the matter. Importantly, there was no suggestion that her date of birth was not 19/05/2016. She was around 9 years of age at the time of the incident.

8. PW-1 Anita Chavan was the other teacher. She has deposed that, she was serving in that school since 2012. Out of the three rooms of the school, one room was used as a store room. The school had only two teachers i.e. PW-1 and the appellant. In 2015, PW-1 was teaching the 1<sup>st</sup> and the 3<sup>rd</sup> standard and the appellant was teaching the 2<sup>nd</sup> and the 4<sup>th</sup> standard. On 19/03/2015, one Sambhaji Patil, Kashinath Patil and others from the village came to the school. They accused that the appellant was misbehaving with a girl student. It is PW-1's case that the appellant had apologized to those people saying that he had committed a mistake. One Ravindra Dabse had complained to PW-1 that the appellant had misbehaved with his niece. PW-1 feared that the crowd would become violent. She informed Shri. Jadhav who was Centre Head of the school. He came to the school. Shri. Jadhav and others inquired with the appellant. Again the Appellant admitted his guilt. PW-1 then inquired with the other girl about the incident.

She told PW-1 that the appellant had taken her in the store room. He had closed the door and he had caught her hands. She started crying and after that the appellant opened the door and let her go away.

In the cross-examination, she admitted that, part of the building which was previously used for the school, was handed over to the police and there was a police station in the same building in the same premises. PW-1 did not know whether some local politicians wanted that building for some other purpose. Sambhaji Patil mentioned by her was the Ex-Sarpanch of the village. The Sarpanch of the village had not come to the school on that day. She admitted that the situation was such that the crowd would have thrashed the appellant. She admitted that, none of the students or their parents had complained to her against the appellant prior to 19/03/2015. She did not know whether Sambhaji Patil was holding grudge against the appellant.

9. PW-3 Santosh Patil was the father of the other victim. He has deposed that, his wife had told him about the teacher in the

school touching their daughter inappropriately. He then went to Sambhaji Patil and told him about the incident. PW-3, his father, Sambhaji Patil and other 4 to 5 persons went to the school. They made inquiries with the appellant and told him that his daughter had complained against him. According to him, the appellant accepted his mistake and said that he would not repeat it.

In the cross-examination, he admitted that, Sambhaji Patil was not the Sarpanch of their village. He had not gone to the police station. The police had come to his house, but he did not remember when police had come to his house. He also admitted that, some part of the premises was converted into the police chowky. He did not know that Sambhaji Patil wanted that part of the building for his office. He denied the suggestion that, he was deposing at the instance of Sambhaji Patil.

10. PW-4 Datta Jadhav was the Centre Head of all Zilla Parishad schools in Khalapur Taluka. On 19/03/2015, at about 10.30a.m. he received a phone call from PW-1. He was informed that the villagers had come to his school and there was a problem.

He along with one Anant Thakur who was the President of the Teacher's Association, went to the school. Sambhaji Patil complained that the Appellant had misbehaved with a student and that he should be removed. PW-4 then discussed with PW-1 and the appellant. According to him, there was substance in the allegation of misbehaviour. He took note of the incident in the Visitor's book maintained at the school. According to him, the Appellant had admitted his guilt.

In the cross-examination, he deposed that the Visitor's book was given to his superior Surekha Hirve who was the Block Education Officer. She did not inquire with him. He also admitted that, amongst the villagers he himself had spoken to Sambhaji Patil. According to him, Sambhaji Patil was also the Ex-President of the school.

11. PW-5 Suresh Atigre, P.S.I. had registered C.R.No.53 of 2015 at Khalapur police station based on the complaint given by PW-2. On 26/03/2015, on the next day, he visited the spot and prepared the spot panchanama which is produced on record at

Exhibit 19. He had also recorded the statement of PW-1. He had proved the contradiction from her statement, however, as mentioned earlier, her contradictions are not very material. The spot panchanama describes three rooms mentioned by PW-1 and PW-2.

12. PW-6 Rangrao Pawar was the investigating officer. During investigation he collected the bonafide certificate of the victim. He sent the victim for recording her statement U/s.164 of the Cr.p.c. He recorded the statements of other witnesses and filed the charge-sheet against the appellant.

In the cross-examination, he admitted that he himself had not inquired with the victim regarding the incident. He had not recorded the statement of the other victim. He proved some omissions from the police statement of PW-3 Santosh Patil.

As mentioned earlier, learned Trial Judge did not accept the defence of the appellant. He relied on the evidence of the prosecution and convicted and sentenced the appellant, as mentioned earlier.

13. Learned counsel for the Appellant made following submissions:

There was a delay from January 2015 to 25/03/2015 in lodging of F.I.R. and that delay is not explained. The victim-PW-2 has not given the date of incident. The F.I.R. is lodged against the appellant out of grudge which Sambhaji Patil was holding against the appellant for giving the premises to police chowky and the F.I.R. was lodged at the instance of Sambhaji Patil. Apart from the victim's F.I.R. there was no other complaint on record. Neither the victim's other friend nor anybody else had lodged any complaint or F.I.R. with the police. The age of the victim is not proved. According to her, the prosecution should have produced on record the birth certificate or bonafide certificate from her school.

Learned counsel relied on the Judgment of a Single Judge of this Court *dated 24/05/2018 in Criminal Appeal No.597 of 2005*. It was held in the said Judgment that as per the Rules of Juvenile Justice (Care and Protection of Children) Rules, 2007 the certificate of the first school which the victim had attended was

necessary or the birth certificate issued by the Corporation was necessary to prove the date of birth of the victim. In absence of these documents, her date of birth cannot be proved.

Learned counsel also relied on the Judgment of the Hon'ble Supreme Court in case of *Jarnail Singh Versus State of Haryana, in Criminal Appeal No. 1209 of 2010 dated 01/07/2013* to contend that the Hon'ble Supreme Court has also held that the procedure laid down in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 should be followed for proving the age. According to learned counsel, in this case, no documentary proof is given to prove that the date of birth of the victim was 19/05/2006. She further submitted that, PW-1, PW-3 and PW-4 had not witnessed the incident and, therefore, their evidence is not material. There are also material contradictions between the evidence of PW-1, PW-2 and others.

14. Learned counsel for the Respondent No.2, as well as, learned APP for the State opposed these submissions. They submitted that the prosecution has not only proved the age of the

victim, but it has also proved the incident. There was no challenge to the date of birth of the victim as deposed by her. It was admitted that, she was studying in 3<sup>rd</sup> standard and, therefore, it cannot be said that she was not below 18 years of age. They further submitted that the evidence of the victim-PW-2 is cogent and reliable and, therefore, conviction can be recorded on the basis of her evidence alone. They submitted that, in such cases, it was not possible for a small child to make complaint against her teacher immediately, therefore, delay in lodging the F.I.R. was not very material. They further submitted that the appellant had admitted his guilt when the villagers had gone to the school. This also is an incriminating circumstance. Both of them conceded that, there was no such section as 354(1)(i) of the I.P.C. and it is a typographical error. The correct section should be 354-A(1)(i) of the I.P.C., for which the maximum sentence prescribed is for three years. To that extent the operative part of the impugned Judgment and order was wrong.

15. I have considered these submissions. As far as age of the victim is concerned, she had deposed that her date of birth was

19/05/2006. In the entire cross-examination, there was not even a suggestion that said date of birth was not true. Her deposition to that extent was not challenged in the cross-examination. It was an admitted fact that the victim was studying in 3<sup>rd</sup> standard. Learned Trial Judge has seen this witness when her deposition was recorded. At that time, she was 13 years of age. Learned Trial Judge has put preliminary questions to the victim. Thus, the gap between 9 years and 18 years is too much. Considering the facts and record of the case, it is not possible to hold that the prosecution has failed to prove that, she was below 18 years of age. The age of the victim was not seriously disputed in the entire cross-examination. In this view of the matter, even in the absence of documentary evidence, it can be held that the prosecution has proved that the victim was below 18 years of age.

16. As far as evidence of PW-3 is concerned, he was the father of the other victim. But the prosecution has not examined the other victim, neither any complaint given by her is produced on record. It is not even the case of the prosecution that she had given any complaint, therefore, his evidence does not help the

prosecution in proving the case in respect of the incident involving PW-3. At the highest, it can be said that there were some complaints against the appellant, for which the villagers had gathered in the school on that particular date. To that extent, the evidence of PW-3, PW-4 and PW-1 support each other's evidence. PW-1 and PW-4 have also spoken about the villagers going to the school complaining about the misbehaviour of the Appellant with other students. To that extent, all these three witnesses have consistently deposed about that fact. Therefore, it is a circumstance against the Appellant which shows that there was some grievance against him for his misbehaviour with a girl student. However, the details of such misbehaviour and other instances are not brought on record. Therefore, this evidence cannot be stretched any further except to show that the villagers had gathered in the school on 19/03/2015.

17. Though other instances are not proved, the prosecution has been successful in proving that the villagers had some grievance against the appellant and for that purpose they had gathered in the school. That gave courage to PW-2. On specific

inquiry with her, she narrated the incident which she had to suffer. Thereafter she went to the police station and lodged the F.I.R. Though there is a gap of six days from 19/03/2015 to 25/03/2015, in the facts of this case, it cannot be said to be fatal to the prosecution case. The appellant was a teacher in the school. The victim was studying in the same school. She was under his pressure and, therefore, it was not unusual that she did not make her grievance immediately.

18. Though, the F.I.R. mentions the incidents taking place on more than one occasion, her deposition is restricted to only one instance which had taken place in January 2015. Learned Trial Judge has considered only that particular incident. Because of this, the appellant was acquitted from the charges of commission of offence punishable U/s.10 r/w. Section 9(l) of the POCSO Act.

19. As far as quality of the evidence of PW-2 is concerned, I find that she has given clear, cogent and reliable evidence. There is absolutely no reason to disbelieve her. There is not even a suggestion that she was deposing on the basis of some tutoring. A

vague suggestion was given to her that Sambhaji Patil wanted some part of the building and, therefore, he was holding grudge against the appellant. However, that line of cross-examination and the defence was not taken further to show the connection between Sambhaji Patil and PW-2. There is nothing to show that PW-2 was deposing at the behest of Sambhaji Patil or that any of her family members were under pressure of Sambhaji Patil. In this view of the matter, no reason is spelt out from the evidence to show as to why PW-2 could have deposed against the Appellant. So far as the incident is concerned, she has narrated it clearly as mentioned earlier, in relation to fulfillment of ingredients of Section 354-A(1) (i) of the I.P.C. and Section 9(f) of the POCSO Act which is punishable U/s.10 of the POCSO Act.

20. It is not possible to accept learned APP's submission that the appellant had admitted his guilt. The evidence shows that the villagers were angry and were about to assault him. His acceptance of guilt was therefore because of this situation. Based on the evidence of PW-2, I am of the opinion that the Appellant is rightly convicted U/s.9(f) r/w. 10 of the POCSO Act. However, as

mentioned earlier, the conviction U/s.354(1)(i) of the I.P.C. is not correct. It is a typographical error. The Charges indicate ingredients of Section 354-A(1)(i) of the I.P.C., therefore, this irregularity can be cleared and the appellant can be convicted U/s.354-A(1)(i) of the I.P.C. The maximum sentence provided under that section is three years. Learned Judge has sentenced the Appellant for a period of five years under that particular head. That sentence will have to be set aside and the maximum sentence of three years at the most can be imposed on him under that section. The conviction and sentence U/s.9(f) of the POCSO Act will have to be maintained.

21. Hence, the following order:

#### O R D E R

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant recorded by the Trial Court for commission of the offence punishable under section 9(f) of the POCSO Act and sentence of five years R.I. with payment of

fine of Rs.2000/- and in default of payment of fine S.I. for three months are maintained.

- iii) The conviction and sentence recorded U/s.354(1)(i) of the I.P.C. are set aside. Instead, the Appellant is convicted U/s.354-A(1)(i) of the I.P.C. and he is sentenced to suffer R.I. for three years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for three months.
- iv) The conviction U/s.7 r/w. 8 of the POCSO Act is maintained. However, the trial Court has not imposed the separate sentence in view of sentenced passed U/s.9(f) of the POCSO Act. That position is retained in this order, as well.
- v) The amount of Rs.2000/- was directed to be paid to the victim out of the realized fine amount of Rs.4000/-. That part of the impugned Judgment and order is retained.

- vi) All the substantive sentences are directed to run concurrently.
- vii) The Appellant is granted set off U/s.428 of the Cr. P. C.
- viii) With this modification, the Appeal is disposed of.

**(SARANG V. KOTWAL, J.)**