

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

**CRIMINAL APPEAL NO. 334 OF 2021
WITH
INTERIM APPLICATION NO. 794 OF 2021**

Rajan Gaurishankar chaudhari	..Appellant.
Versus	
The State of Maharashtra & Anr.	..Respondents

Mr. Vivek N. Arote for Appellant.
Smt. M. R. Tidke, APP for State/Respondent No.1.
Ms. Grishma N. Lad (Appointed Advocate) for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 5 JANUARY 2023**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 18/02/2019, passed by learned Special Judge, Raigad-Alibag, in Special (POCSO) Case No.19 of 2018. The Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s. 354-B of the I.P.C. and was sentenced to suffer R.I. for 7 years and to

pay a fine of Rs.3000/- and in default of payment of fine to suffer S.I. for three months.

- ii) The Appellant was convicted for commission of offence punishable U/s. 506 of the I.P.C. and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for one month.
- iii) The Appellant was convicted for commission of offences punishable under sections 354 and 354-A of the I.P.C., but no separate sentences are awarded in view of sentence passed U/s.354-B of the I.P.C.
- iv) The Appellant was convicted for commission of offence U/s.7 punishable under section 8 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') but no separate sentence is awarded in view of sentence passed U/s.354-B of the I.P.C.

- v) The Appellant was acquitted from the charges of commission of offences punishable U/s.376(2)(n) of the I.P.C. and U/s.3 r/w. 4 of the POCSO Act.
- vi) The fine amount of Rs.5000/-, if deposited, was directed to be paid to the victim.
- vii) All the substantive sentences were directed to run concurrently.
- viii) The Appellant was granted set off U/s.428 of the Cr.p.c.

2. Heard Shri. Vivek Arote, learned counsel for the Appellant, Shri. Agarkar, learned APP for the State/Respondent No.1 and Ms. Grishma Lad, learned Appointed Advocate for the Respondent No.2.

3. The prosecution case is that, the victim, her mother and her brother were residing with the Appellant. The victim's mother was in a relationship with the Appellant. He was looking after the

entire family. The victim's biological father was residing in Bihar. The Appellant's wife was residing separately. The victim's date of birth was 20/05/2005. The subject matter of the F.I.R. was an incident dated 17/01/2018. On that day, in the morning, the victim and her brother were in the house with the Appellant. The victim's mother had gone to attend her duties. The Appellant sent the victim's brother outside the house on the pretext of buying something. During that period, he removed his own clothes. He removed the clothes of the victim and touched her private parts with his private parts. He kissed her and pressed her breast. When her mother came back from her duties, she found that victim's lips were swollen. She made inquiries with the victim. The victim told her about the incident. The victim's mother discussed this with her colleague and then approached the police station. The offence was registered at Kamothe police station vide C.R.No.11 of 2018 on 18/01/2018. The Appellant was arrested on that day itself. The investigation was carried out. The statements of various witnesses were recorded. The victim was referred for medical examination. Even the Appellant was medically examined. The victim's clothes

and the Appellant's clothes were sent for chemical analysis. On the completion of the investigation the charge-sheet was filed and the case was committed before the Special Court.

4. During trial, the prosecution examined nine witnesses including the victim, her mother, the Medical Officer, the Head Master of the victim's school, panchas and the Investigating Officer. The defence of the appellant was of mere denial. He has not taken any specific defence.

5. The victim in this case is examined as PW-2. She has deposed that, she herself, her mother and her brother were residing with the Appellant. She referred the Appellant as her paternal uncle. Her date of birth was 20/05/2005. She was studying in 8th standard. On the date of incident, her mother had gone to attend her duty. Her brother and the Appellant were at home. The Appellant sent the victim's brother out to buy something. When the victim and the appellant were alone in the house, he asked the victim to remove her clothes; she refused. Then the Appellant himself removed her clothes. He kissed her on

her lips. He pressed her breast. He then touched her private parts with his private parts. In the meantime, her brother returned home and pressed the door bell. The appellant sent the victim to the washroom and again sent her brother to buy something. He again repeated the same act. Her brother again returned home. At that time, the appellant sent her to the washroom and asked her to wear her clothes. After that, the Appellant asked the victim to cook food for him. He ate the food and slept. Her mother returned home from her duty. It is the case of the victim that the appellant had threatened her that he would kill her mother and brother if she disclosed this incident to anybody. According to her, the Appellant used to beat all of them under the influence of liquor. Her mother inquired with her about her swollen lips. The victim then told her about the incident. She told her mother that the Appellant kissed her and pressed her breast and had touched her private parts with his private parts. PW-2 has further added that the appellant would commit these acts since she was in the 3rd standard, but she had not told her mother about it because of the threats given by the Appellant. On the next day, her mother came

home with the police. The Appellant was arrested. The victim's statement was recorded. She was sent for medical examination. Her clothes were seized.

In the cross-examination, she deposed that, she used to ride bicycle. Her school timing was between 12.20p.m. to 5.30p.m. She admitted that, she did not like the fact that her mother was not staying with her real father. She denied the suggestion that the Appellant had caught her watching dirty videos and, therefore, he was implicated falsely. However, she admitted that, all three of them were fed up with the Appellant.

6. PW-1 was the mother of the victim. She had lodged the F.I.R. She has deposed that, on 17/01/2018 she returned home at about 4.00p.m. Her daughter- the victim told her about the incident. She also told her that the Appellant was committing these acts since she was in the 3rd standard. On the next day, PW-1 discussed this matter with her colleague and then on her advise, she decided to lodge her complaint. Her F.I.R. was produced on record at Exhibit 10.

In the cross-examination, she admitted that she could not read Marathi. She worked in two different shifts on different days of a month. She admitted that, she used to reside with the Appellant as husband and wife. Since the past five years, she was not in touch with her husband. The Appellant was maintaining PW-1 and her children when PW-1 was not working. She stated that, though, she had some doubt, she did not take her doubt seriously because she thought that there could not be a wrong relationship between the Appellant and her daughter. She admitted that, she did not confront the appellant about the incident. On the next day, she had gone to the work.

7. PW-3 Gopal Patil and PW-8 Prachi Narvekar were panchas in whose presence clothes of the victim were seized.

8. PW-6 Sonukumar Phoosling was a pancha in whose presence the appellant produced his clothes. This evidence is quite innocuous because though the clothes were sent to Chemical Analyzer, no such C.A. report is produced on record. Therefore, it is not an incriminating circumstance. In any case, looking at the

nature of allegation, that would not have revealed anything.

9. PW-5 Dr. Sairaj Sutar had examined the Appellant and opined that the Appellant was potent and was capable of performing sexual intercourse.

10. PW-4 Dr. Kanchanlata Puppál had examined the victim on 18/01/2018. According to her examination, she found that the victim's hymen was torn irregularly with old tear. She opined that the evidence of sexual intercourse or assault could not be ruled out, but the final opinion was kept pending. She admitted that the hymeneal tear was possible due to cycling. She admitted that there were no new or old injuries on the victim.

11. PW-7 Jaywant Jagtap, A.P.I. was the first investigating officer. He had recorded the F.I.R. vide C.R.No. 11 of 2018 at Kamothe police station. He had arrested the appellant on the same day. He had seized the clothes of the Appellant. He recorded the statement of the victim with the help of WPHC Khade. He obtained bonafide certificate of the victim from her school. He conducted the spot panchanama. It is produced on record at Exhibit 30. He

seized the clothes of the victim. He got the victim's statement recorded U/s.164 of the Cr.p.c. He admitted that, it was revealed that the victim was with the Appellant since morning of 18/01/2018 till the evening of 18/01/2018. That was the next day of the alleged incident. The defence wanted to submit that the conduct of the victim's mother was unnatural as she had left the victim in the custody of the appellant in spite of being aware of the allegations on 17/01/2018 itself.

12. PW-9 Abhijeet Madke, A.P.I. was the second investigating officer. He had sent the victim's mother for recording her statement U/s.164 of the Cr.p.c. He had filed the charge-sheet against the Appellant.

13. Learned counsel for the Appellant submitted that the prosecution case is not true. There is no corroboration to the victim's statement. The victim's brother who was an important witness is not examined. PW-1's colleague who had advised her to lodge the F.I.R. is not examined. The conduct of the mother of the victim was unnatural. If she was aware of the incident which had

taken place on 17/01/2018, she would not have left the victim alone in the company of the Appellant on the next day and had gone to attend her duties. He submitted that the medical evidence does not support the prosecution case as the Doctor did not find any injury particularly on the lips. He submitted that, learned Trial Judge has rightly acquitted the Appellant from the charges of commission of offences punishable U/s.376 of the I.P.C. and U/s.3 and 4 of the POCSO Act. To that extent, the victim was disbelieved and, therefore, benefit of doubt should have been given to the Appellant for the other offences, as well. Learned counsel for the Appellant submitted that, in any case, the sentence imposed on the Appellant on the basis of this weak evidence is quite harsh. The Appellant is continuously in custody since 18/01/2018 and almost five years have passed. The minimum sentence U/s.354-B of the I.P.C. is three years which could extend up to 7 years. Learned Trial Judge has not given any reasons why maximum sentence is imposed. The maximum sentence U/s.8 of the POCSO Act is five years and, therefore, it is necessary that the sentence should be reduced.

14. Learned APP, as well as, learned counsel for the Respondent No.2 opposed these submissions. According to them, the medical evidence in fact supports the theory of rape. Though, they conceded that learned Trial Judge has acquitted the Appellant from those charges. They submitted that the conduct of the mother of the victim was not unnatural. All the family members were under the fear of the Appellant and, therefore, the mother of the victim had no choice but to leave the victim in the house; even on the next day. They submitted that the victim had described the incident clearly and in fact, she has stated that such incidents were going on since past more than four years. Therefore, though there is no Appeal against the acquittal, leniency may not be shown to the Appellant.

15. I have considered these submissions. I have also perused the impugned Judgment. Learned Judge has considered as to why the Appellant could not be convicted U/s.376 of the I.P.C. and U/s.3 and 4 of the POCSO Act. Learned Judge has observed in paragraph 39 of his Judgment that the victim had specifically stated that the Appellant had touched his private parts to her

private parts. The Appellant had repeated those acts but she had not stated that he had committed penetration. Learned Judge has observed that the fact remains that the victim had not stated anything about penetrative sexual assault. Hearsay evidence of the mother was left out of consideration and, therefore, the Appellant was acquitted of such charges. The State has not preferred any Appeal against his acquittal. In any case, that finding is based on the evidence before the Court. Therefore, from the evidence, now the only question remains is about conviction of the appellant U/s.354-B of the I.P.C. and U/s. 7 and 8 of the POCSO Act. To that extent, learned Trial Judge has rightly believed the evidence of the victim and her mother. On the next day, the mother had taken advise of her colleague and had approached the police. After that the F.I.R. was lodged and the Appellant was immediately arrested. The sequence of events to that extent is consistent. Though the medical evidence does not show any swelling on the lips, the examination was conducted on the next day and not on the day when the incident took place.

16. Though, brother of the victim was not examined by the

prosecution, but his non examination will not wipe out the evidence of PW-1. The victim was 12 years of age and was capable of giving proper answers in the Court. There is hardly any contradiction from her previous statement. It is not possible to hold that her deposition was based on some tutoring. Therefore, though there are no other corroborative pieces of evidence, her evidence itself is sufficient to prove the offence against the Appellant, for which he was convicted.

17. The next question is about deciding the quantum of sentence. To that extent, learned Trial Judge has not given any reason, whatsoever, as to why maximum sentence U/s.354-B of the I.P.C. was awarded. The sentence which can be awarded U/s.354-B of the I.P.C. is between 3 years to 7 years. The sentence U/s.354-A of the I.P.C. can extend upto 3 years. The sentence U/s.354 of I.P.C. can extend upto 5 years. The sentence U/s.8 of the POCSO Act is between 3 to 5 years. Thus, except for Section 354-B of the I.P.C., the maximum sentence which could be imposed is for 5 years. Even for section 354-B of I.P.C. minimum sentence is 3 years. The Appellant is in custody continuously since 19/01/2018. Almost

five years have passed. The Appellant does not have any criminal antecedents. He was not released on furlough leave or parole leave. In this background and considering the sentences which can be imposed under the above mentioned sections, it would be sufficient if the Appellant is sentenced for the period which he has already undergone in custody.

18. 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 under section 354-B of the I.P.C. is maintained. However, in stead of 7 years of R.I. the Appellant is sentenced to suffer Rigorous imprisonment for the period which he has already undergone and to pay a fine of Rs.3000/- and in default of payment of fine to suffer S.I. for three months.
- iii) The conviction of the Appellant under sections

354 and 354-A of the I.P.C. are maintained, but the Trial Court had not imposed separate sentences in view of sentence imposed U/s.354-B of the I.P.C. The same position is retained.

- iv) The Appellant's conviction and sentence recorded U/s.506 of the I.P.C. are maintained. He is sentenced to suffer R.I. for two years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for one month.
- v) The conviction of the Appellant under section 7 punishable U/s.8 of the POCSO Act is maintained, but no separate sentence was imposed in view of sentence imposed U/s.354-B of the I.P.C. The same position is retained.
- vi) The Appellant's acquittal under other sections is maintained.
- vii) All the substantive sentences are directed to run concurrently.

- viii) The Appellant is granted set off U/s.428 of the Cr. P. C.
- ix) The fine amount of Rs.5000/-, if deposited, by the Appellant is directed to be paid to the victim. That part of the impugned Judgment and order is maintained.
- x) Rest of the clauses in the operative part of the impugned Judgment and order, if they are not inconsistent with this order, are retained as they are.
- xi) The Appeal is disposed of.
- xii) The companion application does not survive in view of disposal of main Appeal. Hence, it is also disposed of.

(SARANG V. KOTWAL, J.)