



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

CRIMINAL APPEAL NO. 158 OF 2018

The State of Maharashtra
Through Kasoda Police Station,
Tal.Dharangaon, Dist.Jalgaon.

....Appellant

Versus

Jainuddin Gayasuddin Shaikh
Age: 25 years, R/o. Mashidali Mohalla,
Dharangaon, Tal.Dharangaon,
Dist.Jalgaon.

.....Respondent

.....

APP for Appellant : Mr.N.D.Batule
Advocate for Respondent : Mr. G.V.Wani

.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 05 FEBRUARY, 2024

PRONOUNCED ON : 14 FEBRUARY, 2024

JUDGMENT :-

1. Aggrieved by the judgment and order passed by the learned Special Judge (POCSO), Jalgaon dated 11-04-2017 acquitting respondent from offence under Section 354-A(1) of the Indian Penal Code (IPC) and Section 8 of the Protection of Children from Sexual Offences (POCSO) Act, State has preferred instant appeal.

SUBMISSIONS

On behalf of State :

2. Briefing this Court regarding the charge framed against

respondent accused and even taking this Court through the evidence adduced in the trial Court, learned APP submitted that accused is a teacher. Victim was his student. That during class, he sat near victim and touched her inappropriately i.e. pressed her breast. That complaint was promptly lodge of occurrence dated 20-12-2014. That mother to whom victim narrated the incident lodged FIR and she has stepped in the witness box. That prosecution had examined seven witnesses including school authorities and victim herself, however, inspite of clear and cogent evidence regarding victim, a minor, being sexually assaulted, learned trial Judge has unfortunately acquitted respondent. That there is apparently improper appreciation of evidence. That findings are not supported by sound reasons and rather not in consonance with the evidence and hence, he prays to set aside the impugned judgment date 11-04-2017 by allowing the appeal.

On behalf of Respondent accused :

3. In answer to above, learned Counsel for respondent - accused would submit that apparently there is weak evidence and false fabricated case is filed. That witnesses are not lending support to the testimony of victim and as such there is no corroboration. That

version of complainant is improvised i.e. before Police, learned JMFC and finally in witness box. That there are discrepancies in testimony of victim and spot panchanama. That there is also delay in lodging FIR. That false case is foisted and therefore, as prosecution has miserably failed, he pointed out that, learned trial Court committed no error in acquitting respondent and he prays to dismiss the appeal.

4. This Court, being first appellate Court and last fact finding Court is expected to re-appreciate, re-analyze and re-examine the entire oral and documentary evidence adduced by prosecution.

5. In support of its case prosecution has adduced evidence of in all seven witnesses and their status is as under:

PROSECUTION WITNESSES

PW1 is mother of victim. Her evidence is at exh.20.

PW2 is victim. Her evidence is at exh.22.

PW3 Shaikh Fahim Abdul Rauf is Head Master of Urdu High School. His evidence is at exh.29.

PW4 Allimuddin Rafiuddin is pancha to spot panchanama exh.31. His evidence is at exh.30.

PW5 Ramdas Budha Rathod (PSI) is the Investigating Officer, who

initially investigated the crime.

PW6 Purushottam Kisan Khobragade is Gramvikas Adhikari, who issued true copy of birth certificate exh.49.

PW7 Nazim Rehman Shaikh (PSI), is another Investigating Officer, who gathered original birth certificate and filed verified copy of birth certificate exh.53.

Defence has examined DW1 Shaharinbanu Amjadkhan at exh.60.

ANALYSIS

6. After considering the submissions of both sides and on carefully scrutinizing evidence on record, it seems that learned trial Judge has tried the case for offence under Section 354-A(1) of the IPC and Section 8 of the POCSO Act.

7. It would be desirable to reproduce the substantive evidence of **PW2** victim, who was studying in 8th standard and who has given her age as 13 years, regarding the occurrence, as is narrated by her while in witness box.

“I was studying in 6th standard. Incident occurred on 20-12-2014. On that day myself and my friend Ujma Kausar Shaikh went on foot to the our school at 10:00 a.m. As I was

late, I was sitting alone at back bench in my class. Our second period of maths started at about 12:00 noon. Our teacher (accused) used to teach us maths. He came in the class. While teaching, he came near me and sat on my bench. He sat on my right hand side. “He put his left hand below my shoulder and pressed my left breast”. Then he went for teaching. Then again he came and sat on my right hand side. “Again he put his left hand from below my shoulder and pressed my left breast”. Due to this, I got frightened.”

On the next day, complaint was lodged and victim caused signature in Urdu.

8. On going through the **cross-examination** of the victim, there seems to be questions whether she can read Marathi and she replied in negative, but answered that she can write Marathi to some extent. Then she is asked the meaning of left and right. Details about her parents, brother to be studying in same class are brought in her cross-examination. She denied suggestion that accused taught her in 5th standard as a class teacher, but answered that he taught when she was in 4th and 5th Standards. Questions about percentage obtained and performance are put to her.

9. Regarding the occurrence, questions are put in paragraph 5 about time at which she and her friend reached school, strength of

students in their class, subject taught in first period. She specifically stated that Shoeb Sir marked her presence. Then she is questioned about location of bench occupied by her and other students and she categorically stated that benches in front of her were occupied by other students and further categorically answered that no other student was sitting adjacent to her. She stated about accused giving two problems on board for solving to the students and all students were solving it in their notebooks. She denied that she could not finish the problem given to them. She flatly denied that as she could not finish her answer, accused completed last line of the answer and that he scolded her for not finishing the answer. She further denied any happening during which her Sir has kept hand on her head and shoulder and asked her to complete studies properly. She further denied that accused warned her that as she came late to the school and hence her parents as well as class teacher would be informed. She denied that because of it, she got frightened. She answered that after second period, there was recess and she went out to play. Omission is brought in the report lodged regarding sitting “**alone**” on the last bench.

10. This Court has carefully examined the impugned judgment dated 11-04-2017. In paragraph 11 of the reasoning learned trial

Judge has noted that “victim has reiterated the facts narrated by her in report exh.23”.

In paragraph 12 legal position is discussed. In paragraph 13, it is observed that “*prima facie*, evidence of victim PW2 is corroborated by contents of report exh.23 lodged by her.” However, omission regarding she stating about sitting “**alone**” on the last bench is held as material omission by the trial Judge.

In paragraph 14 of the judgment, learned trial Judge has observed that exh.23 report is silent about the place where her friend, who had accompanied her to the school, was sitting. It is further observed that said friend would have been the best witness, but prosecution has failed to examine her for the best reasons known to it and as such it is observed that, non-examination of material witness casts adverse inference against the prosecution and that no other student has been examined to corroborate her evidence.

In paragraph 17 of the judgment, evidence of PW4 Pancha to spot panchanama exh.31 is dealt and it is observed that there were three rows of five benches in each row and victim informed about sitting on the last bench in the row situated on the western side, but the same is contrary to the admission given by the victim, as according to the trial Court, she has stated that she was not

occupying the bench adjacent to the walls of the classroom.

Inference seems to have been drawn in paragraph 19 that generally two students sit on each bench and this is so stated by defence witness DW1 Shaharinbanu and so 15 benches would be occupied by only 30 students. Further observations are made that assuming that 3 students sat on single bench, at the most 45 students could be occupied, but PW3 Head Master stated about 60 students enrolled in 6th standard.

Again in paragraph 20, learned trial Judge has held that, on 20-12-2014, out of 30 girls, only 28 were present and the inference that can be drawn is that 28 girls might be occupying 14 benches.

11. Above observations in the impugned judgment, in the considered opinion of this Court, are based on assumptions and surmises and without concrete foundation or conclusive evidence to that extent. Therefore, on the findings reached at by the learned trial Judge that, “it is highly impossible to hold that victim was sitting alone”, her version does not seem to be probable, holding that there is a day’s delay, failure to conduct medical examination and accused having successfully rebutted presumption under Section 29 of the POCSO Act, learned trial Court seems to be acquitted

accused.

12. On critical analysis of above discussed testimony of victim and the above observations of the trial Court, in the considered opinion of this Court, apparently and patently victim's testimony has not at all been appreciated as required under law. Mere minor omission like of the word "alone" in the report is surprisingly held as material omission. Likewise, even when not necessary in the light of nature of case, failure to conduct medical examination is also made a ground to disbelieve her version. In fact, the Hon'ble Apex Court in case of *State of MP v. Dayal Sahu* 2005 Cri.L.J. 4375 observed that "non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution **if** statement of prosecutrix and other prosecution witnesses inspire confidence".

13. On carefully appreciating the testimony of victim, she is found to be very categorical about she reaching late to the class, therefore she occupying last bench and was sitting alone. She has very categorically stated about accused coming to her bench and sitting on her right hand side and by putting his left hand under her shoulder and pressing her breast not once but **twice**. Child is very categorical

about getting frightened. She is a girl of 13 years of age. She must not have reacted as accused was her teacher. However, she has reported the incident to her mother on the same day after returning from the school and on the next day, complaint seems to have been lodged.

14. In the considered opinion of this Court, there is no reason for false implication. There are no suggestions for what there could be false implication. Learned trial Judge has made unwarranted observations in paragraph nos.14 and 20 inspite of initially holding that report exh.23 lodged by her is corroborated by her testimony in the witness box. Further there seems to be a suggestion, which is denied by her, that accused kept hand on her head and shoulder and further asking her to complete studies properly. Therefore, such suggestion clearly shows that there is use of hand in touching person of the victim.

Under such circumstances, it was not open for the learned trial Judge to make further observations by drawing some assumptions and surmises, more particularly, as is done in paragraph 14 regarding her friend Ujma, in paragraph nos.17, 19, 20 and 21 holding that

prior to alleged second act, she could have changed her place and that she did not react.

15. This Court is mindful of the precedents set out by numerous judgments by the Hon'ble Apex Court that view taken by the trial Court generally should not be substituted by the appellate Court by its own view or taking different view. There are numerous legal pronouncements on such precedent. The relevant judgment, which recapitulates the settled principle is the case of ***Chandrappa & Ors. v. State of Karnataka***, (2007) 4 SCC 415 and the principles enunciated therein in para 42 are borrowed and quoted herein, which are as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

16. Keeping above parameters into consideration, on re-appreciation and reanalysis of entire prosecution evidence, which is power of appellate Court, it is emerging that, as stated above, victim has categorically deposed that accused her class teacher came and sat near her on same bench while she was sitting alone having reached

late to the class. She has deposed about his act not once but twice regarding pressing her breast with his hands. As stated above, there is no reason for false implication. Therefore, her testimony ought not to have been doubted by the trial Judge. In spite of facing extensive cross-examination, her testimony to the extent of actual acts of accused is not at all rendered doubtful.

17. Resultantly, taking into account, the nature of acts, provisions under Section 354-A(i) of the IPC, its essential ingredients and provisions under Section 8 of the POCSO Act offences are clearly made out. But trial Court has acquitted accused / respondent from all charges. Therefore, interference at the hands of this Court becomes necessary.

Section 354-A(2) of the IPC provides punishment for offence under Section 354-A(i) as rigorous imprisonment for a term which may extend to three years with fine, whereas Section 8 of the POCSO Act provides punishment for sexual assault. Here there is offence of pressing breast of the victim twice and therefore, there is sexual assault as provided in Section 7 of the POCSO Act. Punishment for the said act, as provided in Section 8 of the POCSO Act, is “imprisonment of either description for a term, which **shall not**

be less than three years but which may extend to five years and also fine”.

CONCLUSION

18. Taking into account the status of accused as a Teacher and the victim to be his pupil, there is clear misuse of authority and trust. His job was to teach and groom the children to become good citizens. Here he has apparently victimized his own pupil and therefore, he deserves to be held guilty and further dealt according to law. Resultantly, State succeeds and accordingly, I proceed to pass following order :

ORDER

(i) Criminal Appeal No.158 of 2018 is allowed.

(ii) The impugned judgment and order of the Special Judge (POCSO), Jalgaon passed in Special Case (POCSO) No.11 of 2015 on 11-04-2017 is hereby quashed and set aside.

(iii) The respondent / original accused - Jainuddin Gayasuddin Shaikh is hereby convicted for the offence under Section 354-A(i) of the IPC and under Section 8 of the POCSO Act and is sentenced to suffer rigorous imprisonment for three (3) years and to pay fine of Rs.1,000/-. In default of fine, he shall suffer rigorous imprisonment for 3 months.

(iv) The respondent shall surrender his Bail Bonds.

(v) The respondent shall be entitled to relief of set off, if any, as prescribed under the provisions of Section 428 of the Code of Criminal Procedure.

(vi) The trial Court shall ensure execution of sentence.

(ABHAY S. WAGHWASE)
JUDGE

SPT