



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.593 OF 2023

Sudhakar Omkar Bunde,
aged about 54 years, occupation - service,
r/o Gayatri Nagar, Telhara,
district Akola. **Appellant.**

:: V E R S U S ::

1. The State of Maharashtra,
through Police Station Officer,
Police Station Tamgaon,
taluka Sangrampur,
Buldhana.

2. XYZ
Crime No.20/2019,
through Police Station Officer,
PS Tamgaon, tahsil Sangrampur,
district Buldhana. **Respondents.**

Shri S.V.Sirpurkar, Counsel for the Appellant.
Mrs.Swati Kolhe, Addition Public Prosecutor for
Respondent No.1/State.
Mrs.Sonali Saware, Counsel Appointed for Respondent
No.2/Victim.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 18/02/2025

PRONOUNCED ON : 17/03/2025

JUDGMENT

1. By this appeal, the appellant (accused) has challenged judgment and order dated 19.8.2023 passed by learned Additional Sessions Judge, Khamgaon (learned Judge of the trial court) in Special Case No.65/2019.

2. By the said judgment and order impugned, the accused is convicted for offence punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2012 (the POCSO Act for short) and sentenced to undergo rigorous imprisonment for 5 years and to pay fine Rs.1000/-, in default, to undergo further rigorous imprisonment for 2 months.

He is further convicted for offence punishable under Section 354 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 2 years

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and to pay fine Rs.1000/-, in default, to undergo further rigorous imprisonment for two months.

3. Brief facts of the prosecution case which are necessary for disposal of the appeal are as under:

The victim girl is six years old and was studying in school at Pimpari Adgaon, taluka Sangrampur, district Buldhana. The accused is teacher of victim. As per the allegations, on 31.1.2019, the victim disclosed to her father that the accused has called her inside the class room after the school and pressed her breast. Therefore, the father of the victim approached the police station and lodged report. On the basis of the said report, crime is registered against the accused vide Crime No.20/2019 under Sections 354; 354-A 354-D, and 506 of IPC and 8 and 10 of the POCSO Act.

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4. After registration of the crime, Investigating Officer has recorded statements of the witnesses, drawn spot panchanama, referred victim for medical examination, and after completion of the investigation, submitted chargesheet against the accused.

5. Learned Judge of the trial court framed the charge vide Exh.10. On denial of the charge by the accused, the prosecution has examined in all 5 witnesses, as under:

PW Nos.	Names of Witnesses	Exh. Nos.
1	The victim	18
2	The father of victim	20
3	Gajanan Nage, pancha on spot	34
4	Dr.Neha Mahale, the Medical Officer	39
5	Dilip Patil	49

6. Besides the oral evidence, the prosecution placed reliance on report Exh.21, FIR Exh.22, statement of the

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informant under Section 164 CrPC Exh.23, statement of the victim under Section 164 CrPC Exh.24, spot panchanama Exh.35, requisition to the panchas Exh.50, requisition to the Magistrate for recording statement of victim Exh.51, requisition to the headmaster, Zilla Parishad School Exhs.52 and 53, attendance sheet Exh.57, birth certificate Exh.59.

7. On the basis of the oral as well as the documentary evidence, the prosecution claimed that the prosecution has proved its case. All incriminating evidence is put to the accused in order to obtain explanation regarding the evidence appearing against him by recording his statement under Section 313 of the CrPC. The defence of the accused is of total denial and of false implication.

8. Heard learned counsel Shri S.V.Sirpurkar for the accused, learned Additional Public Prosecutor Mrs.Swati

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Kolhe for the State, and learned counsel Mrs.Sonali Saware for the victim.

9. Learned counsel for the accused submitted that as per the prosecution case, since 15 days prior to the incident i.e. 31.1.2019 the victim was sexually harassed by the accused is falsified by the attendance sheet as Exh.57 shows that from 18.1.2019 to 24.1.2019 the victim has not attended the school. The evidence of the victim shows that she was attending school along with her cousin. Classes of her cousin and her were taken in one room. The cousin of the victim is not examined. The admission during cross examination of the victim falsifies the story of the prosecution. The foundational facts itself are not proved by the prosecution. Thus, the prosecution failed to prove its case beyond reasonable doubt that on the day of the incident or prior to that, the victim was subjected for molestation. The material witnesses are not

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examined. Thus, prosecution case becomes doubtful and, therefore, presumption under Section 29 of the POCSO Act will not attract.

10. *Per contra*, learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal and submitted that there is no reason for the victim to falsely implicate the accused in the crime in question. The victim has narrated the incident immediately to her father and her father has lodged the report. At this stage, it would not be reasonable to disbelieve the victim as the evidence of the victim is at higher pedestal and no corroboration is required. In view of that, the appeal is devoid of merits and liable to be dismissed.

11. The prosecution has examined in all five witnesses. As far as the age of the victim is concerned, at the time of

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incident, she was 6 years old and at the time of deposition, she was 10 years old. The age of the victim is not seriously challenged by the accused. The birth certificate of the victim also discloses the birth date of the victim as 6.8.2012. Though the prosecution has not examined any witnesses on the birth certificate, it is marked as Exh.59 as it is admissible in evidence in view of Section 35 of the Indian Evidence Act.

12. The said birth certificate is issued in view of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. As per Rule 9 of the Maharashtra Births and Deaths Registration Rules 1976, this certificate is issued by the Sub Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. The Act mandates that the Registrar should discharge duties in view of Section 7 of the said Act. Section 8 of the said Act mandates that each head of the house to report birth

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in the family to the Registrar. The Act provides for maintenance for recording birth and death within local area. That is how, certificate came to be issued by Sub Registrar as per the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. The birth certificate as such is issued by the public officer and it is a document forming record of the acts of the public officer and, therefore, the same is a public document within the meaning of Section 74 of the Indian Evidence Act and the same is admissible in evidence in view of Section 77 of the Indian Evidence Act. Section 17 of the said Act provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The birth certificate is in fact the extract of

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Birth Register in respect of entry of birth of the victim child and as such, admissible in evidence. Section 35 of the Evidence Act makes it clear that if entry is made by public servant in the official book in discharge of his official duty, such entry becomes the relevant fact and admissible in evidence. Section 35 of the Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact.

13. It is thus clear that it is an entry taken by the public servant in discharge of his official duty while performing official duty enjoined by law. It is thus clear that the birth certificate issued by the statutorily appointed authority or competent authority is relevant and admissible.

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14. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 also states that in every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the

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reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

15. Now, coming to the evidence of the prosecution witnesses as to the actual incident, PW1 victim testified that incident took place when she was in 1st Std.. After school is over, she was called by the accused in the class room and the accused made her to sit on his thigh and pressed her chest. The accused rolled over his hands over

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her breast because of which she was having pain in her breast. This act was continued by the accused for 15 days. She has informed the incident to her father.

The evidence of the father of the victim corroborates the fact that the victim has disclosed the said incident to him and, therefore, he approached the police station and lodged the report Exh.21 and Exh.22.

The veracity of the evidence of the victim is tested through the cross examination. During the cross examination, she admitted that her cousin is studying in 7th Std. Her class and her cousin's class were used to be held in one room only. The accused was her class teacher as well as class teacher of her cousin. She further admitted that she used to go to school with her cousin and used to return with her. In absence of her cousin, her parents used to drop her and pick her from school.

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On the day of the incident, her cousin was present in the school and they returned from the school together. Her evidence further shows that when she was in 1st Std., one female teacher, three male teachers, and 1 headmaster were serving in the school. The students of 7th Std. used to open the locks of class room and after the school, students of 7th Std. used to lock class room again. She further admitted that till locking of the class room, teachers and the headmaster used to remain present in school premises. When students lock all doors, hand over the key to the headmaster, the headmaster and teachers used to leave the school. She further admitted that she informed the police that the accused asked her to sit on his thigh, but she is unable to tell why it is not mentioned in her statement. She admitted that on the day of the incident, there were sports competition in the school. During recess, she was playing with her friends and

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cousin and she fell down at the time of playing. As she fell down, she was taken to the accused and the accused scolded her for her behaviour.

16. The cross examination of the father of the victim also shows that the victim used to attend the school along with her cousin. He shown his inability to say that whether cousin of the victim was present in the school on the day of the incident. He was also not aware whether the victim fell down and sustained the injuries.

17. Thus, the evidence of the victim is to be appreciated in the light of her attendance sheet. As per the allegations, she was continuously subjected for sexual harassment from last 15 days. Exh.57 attendance sheet shows that she was absent in the school from 18.1.2019 to 24.1.2019.

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18. Thus, the contention of the victim that since last 15 days of the incident, she was subjected for continuous sexual harassment is falsified by this attendance sheet. Admittedly, the cousin of the victim who is material witness is not examined by the prosecution. The Investigating Officer has admitted during his cross examination that though he has recorded the statements of the headmaster, teachers, and students of the school wherein the victim was studying, none of them are examined. Even, the cousin of the victim is also not examined. The Investigating Officer has admitted during cross examination that the victim has not stated before him that the accused made her sit on his thigh. Thus, material omission is brought on record.

19. PW3 Gajanan Nage, has acted as pancha on spot panchanama. His evidence is formal in nature. Spot panchanama Exh.35 shows that the alleged spot of

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incident is class room of 1st Std.. The said room was having door towards western side. The said spot of incident is bounded as towards north open ground and class room of 6th Std., towards south open ground and class room of 4th Std., and towards west ground and gate of the school.

20. PW4 Dr.Neha Mahale, the Medical Officer, testified that victim was referred to her for medical examination and on medical examination, she found abrasion over chest. She admitted that the abrasion can be possible if kid fell on ground while playing. The injury certificate placed on record shows abrasion. However, the Medical Officer has not noted any swelling on her chest.

21. The evidence of the Investigating Officer narrates about the investigation carried out by him.

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22. The defence of the accused is of total denial and false implication. It reveals from the cross examination of victim that she was scolded by the accused. She has narrated the incident on 31.1.2019 and her father lodged report on the same day and the police registered the offence on the same day at about 11:30 pm. The material omission brought on record shows that victim has not disclosed that she was asked to sit on the thigh of the accused. This omission is vital in nature. From the cross examination of the victim, it reveals that the victim was not alone when she approached the accused. The evidence further discloses that the victim used to be accompanied by her cousin all time who is studying in 7th Std. in the same school. The evidence of the victim further shows that she along with her cousin used to sit in the class room.

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23. The cross examination of the victim shatters the prosecution case for the reason that 7th Std. students used to close and open class room and teachers were not leaving the school and the class room is locked and keys are handed over to the headmaster. The cross examination further shows that prior to the incident, the victim was playing along with her friends and also approached the accused along with her friends. She specifically admitted that due to fall, her clothes were tarnished. She sustained injuries. So, the accused sent her to home with her cousin. This admission itself is sufficient to show that she sustained injuries due to fall.

24. Thus, the circumstance brought on record clearly suggests that genesis of the case of the prosecution is not supported either by direct or circumstantial evidence. On the contrary, the cross examination clearly dent the prosecution as the very genesis of the case is affected.

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The independent witness, the cousin sister of the victim, who used to accompany the victim all the time in school, is not examined. The allegation, that from last 15 days she was subjected for sexual assault, is falsified by the attendance sheet as prior to the alleged incident the victim has not attended the school at least for 6 days.

25. The evidence of the father of the victim as to outraging the victim's modesty is also not cogent and reliable.

26. If the entire evidence is appreciated in the backdrop of totality of the circumstances, it would show that the case of the prosecution cannot be accepted as gospel truth. On the contrary, it creates doubt about occurrence of the incident. I view of the same, I conclude that learned Judge of the trial court has failed to consider these facts and circumstances.

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27. Though there is statutory presumption under Section 29 of the POCSO Act with respect to the guilty of an accused, this presumption will not operate when the prosecution failed to prove some foundational facts in respect of the case. The presumption under Section 29 of the POCSO Act is not absolute presumption. It is rebuttal presumption. The presumption would attract only when the foundational facts are established by the prosecution beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution there by supporting the very foundation of the case of the prosecution.

28. In this case, very foundation of the case of the prosecution vis-a-vis the charge against the accused has been and, therefore, the presumption under Section 29 of the POCSO Act would not attract.

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29. In view of the above observations, the appeal deserves to be allowed by giving benefit of doubt to the accused. Accordingly, I proceed to pass following order:

ORDER

(1) The Criminal Appeal is **allowed**.

(2) The judgment and order dated 19.8.2023 passed by learned Additional Sessions Judge, Khamgaon in Special Case No.65/2019 is quashed and set aside.

(3) The accused is acquitted of the offences for which he was charged and convicted by learned Judge of the trial court.

(4) As the accused is in jail, he be released forthwith if he is not required in any other crime cases.

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(5) Fees of learned counsel Mrs.Sonali Saware appointed for the victim be quantified and the same be paid to her as per rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!