

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.340 OF 2015

Ashish Dnyeshwar Channurwar,
Age : 22 Years,
R/o. Room of Datta Sangale,
Malegaon, Sinnar, Taluka:Sinnar,
District : Nashik.
(At present Nashik Road Central
Prison, Nashik)

.....Appellant

V/s.

The State of Maharashtra,
(Through Sinnar Police Station,
Taluka : Sinnar, District : Nashik.
C.R.No.283/2013.)

....Respondent

Mrs. N.S.K. Ayubi, Appointed Advocate for the Appellant.

Mr. S.V. Gavand, APP for the Respondent/State.

CORAM : A.M.BADAR, J.

DATED : 7th DECEMBER 2018.

ORAL JUDGMENT :

1. By this appeal, the appellant/accused is challenging the Judgment and Order dated 29.11.2014 passed by the learned Special Judge, Nashik in Sessions Case No.52 of 2014, thereby convicting the appellant/accused of the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences

Act, 2012 (hereinafter referred to as 'POCSO Act' for the sake of brevity).

2. For the offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for ten years apart from directing him to pay fine of Rs.5,000/- and in default to undergo rigorous imprisonment for two years. For the offence punishable under Section 363 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for five years apart from payment of fine of Rs.5,000/- and in default to undergo rigorous imprisonment for six months. Similar sentence is awarded to him even too the offence under Section 366 of the Indian Penal Code. For the offence punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.5,000/- and in default to suffer further rigorous imprisonment for one year. Substantive sentences were directed to run concurrently by the learned trial Court.

3. Brief facts leading to the prosecution of the appellant/accused can be summarized thus :

(a) First Informant/PW1 Sudhir Saha used to reside along with his family members comprising of one son and one daughter as well as wife in the tenanted room owned by Sanjay Sangale in Malegaon, Taluka Sinnar, District Nashik. The victim of the crime in question is his minor female child,

aged about 13 years and 7 months, who at the relevant time was taking education in the Zilla Parishad School of Malegaon. The appellant/accused used to reside in the neighbourhood along with his brother. PW1 Sudhir Saha as well as his wife used to work in Zindal Steel Company as well as Sambe Company in the MIDC situated at Malegaon.

(b) The incident in question allegedly took place on 20.09.2013. Parents of the minor female victim child/PW2 went to work as usual. On returned, they found their minor female victim child/PW2 missing from the home. PW1 Sudhir Shah then got a telephonic call on his mobile number. It was from his female victim child/PW2. She informed that she is with the appellant/accused at some unknown place. PW1 Sudhir Saha then immediately went to the Sinnar Police Station and lodged report Exhibit 20, which has resulted in registration of Crime No.283/2013 for the offence punishable under Section 363, 366 and 376 of the Indian Penal Code.

(c) On the next day morning, landlord of PW1 Sudhir Saha brought the female victim child/PW2 to her home. She was then taken to the police station and thereafter to the Civil Hospital, Nashik where she was examined by PW5 Dr. Omkar Joshi. During the course of investigation, Investigating Officer PW6 Anjali Rajput, PSI had inspected the spot and Spot Panchnama Exhibit 34 was drawn on 23.09.2013. Clothes of the female victim child/PW2 came to be seized

vide Seizure Panchnama on 22.09.2013, so also clothes of the appellant/accused vide Seizure Panchnama Exhibit 37. Documents regarding date of birth of the minor female victim child/PW2 were collected and on completion of routine investigation, the appellant/accused came to be charge-sheeted.

(d) Charge for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.

(e) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. First Informant/father Sudhir Saha is examined as PW1, whereas the FIR lodged by him on 20.09.2013 is at Exhibit 20. His minor daughter who is victim of the crime in question is examined as PW2. Panch Witness Vishnu Sangale is examined as PW3. He acted as a Panch to the spot panchnama as well as seizure of clothes of the victim and the appellant/accused. He turned hostile to the prosecution. Another witness Ganesh Tatane who is examined as PW4 has also turned hostile to the prosecution. Dr. Omkar Joshi, Medical Officer of Civil Hospital is examined as PW5. Exhibit 30 is the Medico Legal Certificate issued by this witness. Anjali Rajput, PSI had inspected the spot is examined as PW6. Head Mistress of the Zilla Parishad Primacy School at

Malegaon where the minor female victim child/PW2 was taking education is examined as PW7. She is Alka Aher.

(f) The defence of the appellant/accused is that of total denial. According to him, he is falsely implicated in the crime in question. The victim was having love affair with his friend. She had asked him to convince his friend. Accordingly, he has convinced his friend, but he himself has falsely implicated in the crime in question.

(g) After hearing the parties, the learned trial Court by the impugned Judgment and Order was pleased to convict the appellant/accused and to sentence him as indicated in the opening paragraph of this judgment.

4. I heard Mrs. N.S.K. Ayubi, the learned advocate appointed to represent the appellant/accused at sufficient length of time. She took me through the entire evidence adduced by the prosecution and vehemently argued that evidence of the prosecution is discrepant. Though father of the victim is saying about telephonic contact between him and the victim, the victim is not vouching about the same. It is further argued that cross-examination of the female victim child/PW2 shows that her two friends were accompanying her when she was allegedly taken by the appellant/accused. Those persons are not examined by the prosecution. It is further argued that as per version of the father of the victim, the female victim child/PW2 was brought to her

house by landlord named Sanjay Sangale. He is also not examined by the prosecution. Therefore, it cannot be said that the prosecution has proved its case beyond reasonable doubt.

5. The learned APP supported the impugned judgment and order of conviction and resultant sentence by submitting that evidence of the prosecution and particularly the one of the victim female child is clear, cogent and trustworthy. I have carefully considered the submissions so advanced and also perused the Record and Proceedings including the oral as well as documentary evidence.

6. According to the prosecution case, the appellant/accused had committed penetrative sexual assault on the PW2, who was below 18 years of age at the time of the alleged incident and that too after kidnapping her. As per settled legal position, the conviction of perpetration of such crime can be based even on uncorroborated testimony of the victim of such offence. A prime reason for giving such an importance to the testimony of the victim female child is that of a girl in the tradition bound non-permissive society of India would be extremely reluctant to falsely implicate or even to admit happening of any such incident which is likely to reflect on her chastity. On this backdrop, it is in evidence of PW2 Sudhir Saha, who happens to be father of the female victim child/PW2 that the appellant/accused is his

neighbor and he was residing near the room in his occupation. This evidence is not assailed in the cross-examination. In the light of this nearness of residence of the victim as well as the appellant/accused, testimony of the female victim child/PW2 will have to be examined. It is in her evidence that on 20.09.2013, the appellant/accused came and asked her to come to the temple and accordingly she went with him. During the returned journey, as per version of the minor female victim child/PW2, the appellant/accused stayed back. However, friend of the appellant/accused met her and then she went to the room of his friend. The female victim child/PW2 has further deposed that the appellant/accused was there. Thereafter, his friends went on duty and she along with the appellant/accused stayed there throughout the night. The female victim child/PW2 testified that during that night, the appellant/accused has committed sexual intercourse with her and in the morning, she along with the appellant/accused were proceeding to go to Nagpur. However, her landlord met her on the way and brought her home. The tone and tenor of evidence of the female victim child/PW2 as such indicates that she was taken by the appellant/accused with him and thereafter at the instance of friend of the appellant/accused, she went to the room in which the appellant/accused was there. Her evidence shows that then the couple had sexually intercourse during the night. All this indicates that the act was consensual in nature.

7. In cross-examination, the female victim child/PW2 denied the suggestion that, she had sexually intercourse not with the appellant/accused, but with his friend. It is further brought on record through her cross-examination that the place of that temple came on record by way of omission, so also the fact that the appellant/accused stayed behind and she went ahead. However, these omissions are minor discrepancy and core of her version to the effect that she accompanied the appellant/accused and then had sexually intercourse with him in the room is not at all affected by these minor discrepancies in her evidence. Her version on the aspect of penetrative sexual assault on her by the appellant/accused is not at all shattered in the cross-examination.

8. Evidence of the minor female victim child/PW2 is gaining corroboration from the evidence of her father PW1 Sudhir Saha. As per version of this witness, when he returned back from work on 20.09.2013, he found his female victim child/PW2 missing, and therefore, he lodged report Exhibit 20 on the very same day after receipt of telephonic call from his daughter. This evidence is virtually went unshattered in the cross-examination. There is no reason to disbelieve this version, which is gaining necessary corroboration from the FIR Exhibit 20 lodged by him on 20.09.2013 itself. Similarly, this witness has heard narrations of the victim to the effect that the appellant/accused took her on the pretext of pooja and then committed sexual intercourse with her

during that night are relevant for the purpose of corroboration of evidence of the victim in the light of provisions of Section 157 of the Indian Evidence Act, 1872.

9. Medical evidence coming on record through PW5 Dr. Omkar Joshi, Civil Hospital, Nashil is fully corroborating the version of the minor female victim child/PW2. According to the prosecution case, the victim was taken by the appellant/accused on 20.09.2013. Then in the intervening night he committed rape on her and then she returned to her house in the morning hours of 21.09.2013. On this day itself, the minor female victim child/PW2 was examined by this witness Dr. Omkar Joshi. His oral evidence which is duly corroborated by the contemporaneous Medico Legal certificate establishes that on local examination of the victim he found her Labia Minora was edematous i.e. having swelling as well as redness. This witness found bruising at Labia Minora of the victim. On the basis of this finding, PW5 Dr. Omkar Joshi has opined that the victim was subjected to the recent sexual intercourse. Though in cross-examination of this witness, it is brought on record that such type of injuries are possible due to some trauma, it is not shown how such trauma did take place with the victim that too directly on the organ. On the contrary, the victim is very specific in attributing these injuries to the act of the appellant/accused. Thus, there is no reason to disbelieve the medical evidence coming on record.

10. Though the act of sexual intercourse between the appellant/accused and the female victim child/PW2 was consensual in nature, evidence on record shows that the PW2 had not attained the consenting age. She was taking education in 7th Std. in Zilla Parishad School of Malegaon. Her Principal Alka Aher has duly proved the admission form filled in by mother of the minor female victim child. The said form at Exhibit 48 shows that the victim was born on 16.02.2000. Similar is the oral evidence of her father PW2 which virtually went unchallenged in the cross-examination. General register maintained by the school, the extract of which is at Exhibit 49 is also demonstrating the same date of birth of the victim. It is thus clear that on the date of commission of crime, the female victim child/PW2 was 13 years, 7 months and few days old. As such, she had not attained the age of giving consent to such act. Resultantly, the prosecution had proved a fact that the appellant/accused had kidnapped the minor female victim child/PW2 throughout of lawful custody of her parents without their consent, knowing full well that she will be compelled force or seduce to illicit intercourse. It is also established that thereafter the appellant/accused had indulged in illicit intercourse with the female victim child/PW2. In the result, no fault can be found in conviction of the appellant/accused for the offences punishable under Sections 376, 363 as well as under Section 366 of the Indian Penal Code apart from his conviction

under Section 4 of the POCSO Act. It is seen from the impugned judgment and order that the appellant/accused is sentenced to suffer rigorous imprisonment for five years apart from direction to pay fine of Rs.5,000/- and in default to undergo further rigorous imprisonment for six months for the offence punishable under Section 366 of the Indian Penal Code. At the same time, the appellant/accused is sentenced to suffer rigorous imprisonment for five years apart from direction to pay fine of Rs.5,000/- and in default to undergo further rigorous imprisonment for six months for the offence punishable under Section 363 of the Indian Penal Code. Thus, the appellant/accused is sentenced on both counts i.e. under Sections 363 as well as 366 of the Indian Penal Code. Section 363 of the Indian Penal Code provides punishment for kidnapping. The case in hand is in respect of taking the victim female child from lawful guardianship of her parents. Section 366 deals with kidnapping a minor female with intent that she may be compelled or knowing it to be likely that she will be compelled, forced or seduced to illicit intercourse. Thus, offence under Section 366 includes the offence of kidnapping. The appellant/accused is proved to have kidnapped the female victim child with a knowledge that she will be seduced to illicit intercourse with him. Section 71 of the Indian Penal Code deals with limit of punishment of offence made up of several offences. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender cannot be punished

with the punishment of more than one of such his offences, unless such punishment is expressly provided. Similarly, where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, then the offender cannot be punished with a more severe punishment than the Court which tries him could award for any one of such offences. In the light of provisions of Section 71 of the Indian Penal Code, sentence imposed on the appellant/accused for the offence punishable under Section 363 of the Indian Penal Code needs to be quashed and set aside.

11. It is seen that the appellant/accused is directed to pay fine of Rs.5,000/- for the offence punishable under Section 376 of the Indian Penal Code and in default of payment of that fine, he is directed to undergo further rigorous imprisonment for two years. Similarly, for the offence punishable under Section 4 of the POCSO Act apart from substantive sentence, the appellant/accused is directed to pay fine of Rs.5,000/- and in default he is directed to suffer further rigorous imprisonment for one year. It is held by catena of judgment of the Hon'ble Apex Court that sentence in default of fine cannot be harsh and excessive. In the matter of **Shahejadhkhan Mahebubkhan Pathan vs. State of Gujarat**¹ the Honourable Apex Court had brought down the substantive sentence of rigorous imprisonment for the period of 15 years to 10 years and default sentence of 3 years to 6

¹ 2013 (1) SCC 750

months, in serious offences punishable under the NDPS Act relating to conspiracy and possession of the narcotic drug in commercial quantity. The Honourable Apex Court in the said matter has considered its earlier judgments in the matter of **Shantilal vs. State of M.P.**² as well as **Adamji Umar Dalal vs. State of Bombay**³. In the matter of **Shantilal (supra)** it is held thus, in paragraphs 31 and 32 by the Honourable Apex Court :

“31.....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.”

32. A general principle of law reflected in Section 63 to 70, IPC is that an amount of fine should not be harsh or excessive. The makers of IPC were conscious of this problem. The Authors of the Code, therefore, observed;

“Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all

² (2007) 11 SCC 243

³ AIR 1952 SC 14

men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.' (Ratanlal & Dhirajlal's Law of Crimes, 26th Edn., 2007, p. 221)

The authors further stated : (Ratanlal & Dhirajlal at pp.226-227)

'.....when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course....

.....We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the

offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.”

12. In the matter of **Palaniappa Gounder vs. State of T.N.**⁴, the Honourable Apex Court has considered the issue of sentence in default of payment of fine and has held that legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. It is further held that though there is power to combine a sentence of death with a sentence of fine, that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. The Honourable Apex Court also observed that, in fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. These observations were relied by the Honourable Apex Court while deciding the case of **Shahejadh Khan (supra)** in which the substantive sentence of imprisonment was brought down from 15 years to 10 years and that of default sentence from 3 years to 6 months. Relevant

4 (1977) 2 SCC 634

observations of the Honourable Apex Court in the matter of **Shahejadhkhan (supra)** can be found in paragraphs 12, 13 and 15, which read thus :

“12 It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.”

“13 While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.”

“15 It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.”

13. In the light of this legal position, sentence in default of payment of fine imposed on the appellant/accused for the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act needs to be scaled down and I am of the opinion that default sentence of six months rigorous imprisonment on both these counts would meet the ends of justice in the case in hand. Therefore, the order:-

- : ORDER : -

- (i) The appeal is partly allowed.
- (ii) Conviction of the appellant/accused for the offence punishable under Sections 363 and 366 as well as under

Section 376 of the Indian Penal Code recorded by the learned trial Court is maintained. Similarly, substantive sentence of imprisonment imposed on him for the offence punishable under Section 376 as well as 366 of the Indian Penal Code is maintained.

(iii) Sentence imposed on the appellant/accused for the offence punishable under Section 363 of the Indian Penal Code is quashed and set aside in view of provisions of Section 71 of the Indian Penal Code.

(iv) Default sentence of rigorous imprisonment for two years for non-payment of fine of Rs.5,000/- for the offence punishable under Section 376 of the Indian Penal Code is scaled down to the rigorous imprisonment for six months.

(v) Default sentence of rigorous imprisonment for one year in default of payment of fine of Rs.5,000/- for the offence punishable under Section 4 of the POCSO Act is scaled down from rigorous imprisonment of one year to the rigorous imprisonment for six months.

(vi) Rest of the impugned Judgment and Order of the learned trial Court is maintained.

(vii) The Appeal is accordingly disposed of.

(A.M.BADAR J.)