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

**CRIMINAL APPEAL NO. 626 OF 2016
WITH
CRIMINAL APPLICATION NO.1160 OF 2016**

Babu @ Prabhakar Sakharam Karve

..Appellant.

Vs

The State of Maharashtra

..Respondent

Ms. Pracheeta Rathod a/w Smt. Anjali Patil for Appellant.
Mr. V.V. Gangurde, APP for State.

CORAM : A.S.GADKARI, J.

DATE : 20th APRIL 2018.

ORAL JUDGMENT:

1] The present appeal is directed against the Judgment and Order dated 13th July 2016 passed by the learned Designated Judge under Protection of Children From Sexual Offences Act, 2012 (for short "POCSO Act), Greater Mumbai in POCSO Special Case No.486 of 2013, thereby convicting the appellant under Sections, 452, 354 and 376 of the Indian Penal Code and under Sections 4 and 8 of the POCSO Act. The appellant is sentenced to suffer rigorous imprisonment for five years and to pay a fine

of Rs.3000/-, in default of payment of fine, he is further sentenced to suffer rigorous imprisonment for one month in respect of an offence punishable under Section 452 of the Indian Penal Code. The appellant is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.3000/-, in default of payment of fine, he is further sentenced to suffer rigorous imprisonment for one month in respect of an offence punishable under Section 354 of the Indian Penal Code. The appellant is also sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default of payment of fine, he is further sentenced to suffer rigorous imprisonment for six months in respect of an offence punishable under Section 376 of the Indian Penal Code. That the appellant is sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default of payment of fine, he is further sentenced to suffer rigorous imprisonment for six months in respect of an offence punishable under Section 4 of the POCSO Act. The appellant is also sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.3000/-, in default of payment of fine, he is further sentenced to suffer rigorous imprisonment for one month in respect of an offence punishable under Section 8 of the POCSO Act. The substantive sentences are directed to run

concurrently by the Trial Court. The said Judgment and Order dated 13th July 2016 is impugned herein.

2] Heard Ms. Pracheeta Rathod for the Appellant and Mr. Gangurde, the learned APP for the State. Perused the record.

3] The age of the victim girl was about 11 to 12 years on the date of incident and therefore the names of the victim girl and her close family members are not mentioned in the present Judgment, with a view to protect the identity of the victim girl and in consonance with the provisions of Section 228(A) of the Indian Penal Code and Section 33(7) of the POCSO Act and the detailed narration of facts mentioned in the first information report and in the statement of the victim is hereby avoided.

4] The prosecution case in brief is as under:

(i) The victim girl was aged about 11 to 12 years on the date of incident. The appellant was a friend of the father of the victim girl. He used to visit her house. That on 5.2.2013 when the victim girl was in her house with her younger brother aged about seven years, at about 2.00 p.m. the appellant came there. He gave five rupees to the brother of the victim girl and told him to go out and to have some snacks. By taking undue advantage of the situation, the appellant removed the clothes of the victim

girl and despite her resistance, inserted his finger into her private part. That the appellant committed forcible penovaginal intercourse with the victim girl. He thereafter assured her of purchasing a new dress and also threatened her of dire-consequence, if she discloses the said fact to her mother or anybody else.

(ii) That on 8.2.2013, the appellant gave a phone call on the mobile phone of the mother (PW No.2) of the victim girl and told her that he wanted to talk with the victim girl. Being suspicious about the appellant, the mother of the victim girl let her mobile phone switched on speaker mode and asked the victim girl (PW No.1) to talk with the appellant without disclosing the fact that her mother is present nearby. That the appellant talked with victim girl whether she had disclosed the said incident to anybody and further assured her that he would purchase her a new dress. The mother of the victim girl asked her about the said incident and when the victim girl was hesitant to tell the fact, her mother slapped her, upon which the victim girl confided with her and narrated the entire incident to her.

(iii) The first information report came to be lodged at the instance of the mother of the victim girl (PW No.2.) initially under Section 354 and

452 of the Indian Penal Code and under Sections 4 and 8 of the POCSO Act. During the course of investigation, the Investigating Agency recorded the statement of victim girl. The victim girl was thereafter referred for medical examination initially to Nagpada Police Hospital where Dr. Baban Shinde (PW No.3) examined the victim girl and referred her for further examination to J.J. Hospital. At Sir J.J. Hospital Dr. Ashok Anand (PW No.9) examined victim girl in the presence of Dr. Aparna Joshi (PW No.8).

(iv) After receipt of report of Chemical Analyzer from Forensic Science Laboratory, the Police submitted chargesheet against the appellant for the offences punishable under Sections 452, 354 and 376 of the Indian Penal Code and under Sections 4 and 8 of POCSO Act before the Special Court constituted under the POCSO Act.

(v) The Trial Court framed charge below Exhibit-2. The said charge was read over and explained to the appellant to which he denied and claimed to be tried. The defence of the appellant was of total denial and false implication. The defence of the appellant is that, he had advanced monetary help to the father of the victim girl for purchase of the said room where the victim girl along with her parents were residing and when he demanded his money back, with a view to avoid repayment, at the instance

of the father and mother of the victim girl, he has been falsely implicated in the present crime.

(vi) The prosecution in support of its case, examined in all twelve witnesses. The appellant has examined two witnesses in his defence and the defence of the appellant was that, he was not present at the scene of offence on the date and time of incident. The defence of the appellant was also of alibi. The learned Trial Court after recording the evidence and after hearing the parties to the said case, was pleased to convict the appellant by the impugned Judgment and Order dated 13th July 2016 as stated hereinabove.

5] The learned Counsel for the appellant submitted that, as far as the forcible penovaginal intercourse by the appellant as has been narrated by the victim girl is concerned, the same is an omission amounting to improvement which has been brought on record by the defence. She submitted that if the said improvement is excluded from consideration, then it is difficult to believe the version as narrated by the victim girl. She submitted that, there is variance in the version of the victim girl stated before the Investigating Officer, Dr. Baban Shinde (PW No.3) and Dr. Ashok Anand (PW No.9.). The learned Counsel for the appellant contended that at

the time of medical examination by Dr. Baban Shinde (PW No.3) the victim girl has narrated about sexual assault to the extent of insertion of finger in her private part by the appellant and did not disclose the act of sexual assault i.e. commission of forcible penovaginal intercourse by the appellant and therefore an omission has been brought on record at the instance of the victim girl to that extent and it is proved beyond doubt. She submitted that, in view of variance in the statements of the victim girl given to various witnesses, the offence as contemplated under Section 376 of the Indian Penal Code is not made out and the conviction under Sections 4 and 8 of the POCSO Act also cannot be upheld in the present crime and the appellant is therefore entitled to be acquitted from the charges framed against him. She therefore prayed that the present appeal may be allowed and the appellant may be acquitted from all the charges framed against him.

6] The learned APP per contra vehemently opposed the appeal and submitted that the prosecution has proved the guilt of the appellant beyond reasonable doubt by leading sufficient and cogent evidence in that behalf. He submitted that the omissions and/or contradictions brought on record by the appellant are minor in nature and does not affect the

credibility of the prosecutrix in any way. He therefore submitted that the present appeal may be rejected and the conviction and sentence imposed upon the applicant may be upheld.

7] Though the prosecution has examined in all twelve witnesses in support of its case, the evidence of victim girl (PW No.1), mother of the victim girl (PW No.2), Dr. Aparna Joshi (PW No.8), Dr. Ashok Anand (PW No.9) and Investigating Officer Shri Rajan Bknalkar (PW No.7) is relevant for decision of the present appeal.

8] The victim girl in her testimony has narrated the incident of sexual assault on her which took place in her house in the absence of her mother on 5.2.2013. She has stated that, initially the appellant undressed her and thereafter inserted finger in her private part and did forcible penovaginal intercourse with her. The Trial Court while recording the evidence of the victim girl (PW No.1), has observed the demeanor of the witness (victim) and has noted in the notes of evidence that, the said witness was very much tense, scared and was hesitant to tell the exact fact, as she appeared to be ashamed of telling it. The victim girl further stated that the appellant had told her that he would give her new dress and subsequently threatened her with dire-consequences and therefore she did

not tell the said fact to her mother immediately. She has further stated that on 8.2.2013 the appellant gave a phone call on her mother's mobile. That her mother kept the mobile on speaker phone mode and asked her to speak with the appellant and heard the conversation with the appellant wherein the appellant asked the victim whether she had told the said incident to anybody and asked her not to disclose it to anybody. The victim girl has further stated that the appellant told her that he will purchase new dress for her. That as she did not tell her mother about the incident, her mother (PW No.2) slapped her, upon which she confided with her mother and narrated the incident. Thereafter her mother lodged the first information report. The victim girl in her testimony has further stated that on 9.2.2013 she was examined by Dr. Aparna Joshi (PW No.8) in presence of Dr. Ashok Anand (PW No.9). The Trial Court has observed the demeanor of the said witness (PW No.1) and has noted that, she appears to be of very innocent.

In the cross-examination of the said witness, an omission to the extent that “putting his penis in her private part” has been brought on record. A further omission that, “the appellant extended threats of dire-consequence to the victim girl” has also been brought on record. The victim girl in her cross-examination has further admitted that, after the said

incident she had been to her school on 6.2.2013 and 7.2.2013 as usual.

9] The mother of the victim girl (PW No.2) has fully corroborated the version of the victim girl. The mother of the victim girl in her testimony has narrated the incident of sexual assault i.e. the insertion of finger by the appellant in the private part of her daughter.

10] It is true that the victim girl has not disclosed the fact of sexual assault on her by the appellant to Dr. Baban Shinde (PW No.3), but she did disclose it to Dr. Aparna Joshi(PW No.8) at Sir J.J. Hospital in the presence of Dr. Ashok Anand (PW No.9). It appears from the record and as per demeanor of the victim girl recorded by the Trial Court that, the victim girl must not be comfortable before Dr. Baban Shinde (PW No.3) while narrating the said incident at the first instance. However, in the presence of Dr. Aparna Joshi (PW No.8), she had narrated the said incident of forcible penovaginal intercourse.

11] Even if the argument of the learned Counsel for the appellant that, there is an omission on the part of the victim girl which amounts to improvement to the extent that, the appellant committed sexual intercourse is accepted for the sake of argument, the version narrated by the victim girl that she was undressed by the appellant and then he inserted his finger in

her private part remained undisturbed and the said fact is undoubtedly corroborated by four other witnesses namely her mother (PW No.2), Dr. Baban Shinde (PW No.3), Dr. Aparna Joshi (PW No.8) and Dr. Ashok Anand (PW No.9). The provision of Section 375 (b) of the Indian Penal Code is pari materia to Section 3(b) of the PCSO Act. Section 3(b) of the POCSO Act reads as under:-

“3. Penetrative sexual assault- A person is said to commit

“penetrative sexual assault” if-

(a)

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person”.

It is to be noted here that, there was no reason for the prosecutrix to implead the appellant falsely in the present crime. In the present case, the substantive evidence of the victim girl is indubitably trustworthy and reliable, except the omission which has been proved by the defence beyond doubt as noted hereinabove. Thus it is clear that the appellant has committed an act as contemplated under Section 3(b) of the Act which has been proved by the prosecution and therefore an offence

punishable under Sections 4 and 8 of the POCSO Act is clearly made out.

12] Thus after assessing the entire record and after giving benefit of doubt to the appellant to the extent of forcible penovaginal intercourse as has been brought on record as an omission, the penetrative sexual assault as defined in Section 3(b) of the POCSO Act is duly proved by the prosecution and therefore the conviction of the appellant under Section 376 of the Indian Penal Code read with Sections 4 and 8 of POCSO Act is maintained. However, in view of the peculiar facts and circumstances of the present case, the sentence imposed upon the appellant under Section 376 of the Indian Penal Code and under Sections 4 and 8 of the POCSO Act is reduced to seven years from ten years.

Hence the following Order:-

(a) The conviction and sentence of the appellant under Section 376 of the Indian Penal Code and under Sections 4 and 8 of the POCSO Act is maintained. However, the substantive sentence of rigorous imprisonment of ten years is reduced to seven years.

(b) Fine amount imposed upon the appellant by the Trial Court is also maintained.

(c) Appeal is partly allowed in the aforesaid terms.

13] In view of disposal of the Appeal, Criminal Application No.1160 of 2016 preferred by the appellant for bail does not survive and the same is accordingly disposed off.

(A.S.GADKARI, J.)