

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.171 OF 2018
WITH
CRIMINAL APPLICATION NO.244 OF 2018
AND
CRIMINAL APPLICATION NO.741 OF 2018
IN
CRIMINAL APPEAL NO.171 OF 2018**

SARANG MALHARI PAWAR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.R.Phanse, Appointed Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

DATE : 27th July 2018

JUDGMENT :

1 Appellant/original accused no.1 Sarang Malhari Pawar, by this appeal, is challenging the judgment and order dated 9th August 2016 passed by the learned Special Judge for the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), Greater Bombay, Mumbai, in POCSO Special Case No.512 of

2013, thereby convicting the appellant/accused as well as co-accused for offences punishable under Sections 376(2)(g) and 506 of the Indian Penal Code as well as under Section 4 of the POCSO Act. For the offence punishable under Section 376(2)(g) of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 20 years apart from direction to pay fine of Rs.25,000/- and in default, to undergo further rigorous imprisonment for 6 months. For the offence punishable under Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 2 years apart from direction to pay fine of Rs.1,000/- and in default to undergo further rigorous imprisonment for 3 days. For the offence punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for 20 years, apart from payment of fine of Rs.25,000/- and in default, to undergo further rigorous imprisonment for 6 months.

2 Brief facts leading to the prosecution of accused persons are thus :

- (a) Appellant/accused Sarang Malhari Pawar along with co-accused Ajay Gaikwad were prosecuted for committing penetrative sexual assault and rape on victim girl (PW5) on 15th March 2013. According to the prosecution case, the victim girl (PW5) was suffering from mental retardation. She used to reside with her mother, brother and sister-in-law. Because of fits of epilepsy, she had discontinued her studies. Appellant/accused no.1 Sarang Pawar and juvenile in conflict with law Vishal Gorule used to reside in the building where PW5/victim girl used to reside. Accused no.2 Ajay Gaikwad used to reside in another building situated nearby that building.
- (b) According to the prosecution, the incident of penetrative sexual assault and rape on the PW5/victim girl took place on 15th March 2013. In the afternoon, PW5/victim girl was watching a movie on the television set in the house of her step sister on first floor of the building, where she used to reside. At that time, juvenile in conflict with law Vishal

Gorule called her outside, took her to his room on the ground floor and committed penetrative sexual assault on her. Thereafter, accused no.2 Ajay Gaikwad committed penetrative sexual assault on her. They both threatened her not to disclose the incident to anybody. According to the prosecution case, in the night hours of 15th March 2013, the victim girl was standing in front of her room. At that time, appellant/accused no.1 Sarang Pawar came and took her to the terrace. He threatened her that he will disclose what accused no.2 Ajay Gaikwad and juvenile in conflict with law Vishal Gorule did with her, to her family members, if she fails to allow him to do the same act. With this, appellant/accused no.1 Sarang Pawar had committed penetrative sexual assault on the PW5/victim girl. Because of threats given by accused persons, PW5/victim girl did not disclose the incident to anybody.

- (c) According to the prosecution case, this incident of commission of penetrative sexual assaults on the

PW5/victim girl resulted in her pregnancy. The incident was then told by her to her mother. Her mother then went to the RCF Police Station, Mumbai, and lodged report against accused persons, which resulted in registration of Crime No.15 of 2016 under Section 376(d) and 506 of the Indian Penal Code as well as under Section 10 of the POCSO Act. Routine investigation followed and ultimately, the appellant/accused along with co-accused Ajay Gaikwad was charge-sheeted for offences punishable under Sections 376(2)(g) and 506 of the Indian Penal Code as well as under Section 4 of the POCSO Act.

- (d) In order to prove the Charge, prosecution has examined in all six witnesses. Dr.Vanshree Patil, Dr.Isha Dhingra and Dr.Beena Sawant are examined as PW1 to PW3. Mother of the victim girl is examined as PW4 whereas the victim girl is examined as PW5. Investigating Officer Machchindra Thorve is examined as PW6.

(e) After hearing the parties, the learned Special Judge under POCSO Act, by the impugned judgment and order dated 9th August 2016 was pleased to convict appellant/accused Sarang Pawar as well as the co-accused and both were sentenced accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Shri Phanse, the learned advocate appointed to represent the appellant/accused. I have also heard the learned APP.

4 The appeal came to be filed by way of sending an application through jail while undergoing the sentence imposed upon the appellant/accused by learned trial court. Accordingly, Shri Phanse, the learned advocate on the panel of High Court Legal Aid was appointed to represent the appellant/accused. Subsequently, the appellant/accused sent another communication from the jail which came to be registered as Criminal Application No.959 of 2017. By the said application, the appellant/accused

claimed that his date of birth is 25th April 1995, and therefore, on the date of commission of offence i.e. on 15th March 2013, he was below 18 years of age, and therefore, he is entitled for benefit of provisions of Juvenile Justice (Care and Protection of Children) Act, 2000. After hearing the parties, this court (Coram A.S.Gadkari, J.) vide order dated 7th March 2018 was pleased to direct the learned Designated Judge under the POCSO to conduct an enquiry as contemplated under Section 7(a) of the Juvenile Justice (Care and Protection of Children) Act, 2000, and to submit the report.

5 In pursuant to the order dated 7th March 2018 passed by this court in Criminal Application No.959 of 2017, an enquiry as contemplated under Juvenile Justice (Care and Protection of Children) Act, came to be conducted by the learned Sessions Judge, Sessions Court, Greater Mumbai, and the report dated 30th June 2018 came to be submitted. It is seen from the Enquiry Report that the trial court conducted enquiry by calling necessary documents and by following the procedure prescribed by the

Juvenile Justice (Care and Protection of Children) Act. Birth certificate of the appellant/accused was also considered and the learned Additional Sessions Judge, Sessions Court, Greater Mumbai, has held thus in the said enquiry :

“Whereas, the best documentary evidence is made available by Dr.Harshal (witness no.5), the birth certificate Exhibit W5/2 issued by Municipal Corporation, Gr. Mumbai and the birth of child was registered on 01.08.1996 about three months of the birth of the child i.e. Sarang, to me, the birth date mentioned as 25.04.1996 in the birth certificate Exhibit W5/2 is the real birth date of Sarang. Thus, on the date of incident of the commission of crime i.e. 15.03.2013 Sarang was 16 years 10 months and 18 days old. Thus, according to my finding he was juvenile on 15.03.2013.

Submitted with respect.”

It is, thus, clear from this report that on the date of commission of crime i.e. on 15th March 2013, appellant/accused Sarang Malhari Pawar was 16 years 10 months and 18 days old. It is, thus, clear that appellant/accused Sarang Pawar is a juvenile in conflict with law, he being 16 years 10 months and 18 days old as on 15th March 2013, i.e. the date of commission of crime.

6 Shri Phanse, the learned advocate appearing for the appellant/accused rightly relied on judgments of the Honourable Apex Court in the matters of Ashwani Kumar Saxena vs. State of Madhya Pradesh¹, Dayanand vs. State of Haryana², and Kamlendra Singh alias Pappu Singh vs. State of Madhya Pradesh³. At this juncture, it is apposite to note that in the matter of Hari Ram vs. State of Rajasthan⁴ the Honourable Apex Court after examining the scope of Section 7(a) of the Juvenile Justice (Care and Protection of Children) Act, has held that claim of juvenility can be raised before any court at any stage and such claim is required to be determined as per the provisions of the said Act as well as Rules framed thereunder. If it is found that such accused had not completed 18 years of age on the date of commission of offence, he is entitled for benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Honourable Apex Court in paragraph 59 of that matter has observed as follows :

1 (2012) 9 Supreme Court Cases 750
 2 (2011) 2 Supreme Court Cases 224
 3 (2013) 14 Supreme Court Cases 357
 4 (2009) 13 Supreme Court Cases 211

“59 The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.”

Thus, as the appellant/accused is found to be a juvenile in conflict with law on the date of commission of the offence, he needs to be forwarded to the Juvenile Justice Board for passing appropriate orders, and the sentence, if any, passed by the learned trial court in the matter, shall be deemed to have no effect. The appellant/accused has successfully established his juvenility on the date of occurrence of the crime i.e. on 15th March 2013, and on that date, he was below 18 years of age. He has already undergone sentence for about 5 years. Therefore, the sentence imposed upon him in POCSO Special Case No.512 of 2013 by the

learned trial court needs to be set aside and the record needs to be placed before the Juvenile Justice Board for passing appropriate orders under the Juvenile Justice (Care and Protection of Children) Act. In the result, the following order :

ORDER

The Appeal is disposed of with following directions :

- i) Sentence awarded by the learned trial court on appellant Sarang Malhari Pawar in POCSO Special Case No.512 of 2013 is quashed and set aside. He be released from the prison forthwith if not required in any other case.
- ii) The Record and Proceedings be placed before the concerned Juvenile Justice Board for passing appropriate orders in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act.
- iii) The appellant/accused is directed to appear before the Juvenile Justice Board, Mumbai, on 11th September 2018.
- iv) The appeal stands disposed of accordingly.
- v) In view of disposal of appeal, Criminal Applications Nos.244 of 2018 and 741 of 2018 stand disposed of.

(A. M. BADAR, J.)

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