

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.660 OF 2018

MAHIBOOB@TANYA PEERAHAMAD SHABHAI)

Age 32 years,)
Residing at H.No.352, Sunil)
Nagar, M.I.D.C.road, Solapur,)
(at present lodged in Solapur)
Central Prison, Solapur))...APPELLANT

V/s.

1 THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.Kartik Garg, Appointed Advocate for the Appellant.

Mr.A.A.Palkar, APP for State.

CORAM : A. M. BADAR, J.

DATE : RESERVED ON 17th SEPTEMBER 2019
PRONOUNCED ON 9th OCTOBER 2019

JUDGMENT :

1 By this appeal, appellant/convicted accused is challenging judgment and order dated 25th April 2018, passed by the learned Designated Court for Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as 'POCSO' Act for

the sake of brevity) Additional Sessions Judge, Solapur in Special Case No.72 of 2015 thereby, convicting him of offences punishable under Sections 6, 8, 10 and 12 of POCSO Act as well as under Sections 376(2)(i), 376(2)(n), 363, 366-A of the Indian Penal Code. For the offence punishable under Section 6 of the POCSO Act, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 15 years apart from direction to pay fine of Rs.20,000/-, in default to undergo simple imprisonment for six months. For offences punishable under Section 8 of the POCSO Act the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 3 years, apart from direction to pay fine of Rs.1,000/- and in default to undergo rigorous imprisonment for six months. For offences punishable under Section 10 of the POCSO Act the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 5 years, apart from direction to pay fine of Rs.4000/- and in default to undergo rigorous imprisonment for six months. For offences punishable under Section 12 of the POCSO Act the appellant/convicted accused is sentenced to suffer rigorous imprisonment for one year,

apart from direction to pay fine of Rs.1,000/- and in default to undergo rigorous imprisonment for six months. No separate sentence came to be awarded to him for the offence punishable under Section 376(2) of the Indian Penal Code. For offences punishable under Section 363 of the Indian Penal Code, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 2 years apart from direction to pay fine of Rs.1,000/- and in default to undergo rigorous imprisonment for three months. For offences punishable under Section 366-A of the Indian Penal Code, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 4 years, apart from direction to pay fine of Rs.3,000/- and in default to undergo rigorous imprisonment for three months. Substantive sentences are directed to run concurrently.

2 Brief facts in brief, leading to the prosecution as well resultant conviction of the appellant/accused can be summarized thus:

- (a) The victim of the crime in question is examined as PW1. She is female child born on 25th December 2000. She was residing alongwith her father PW2 Rajkumar and other family members at Sunil Nagar, Solapur and was taking education at Mahatma Vidyamandir in 9th Standard.
- (b) According to the prosecution case, on 30th October 2015, the victim female child/PW1 was going to the school by walk. Appellant/convicted accused came on motorcycle and gave lift to her. When she sat on the motor-cycle, another boy sat behind her. When they reached the school, the teacher was punishing late comers. The appellant/convicted accused then kidnapped her with the aid of another boy sitting behind the victim female child/PW1. She was taken to the bus stand by threatening to kill her. At the bus stand the boy riding on pillion seat, went away. She was made to sit in the bus by the appellant/convicted accused under threats. Then by bus, they went to Railway station. By train she was taken to Hyderabad. There they stayed in the house.

- (c) According to the prosecution case, appellant/convicted accused committed penetrative sexual assault on the victim at the tin shed at Chanda Nagar, Hyderabad for two days. Thereafter she was taken to Secunderabad at the house of one Sanjay Jadhav. There also, the appellant/convicted accused committed penetrative sexual assault on her. Ultimately, Saifan, brother of appellant/convicted accused alongwith others came and the prosecutrix was taken under threats to MIDC police station, Solapur on 30th October 2015.
- (d) In the meanwhile, on finding her female child missing, PW2 Rajkumar lodged missing report on 30th October 2015. He then came to know that the appellant/convicted accused had enticed her and therefore, FIR (Exhibit 27) came to be lodged against appellant/convicted accused by him on 30th October 2015. Accordingly, Crime No.253 of 2015 came to be registered with the Police Station MIDC, Solapur.

- (e) After victim female child/PW1 was brought to the Police Station, she was referred for medical examination to Dr.VM.Medical College, Solapur and on 7th November 2015, she came to be examined by Dr.Duldev Thengal, Assistant Professor with the Medical College at Solapur. Two spots of incidents at Hyderabad came to be inspected in presence of PW3 Anwar Husain Abdul Hamid and accordingly, Spot Panchnama, Exhibits 33 and 34 came to be prepared on 10th November 2015. Clothes of the victim female child/PW1 came to be seized in presence of PW7 Vithal Tonge, vide Panchnama-Exhibit 46 on 9th November 2015. Her Birth Certificate (Exhibit 57) came to be collected from Gram Panchayat, Akkalkot. On completion of routine investigation, the appellant/convicted accused came to be charge-sheeted.
- (f) Charge was framed and explained to the appellant/convicted accused by the learned trial court. He pleaded not guilty and claimed to be tried.
- (g) In order to bring home guilt of the appellant/convicted

accused, the prosecution has examined in all twelve witnesses. Defence of the appellant/convicted accused was that of total denial. However, he did not enter in the defence. After hearing the parties, by impugned judgment and order, the learned trial court was pleased to convict and sentence the appellant/convicted accused as indicated in the opening paragraph of this Judgment.

3 I have heard the learned advocate appointed to represent the appellant/convicted accused at the costs of the State. He vehemently argued that there is evidence to show that the victim female child/PW1 was kidnapped by the appellant/convicted accused. On the contrary, it is seen from her evidence that she voluntarily joined company of the appellant/convicted accused. Even history given by victim female child/PW1 to the Medical Officer shows that the alleged victim female child/PW1 was a consenting party. Her evidence is totally unreliable and is suffering from omissions in material particulars. Her statement under Section 164 of Criminal Procedure Code

recorded by the learned Magistrate is totally at variance with her version before the Court. It is further argued that the prosecution has failed to establish the fact that the victim female child/PW1 was below 18 years of age at the time of incident in question. Birth Certificate sought to be relied by the prosecution is not having signature of either father or mother of the victim. Therefore, same can not be relied for determining the age of victim female child/PW1.

4 The learned advocate for appellant/convicted accused relied on following judgments:-

- i) **Ajaykumar Vs. State of Maharashtra¹**
- ii) **S. Varadrajan Vs. State of Madras²**
- iii) **State of Maharashtra Vs. Surendra Kumar Mevalal Mehesh³**
- iv) **Sat Prakash Vs. State of Haryana⁴**
- v) **Anmol & Ors. Vs.State of Maharashtra⁵**
- vi) **State of Rajasthan VS. Babu Meena⁶**

1 Cri Appeal No.783/2018

2 AIR 1965 SC 942

3 1999(5)BomCR 777

4 2016(1)ACR 389

5 1999(5) BOM CR 209

6 AIR 2013 SC 2207

- vii) **Sannaina Subha Rao and Ors. Vs. State of AP⁷**
- viii) **Narinder Singh Vs. State of Punjab⁸**
- ix) **Gurmukh Singh Vs. State of Haryana⁹**
- x) **Satish Kumar Jayanti Lal Dagar Vs. State of Gujrat¹⁰**
- xi) **Phul Singh Vs. State of Haryana¹¹**

5 The learned APP supported the impugned judgment and order of conviction and resultant sentence by contending that evidence of victim female child/PW1 is trustworthy and reliable. Her age is proved by placing Birth Certificate on record apart from examining Gram Sevak.

6 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence.

7 (2008)17 SCC 225
 8 2014 CriLJ 2436
 9 (2009)15 SCC 635
 10 (2015)7 SCC 359
 11 AIR 1980 SC 249

7 At the outset, let us examine whether the prosecution has established the fact that the victim female child/PW1 was below 18 years of age at the time of commission of the alleged incident of her kidnapping and penetrative sexual assault on her. It is case of the prosecution that the victim female child/PW1 came to be kidnapped on 30th October 2015 by the appellant/convicted accused and thereafter, he committed penetrative sexual assault on her till 5th November 2015. On this backdrop, it is in evidence of victim female child/PW1 that her date of birth is 25th December 2000. Her father PW2 Rajukumar has also deposed that date of birth of the victim female child/PW1 is 25th December 2000. This oral evidence is not at all challenged by cross-examining these witnesses on this aspect.

8 In order to prove the fact that the victim female child/PW1 was below 18 years of age, the prosecution has placed on record her Birth Certificate at Exhibit 57. The said certificated is issued under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 read with Rules 8 and 13 of the Maharashtra

Registration of Births and Deaths Act, 1976. The said Birth Certificate is issued by the Registrar appointed under the Registration of Births and Deaths Act, 1969, on 6th November 2017.

9 In order to prove the Birth Certificate at Exhibit 57, the prosecution has examined Madhuri Survase, Gram Sevak of Akkalkot as PW8. She deposed that apart from serving as Gram Sevak, Akkalkot, she is also Registrar under the provisions of Registration of Births and Deaths Act, 1969. As per her version, birth of the victim female child/PW1 is entered at Serial no.13 in the Birth Register of Akkalkot. Her oral evidence is to the effect that the Birth Register contains names of parents of the victim female child/PW1 and she has deposed about those names. While in the witness box, this witness was equipped with the original Birth Register and she had placed on record the relevant extract thereof, which is at Exhibit 56. PW8 Madhuri Survase has also placed on record Birth Certificate Exhibit 57 of the victim female child/PW1. She was cross-examined to bring on record that

information about birth of the victim female child/PW1 was given by employee of the Gram Panchayat by name S.S.Poojari. This witness further admitted in cross-examination that the Birth Register is having entries from 1st January to 31st December and her cross-examination reveals that entry of birth can be taken within 21 days of the birth. Thus, cross-examination of this witness goes to show that the Birth Register was maintained in regular course of business by the Registrar. Extract of Birth Register at Exhibit 56 is mentioning the fact that birth of the victim female child/PW1 is reported by employee of the Gram Panchayat named S.S.Poojari. It is also seen from the Birth Register that the victim female child/PW1 was delivered at the house itself. The extract of Birth Register is not containing signature of the informant or the Registrar / Deputy Registrar. However, that aspect cannot create doubt because the extract at Exhibit 56 was prepared from the original register and such extract cannot bear signature of the person informing the birth or the Registrar/Deputy Registrar, as the entry was taken in the year 2001 whereas the extract was prepared, for the purpose of this

case, in the year 2017.

10 The Birth Certificate Exhibit 57 is issued under the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the Sub-Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, Exhibit 57, as such, is

issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act. Section 17 of the Registration of Births and Deaths Act, 1969, 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 Exhibit 57 is, infact, the extract of Birth Register in respect of entry of birth of the victim child/PW1, and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence 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. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is a public document and it constitutes primary evidence. Proof of contents of a public document can be had by production thereof as envisaged by Section 77 of the Evidence Act. In this view of the matter, no formal proof of the Birth Certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and Rules framed thereunder is required.

11 This court in the case of **Mahadeo S/o Kerba Maske Vs.**

State of Maharashtra and Anr.¹² has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3) : 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 reasons to be recorded by them,

¹² (2013) 14 SCC 637

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.”

It is, thus, clear that, by this evidence, prosecution has established date of birth of the victim female child/PW1 as 25th December 2000. The incident took place at the end of October 2015 and in the first week of November 2015. As such, the victim female child/PW1 was below 18 years of age, at the time of the incident, and as such, was a child, as defined by Section 2(d) of the POCSO Act.

12 In the matter of Ajay Kumar (supra), evidence of

parents of the victim was not throwing any light on the aspect of giving birth to the victim and it was not clear as to, who had reported about the birth of the victim in that case. Such is not the case in hand.

13 Now let us examine whether the prosecution has established penetrative sexual assault on the victim female child/PW1 after kidnapping her by the appellant/convicted accused. The victim female child/PW1 deposed that while going to school on 30th October 2015, the appellant/convicted accused came and gave lift to her, for dropping to school, by his motorcycle. When she sat behind him, one boy sat behind her and they went to the school. However, the teacher was giving punishment to latecomers. Then the victim female child/PW1 had spoken about her kidnapping by the appellant/convicted accused. She deposed that the pillion rider threatened her and closed her eyes and mouth by means of a handkerchief. The appellant/convicted accused, then, took her to the bus stand and the pillion rider went away. She was then made to sit in a bus under threats

to kill her. In two hours that bus reached the railway station. Then, she was made to board a train forcibly by the appellant/convicted accused and after two days journey, they alighted at a village where she was kept for two days in a house of one family. Thereafter, as per her version, she was taken to Hyderabad and in the tin shed of Chanda Nagar area, the appellant/convicted accused had committed penetrative sexual assault on her, for two days. She was then taken to the house of Sanju Jadhav at Secunderabad and there also the appellant/convicted accused committed penetrative sexual assault on her. Thereafter, brother of the appellant/convicted accused by name Saifan came with five persons and she along with the appellant/convicted accused were brought to MIDC Police Station, Solapur.

14 Though the theory of “taking” is sought to be made out by the victim female child/PW1 in her evidence, her cross-examination shows that she was enticed by the appellant/convicted accused. Her cross-examination shows that on both

sides of the road, people used to reside and they were in a position to see easily what is happening in the locality. Persons from the locality were known to her as well as the appellant/convicted accused. The victim female child/PW1 admitted that she never attempted to contact her parents for the entire period and even Sanju Jadhav was knowing her family members. It is, thus, clear that, the victim female child/PW1 had tons of opportunity to escape from the so called clutches of the appellant/convicted accused. However, she eloped with him on 30th October 2015 and remained in his company till arrival of Saifan on 5th November 2015 at Hyderabad. However, joining of company of the appellant/convicted accused by the victim female child/PW1 is certainly the act of kidnapping from lawful guardians of the victim female child/PW1. Though reliance is sought to be made on judgments in the matter of **S.Varadrajan (supra)** and **Surendra Kumar Mevalal Mehesh (supra)**, facts of this case are otherwise. Evidence of PW2 Rajukumar shows that the appellant/convicted accused used to roam near his house and apprehending that he had kidnapped the victim female

child/PW1, PW2 Rajukumar had lodged report against him on 30th October 2015 itself. This is not a case where the victim female child/PW1 left the house on her own without any allurement to her and subsequently joined the company of the appellant/convicted accused. Her elopement was certainly due to allurement by the appellant/convicted accused with whom she stayed at far away places from 30th October 2015 to 5th November 2015.

15 The victim female child/PW1 was examined by PW6 Dr.Duldev Thengal, Assistant Professor with the Medical College at Solapur on 7th November 2015. He noticed that hymen of the victim female child/PW1 was torn and postero lateral tear was found present but with no fresh bleeding. He clarified that after two days of the incident, he examined the victim female child/PW1. Evidence of PW6 Dr.Duldev Thengal is corroborated by contemporaneous Medico Legal Certificate at Exhibit 42. Evidence of the victim female child/PW1, as such, is gaining corroboration from version of PW6 Dr.Duldev Thengal and torn

hymen of the victim female child/PW1 with postero lateral tear on her private part indicates penetrative sexual assault on her by the appellant/convicted accused, with whom she was till she was brought back to Solapur. In the case of **State of Punjab vs. Gurmeet Singh**¹³ the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the

¹³ 1996 Cri.L.J. 172

very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

16 Though the learned counsel appearing for the appellant/convicted accused relied on judgment in **Sat Prakash**

(supra), Anmol and Others (supra), Babu Meena (supra) and Sannaia Subha Rao (supra), those matters proceeded on their own facts. In the case in hand, evidence of the victim female child/PW1, so far as penetrative sexual assault on her, is duly corroborated by medical evidence coming on record through PW6 Dr.Duldev Thengal.

17 Resultantly, the prosecution is successful in establishing the offence of commission of rape as well as penetrative sexual assault on the victim female child/PW1 by the appellant/convicted accused, after kidnapping her from lawful guardians. However, the Charge with reference to Section 366A of Indian Penal Code fails as inducing a minor by seducing her to illicit intercourse with other person is made punishable by the penal provision. There is no mention of other person for whom the victim female child/PW1 came to be kidnapped. Similarly, the prosecution has also proved that in the course of penetrative sexual assault on the victim female child/PW1, the appellant/convicted accused had committed aggravated sexual

assault on the victim female child/PW1 due to the fact that she was subjected to sexual intercourse repeatedly by him. As such, no infirmity can be found in the conviction of the appellant/convicted accused for the offence held to be proved by the learned trial court except for the offence punishable under Section 366A of the Indian Penal Code.

18 The learned trial court has sentenced the appellant/convicted accused for the offence punishable under Section 6 of the POCSO Act. At the same time, he is also sentenced for offences punishable under Sections 8, 10 and 12 of the POCSO Act. The learned trial court lost sight of provisions of Section 71 of the Indian Penal Code. At this juncture, provisions of Section 71 of the Indian Penal Code can be quoted with advantage:

“Section 71 - 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 shall not be punished with the punishment of more than one of such his

offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.”

19 It is, thus, clear that when 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 such offence. Hence, imposition of separate sentence for offences punishable under Sections 8, 10 and 12 of the POCSO Act by the learned trial court is unjustified. The appellant/convicted accused, as such, ought not to have sentenced separately for offences punishable under

Sections 8, 10 and 12 of the POCSO Act.

20 The appellant/convicted accused is sentenced to suffer rigorous imprisonment for 15 years apart from direction to pay fine of Rs.20,000/- for the offence punishable under Section 6 of the POCSO Act. Let us now examine whether this sentence is proper. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing court is expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

21 In the matter of **State of Himachal Pradesh vs. Mange**

Ram¹⁴ the evidence on record was showing that the prosecutrix was below 16 years of age. It is held thus in paragraph 16 by the Honourable Apex Court while sentencing the accused in that case :

“16 In view of the foregoing conclusions, we reverse the findings of the learned Sessions Judge which was confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 I.P.C. As regards the sentence, we take a lenient view for the reason that the prosecutrix and accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by passage of time, the members of the two families must have buried their hatchet if any arisen on account of this incident. The learned Counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rapture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long

14 2000 CRI.L.J. 4027

between near relatives. Having regard to all these matters, we hold that sentence already undergone by the accused would be sufficient to meet the ends of justice, and we do accordingly.”

22 In the matter of **Zindar Ali SK vs. State of West Bengal and Another**¹⁵ there was no love affair between the prosecutrix and the accused but the accused was after the prosecutrix requesting her to marry him and ultimately committed forcible sexual intercourse with the prosecutrix. While dealing with quantum of sentence, following are the observations of the Honourable Apex Court in paragraph 15 of the judgment :

“15 This takes us to the last argument about the quantum of sentence. The Courts below have awarded 10 years of imprisonment and a fine of Rs.5,000. In our opinion, considering the fact that the incident took place about 6 years back and the fact that the accused is behind the bars for last about 5 years, as also poverty on the part of the accused, we feel that the sentence already suffered would be sufficient. The sentence of fine is however,

¹⁵ 2009 CRI.L.J. 1324

confirmed. Fine, if recovered shall be paid to the Prosecutrix. She shall be intimated by sending notice to her. We, accordingly, modify the sentence. The appeal is disposed of with this modification.”

23 In the matter of Phul Singh vs. State of Haryana¹⁶, the accused was aged about 22 years and was not a habitual offender. He was found guilty of the offence punishable under Section 376 of the Indian Penal Code. While dealing with quantum of sentence, following are the observations of the Honourable Apex Court found in paragraphs 7 and 8 of the judgment :

“7 He is a youth barely 22 with no criminal antecedents save this offence. He has a young wife and a farm to look after. Given correctional courses through meditational therapy and other measures, his erotic aberration may wither away. A man like the appellant has a reasonable prospect of shaping into a balanced person, given propitious social environs, curative and congenial work and techniques of internal stress release or of reformatory self expression.”

16 1980 CRI.L.J. 8

“8 In this background, we regard a four year term of rigorous imprisonment more hardening than habilitative, even though we deplore the sex violence the young appellant has inflicted on his cousin's wife snatching a tricky opportunity. Even so, the incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction and reduce the sentence to rigorous imprisonment for two years. We wish to emphasise that the special circumstances of this case constrain us to relent a little on principle because the restorative approach to sentencing has been jettisoned by the courts below.”

24 Lastly, in the matter of State of Rajasthan vs. N.K. (Accused)¹⁷ the Honourable Apex Court has observed thus while deciding the quantum of sentence for the offence punishable under Section 376 of the Indian Penal Code.

“19 Now remains the question of sentence. The incident is of the year 1993. The accused was taken into custody by the police on 3.11.1993. He was not

¹⁷ 2000 CRI.L.J.2205

allowed bail. During the trial as also during the hearing of the appeal by the High Court he remained in jail. It is only on 11.10.1995 when the High Court acquitted him of the charge that he was released from jail. Thus he had remained in jail for a little less than two years. Taking into consideration the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, we are of the opinion that the accused-respondent need not now be sent to jail. It would meet the end of justice if he is sentenced to undergo imprisonment for the period already undergone by him and to a fine of Rs.2000/- with further simple imprisonment of one year and nine months in default of payment of fine as passed by the Trial Court. The appellant is allowed time till 1st May, 2000 for payment of fine. The accused-respondent is on bail. The bail bonds shall stand discharged on payment of fine as directed. Ordered accordingly.”

25 In the case in hand also, the appellant/convicted accused was 29 years of age when the incident took place. There

is nothing on record to show that he is a habitual offender or criminal. The incidents of sexual intercourse between him and the victim female child/PW1 were consensual in nature, though the victim female child/PW1 had not attained age of consent. In other words, the appellant/convicted accused had not committed penetrative sexual assault by using force on the victim female child/PW1. The victim female child/PW1 had eloped with him and the kidnapping was not by taking her by applying force. Therefore, I am of the considered opinion that imposition of sentence of 15 years rigorous imprisonment on the appellant/convicted accused, so also imposition of fine of Rs.20,000/- on him, is totally disproportionate in the facts of the case in hand. Evidence of PW2 Rajukumar shows that the victim female child/PW1 has already received compensation from the State. The appellant/convicted accused is described as a labour in the charge-sheet. As such, I am of the considered opinion that fine imposed on him also needs to be reduced suitably.

26 In the result, the following order :

ORDER

- i) The appeal is partly allowed.
- ii) The impugned order and judgment is modified thus :
 - ii-a) Conviction of the appellant/convicted accused for offences punishable under Sections 6, 8, 10 and 12 of the POCSO Act is maintained.
 - ii-b) For the offence punishable under Section 6 of the POCSO Act, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment for 6 months.
 - ii-c) No separate sentence is imposed on the appellant/convicted accused for offences punishable under Sections 8, 10 and 12 of the POCSO Act.
 - ii-d) Conviction of the appellant/convicted accused for the offence punishable under Section 376(2) of the Indian Penal Code is maintained but no separate sentence is awarded to him on this count.

- ii-e) Conviction and sentence imposed on the appellant/convicted accused for the offence punishable under Section 363 of the Indian Penal Code is maintained.
- ii-f) The appellant/convicted accused is acquitted of the offence punishable under Section 366A of the Indian Penal Code.
- iii) On recovery of the fine amount, the same be paid to the victim female child/PW1.
- iv) Rest of the impugned order is maintained.
- v) The appeal is disposed off accordingly.

(A. M. BADAR, J.)