

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.319 OF 2018

Mahadev Asaraji Borade,
Age about 52 years,
Occupation : Retired,
Balam Takali, Taluka
Shergaon, District Ahmednagar,
(At present lodged at Yerawada
Central Prison, Pune)

... **Appellant**

Versus

The State of Maharashtra,
(Through Police Inspector,
Narayangaon Police Station,
District Pune).
(C.R.No.99 of 2013)

... **Respondent**

.....

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

Mr.VV.Gangurde, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : RESERVED ON 6th SEPTEMBER 2019
PRONOUNCED ON 20th SEPTEMBER 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/convicted accused is challenging the Judgment and Order dated 28/09/2016 passed by the learned Special Judge, under Protection of Children from

Sexual Offences Act, 2012 (Hereinafter referred to as 'the POCSO Act' for the sake of brevity), Khed, Rajgurunagar, Pune in Special POCSO Case No.5 of 2014 (Old Special POCSO Case No.36 of 2013) thereby convicting him for the offences punishable under Sections 376 and 506 of the Indian Penal Code (hereinafter referred to as 'the IPC' for the sake of brevity) as well as under Sections 4,6,8, and 10 of the POCSO Act. For the offence punishable under Section 376 of the IPC, he is sentenced to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.3,000/- and in default to undergo further rigorous imprisonment for six months. For the offence punishable under Section 506 of the IPC, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for two years apart from direction to pay fine of Rs.1,000/- and in default to undergo further rigorous imprisonment for two months. For the offence punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for three months. Similar punishment was also imposed on him for the offence punishable under Section 6 of the POCSO Act. For the offence punishable under Section 8 of the POCSO Act, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for three years apart from payment of fine of Rs.1,000/- and in default to undergo rigorous imprisonment for two months. For the offence punishable under Section 10 of the

POCSO Act, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for five years apart from payment of fine of Rs.1,000/- and in default to undergo further rigorous imprisonment for two months. The learned trial Court had directed that the substantive sentences shall run concurrently.

2 Facts in brief leading to the prosecution and resultant conviction of the appellant/convicted accused can be summarized thus :

(a) P.W.No.4 Prashant is resident of village Kalavan in Nashik District. His minor female child/P.W.No.1 is suffering from 80% permanent disability. Therefore, she was admitted in the Boarding School run by Bhausahab Bora Apang Kalyan Kendra at village Ane in Junnar Taluka of Pune District from June 2012. said victim female child/P.W.No.1 was taking education in the school run by the said Institution by residing at Hostel of that Institution. The appellant/convicted accused used to work as a peon in the said Institute.

(b) The incident in question took place on 05/02/2013. On that day, pupils of the school went for tour to religious place Alandi. However, the victim female child/ P.W.No.1 did not accompany them because of her disability. On

that day, it was a holiday for the school. Taking advantage of the fact that there was nobody in the school, the appellant/convicted accused took the victim female child/P.W.No.1 to the store room of the Hostel of the Institute and committed rape on her. He threatened her not to disclose the incident to anybody else. However, the victim female child/P.W.No.1 disclosed the incident to Caretaker named Kachole and the said Caretaker in turn had disclosed the same to some teachers in the Institute. The victim female child/P.W.No.1 was taken to the Government Hospital, Belhe and then to Hospital at Narayangaon.

- (c) After completion of annual examination of the school, teachers of the school left the victim female child/P.W.No.1 at her home by a vehicle on 06/04/2013. Thereafter, she narrated the incident of sexual assault to her father P.W.No.4 Prashant. Then, police team headed by P.W.No.5 Narayan Sarangkar, API of Narayangaon Police Station came to the house of the victim female child/P.W.No.1 with Social Worker as well as police staff. Report of the victim female child/P.W.No.1 came to be recorded by him. Accordingly, Crime No.99 of 2013 came to be registered against the appellant/convicted accused.

(d) During the course of investigation, the victim female child/P.W.No.1 was referred to the Sasoon Hospital, Pune where she was examined by P.W.No.2 Dr.Daksha Bilagi, Chief Resident Doctor. The spot of the incident was inspected along with panch P.W.No.3 Sandip Aher by P.W.No.5 Narayan Sarangkar, API. Spot panchanama (Exhibit 22) came to be prepared. Statements of witnesses came to be recorded and ultimately the appellant/convicted accused along with co-accused came to be charge-sheeted.

3 The learned trial Court framed and explained the charge to the appellant/convicted accused and other co-accused. They abjured their guilt and claimed trial.

4 Defence of the appellant/convicted accused was that of total denial and false implication in the crime in question.

5 In Order to bring home the guilt to the appellant/convicted accused and other co-accused, the prosecution has examined in all five witnesses.

6 After hearing the parties, by the impugned Judgment and Order the appellant/convicted accused came to be convicted and sentenced as indicated in the opening paragraph of this Judgment.

7 I heard Ms.Ayubi, the learned Counsel appointed to represent the appellant/convicted accused at the cost of the State. She vehemently argued that evidence of P.W.No.4 Prashant shows that he had been to the school where his victim female child was taking education twice after June 2012. However, he was not informed about any such incident by the victim female child/P.W.No.1. The learned Advocate further argued that there is huge delay in lodging the FIR of the alleged incident which took place on 05/02/2013. The prosecution case reveals that the victim was in company of her parents from 06/04/2013. However, neither the victim female child nor her parents lodged the complaint against the appellant/convicted accused. The report was solicited from the victim by P.W.No.5 Narayan Sarangkar, API and, as such, possibility of false implication of the appellant/convicted accused cannot be ruled out.

8 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence.

9 I have carefully considered the submissions so advanced and also perused the Record and Proceedings including the oral as well as documentary evidence.

10 Case in hand is the case of penetrative sexual assault by the staff member of Educational Institute i.e. Bhausahab Bora Apang Kalyan Kendra, Ane. Therefore, let us examine evidence of

the victim female child/PW.No.1 in order to ascertain whether the prosecution has proved the charge.

11 The victim female child is examined as P.W.No.1. It is in her evidence that her date of birth is 07/07/1996. This oral evidence is not challenged by the defence. Apart from this oral evidence, the prosecution has placed on record report of ossification test, Medical Certificate in respect of orthopedic disability of the victim female child/PW.No.1 and admission form. These documents are admitted by the defence and, as such, are at Exhibit Nos.103 to 105. Bony age of the victim female child/PW.No.1 was found to be above 15 years of age and below 17 years of age. The admission form of the victim female child/PW.No.1 at Exhibit 105 shows that her date of birth is 07/07/1996. In view of this evidence, the prosecution has established that on the date of alleged incident i.e. on 05/02/2013, the victim female child/PW.No.1 was below 18 years age and as such, was a child as defined by Section 2(d) of the POCSO Act.

12 So far as the incident in question is concerned, the victim female child/PW.No.1 has categorically deposed that at about 12.30 a.m. of 05/02/2013 the appellant/convicted accused took her to the store room of the Hostel and committed rape on her. Thereafter, he threatened her not to disclose the incident to

anybody. Because of this incident, as stated by her, she was taken to the Government Hospital at Belhe and thereafter to the hospital at Narayangaon. Subsequently, after completion of her annual examination, she was left at her house on 06/04/2013. The victim female child/PW.No.1 has stated that she narrated the incident to her father and ultimately she lodged report (Exhibit 100) on 09/04/2013.

13 By cross-examining the victim female child/PW.No.1, defence has brought on record that her school had arranged a tour to Alandi on the day of the incident i.e. on 05/02/2013, but she could not go on that tour as she is suffering from disability. Her cross-examination reveals that on 05/02/2013, the school was closed due to holiday. This material brought on record in cross-examination of the victim female child/PW.No.1 goes to show that the appellant/convicted accused had every opportunity to commit the crime in question. Because of picnic of the school so also closure of the school due to holiday, there may not be any student in the Hostel and the appellant/convicted accused had an opportunity to commit the offence. Suggestion that no such act was committed by the appellant/convicted accused was denied by the victim female child/PW.No.1. It is thus seen that material elicited from the victim female child/PW.No.1 is cementing her testimony in respect of commission of penetrative sexual assault on her by the appellant/convicted accused.

14 The victim female child/PW.No.1 upon lodgment of the report by her was referred to the Sasoon Hospital, Pune where she is examined by P.W.No.2 Dr.Daksha Bilagi, Chief Residential Doctor. As per version of this Medical Officer, the victim female child/PW.No.1 had disclosed history of commission of rape by the appellant/convicted accused on the pretext of helping him in the store room. Upon gynecological examination of the victim female child/PW.No.1, P.W.No.2 Dr.Daksha Bilagi, Chief Residential Doctor found hymen of the victim female child/PW.No.1 was having tear of 6 O'clock position. The Medical Officer, as such, opined that the victim female child/PW.No.1 was subjected to the penetrative vaginal intercourse. Though, in cross-examination, it was suggested to P.W.No.2 Dr.Daksha Bilagi, Chief Residential Doctor that hymen can be ruptured by inserting finger or any other object, there was no other suggestion to suggest that it was the victim who caused such injury herself. Thus, torn hymen of the victim female child/PW.No.1 supports her version regarding penetrative sexual assault by the appellant/convicted accused on her.

15 P.W.No.4 Prashant, who happens to be father of the victim female child/PW.No.1 has deposed that on 06/04/2013 her daughter i.e. the victim female child/PW.No.1 returned from the Hostel along with her teachers and then she narrated the incident of 05/02/2013. This witness was very candid in stating that he

was not able to lodge the FIR as his native place is far away from Narayangaon Police Station. He stated that as police came to know the incident, they came to his house and recorded the report. The reason for delay in lodging the report has come on record from cross-examination of this witness. In cross-examination, it is elicited from this witness that as he was thinking whether to lodge a report or not because of fear of defamation of his family and defamation of his daughter, there was delay in lodging the report. This witness further admitted that from June 2012 till annual examination, he had visited Hostel of his daughter twice. However, there is no further question to him that such visits were after the incident of penetrative sexual assault i.e. after 05/02/2013.

16 Evidence of P.W.No.5 Narayan Sarangkar, API shows that while investigating the Crime No.99 of 2013, he came to know that the appellant/convicted accused had committed rape on the victim female child/P.W.No.1 and thereafter accompanied by the Social Worker and his staff member he went to the house of the victim female child/P.W.No.1 and got her report recorded.

17 Delay in lodging the FIR in case of sexual offence cannot be used as a ritualistic formula in disbelieving the prosecution case. In sexual offence, the delay in reporting the matter is because of various reasons. Fear of stigma and adverse

effects on future prospect of the victim female child/PW.No.1 constitute some of such reasons. In the case in hand, evidence of father of the victim female child/PW.No.1 shows that he was feeling that the lodgment of the report would amount to defamation of daughter as well as the family. The victim female child/PW.No.1 was in custody of the Education Institution at the time and after commission of the offence. The document at Exhibit 105 which is admission form of the victim female child/PW.No.1 supports the fact that she is handicap by both the legs. Cross-examination of the victim female child/PW.No.1 reveals that she is unable to walk and she has to crawl for going from one place to another. She is declared to be 80% permanently disable by the Medical Board. This Certificate is at Exhibit 104. Apart from orthopedic disability, the victim female child/PW.No.1 is also suffering from cerebral palsy with spastic nerves. In such situation, it was not expected of her to take recourse of law while in custody of the Educational Institute where she was studying and residing. Further her evidence shows that she had attempted to disclose the incident to the staff members of the Institute. Hence, delay in lodging the FIR is of no consequence in the instant case.

18 In view of foregoing reasons, the prosecution has successfully established the offence of aggravated penetrative sexual assault on the victim female child/PW.No.1 by the appellant/convicted accused, who was staff member of the Bhausahab Bora Apang Kalyan Kendra at village Ane, where she

was admitted for education and was staying in the Hostel of that Institute.

19 The learned trial Court had rightly convicted the appellant/convicted accused of offences punishable under Sections 376 and 506 of the IPC as well as for offences punishable under Sections 4,6,8 and 10 of the POCSO Act. However, the learned trial Court has committed error in sentencing the appellant/convicted accused separately on each count ignoring the provision of Section 71 of the IPC. Perusal of Section 71 of the IPC which deals with limit of punishment of offences made up of several offences makes the position clear. The incident in question held to be proved is only one incident, in which the appellant/convicted accused had taken the victim female child/PW.No.1 in the store room of the Hostel and committed penetrative sexual assault on her which amount to aggravated penetrative sexual assault as the the appellant/convicted accused was staff member of the Hostel where she was residing. In the process of commission of that crime, the appellant/convicted accused had committed aggravated sexual assault on the victim female child/PW.No.1. Section 71 of the IPC provides that 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. 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, the offender shall not be punished with more severe punishment than the Court which tries him would award for any one of such offences. Similarly, Section 42 of the POCSO Act provides that where an act or omission constitute an offence punishable under Section 376 of the IPC, then notwithstanding contained in any law for the time being in force, the offender found guilty of such offence shall be liable to be punished as provided by the POCSO Act or the IPC which is greater in degree. These legal aspects are certainly missed by the learned trial Court while awarding separate sentences for the offences punishable under Sections 376 of the IPC and under Sections 4,6,8 and 10 of the POCSO Act. The impugned Order, therefore, needs to be modified. In the result, the following Order :

ORDER

- (i) The Appeal is partly allowed in following terms.
 - (a) Conviction of the appellant/convicted accused of offences punishable under Sections 376 and 506 of the Indian Penal Code as well as under Sections 4,6,8 and 10 of the Protection of Children from Sexual Offences act, 2012 is maintained.
 - (b) However, sentence awarded to the appellant/convicted accused for the offence punishable under Section 376 of the Indian Penal Code and for the

offences punishable under Section 4,8 and 10 of the Protection of Children from Sexual Offences Act, 2012 is quashed and set aside.

- (c) Needless to mention that sentence imposed on the appellant/convicted accused by the learned trial Court for the offence punishable under Section 506 of the Indian Penal Code as well as for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 is maintained.
 - (d) The substantive sentences shall run concurrently.
 - (e) On recovery of the fine amount, the same shall be paid to the victim as compensation.
- (ii) The Appeal is disposed of accordingly.

(A.M.BADAR, J.)