

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.734 OF 2018

WASIM MOHIDDIN SHAIKH

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Megha Bajoria, Appointed Advocate for the Appellant.

Mr.Vinod Chate, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 3rd OCTOBER 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/convicted accused is challenging the judgment and order dated 29th November 2016 passed by the learned Designated court under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act for the sake of brevity), Greater Mumbai, in POCSO Special Case No.667 of 2013, thereby convicting him of

offences punishable under Sections 376(2)(i) of the Indian Penal Code as well as under Section 4 of the POCSO Act. For the offence punishable under Section 376(2)(i) of the Indian Penal Code, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.20,000/- and in default, to undergo further rigorous imprisonment for 6 months. For the offence punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.20,000/- and in default, to undergo further rigorous imprisonment for 6 months. Substantive sentences are directed to run concurrently by the learned trial court.

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

(a) The PW1 is the alleged victim of the crime in question. She was born on 29th June 1997. The incident in question took place allegedly from April 2012 to March 2013. It is case of

the prosecution that after death of father of the victim female child/PW1, her mother started residing with her boyfriend. The victim female child/PW1 was, therefore, constrained to take shelter in house of her grandmother.

(b) The victim female child/PW1 fell in love with the appellant/convicted accused and from April 2012 for a few months, she started residing with him at his house in Morarji Nagar, Powai, Mumbai. Thereafter, sexual relations came to be established between them. This resulted in pregnancy of the victim female child/PW1 in the year 2013. Thereafter, she had aborted her foetus, after her mother took her to the Rajawadi Hospital, Mumbai.

(c) PW3 Seema is mother of the victim female child/PW1. On 18th April 2013, she lodged report Exhibit 35 alleging commission of rape on the victim female child/PW1 by the appellant/convicted accused. On the basis of this report, Crime No.00 of 2013 came to be registered at Sakinaka Police

Station and the First Information Report (FIR) was then sent to Police Station Powai, where Crime No.213 of 2013 came to be registered against the appellant/convicted accused.

(d) During the course of investigation, the appellant/convicted accused came to be arrested. Routine investigation followed. Clothes of the victim female child/PW1 as well as that of the appellant/convicted accused came to be seized. They were sent for chemical analysis. The spot of the incident came to be inspected and Spot Panchnama Exhibit 12 came to be prepared. Birth Certificate of the victim female child/PW1 came to be collected and on completion of routine investigation, the appellant/convicted accused came to be charge-sheeted.

(e) The learned trial court framed and explained the Charge for the offence punishable under Section 376(i) of the Indian Penal Code as well as under Section 4 of the POCSO Act to the appellant/convicted accused. He pleaded not guilty and

claimed trial.

- (f) In order to bring home the guilt to the appellant/convicted accused, the prosecution has examined in all six witnesses including the victim female child as PW1 and her mother Seema as PW3. Other witnesses are official witnesses, who investigated the crime in question. Defence of the appellant/convicted accused was that of total denial.
- (g) After hearing the parties, the learned trial court was pleased to convict the appellant/convicted accused and sentenced him accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Megha Bajoria, the learned advocate appointed to represent the appellant/convicted accused at the costs of the State. She vehemently argued that the appellant/convicted accused came to be convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code

when he was not even charged for that offence. He was charged for commission of the offence punishable under Section 376(i) of the Indian Penal Code. It is further argued by the learned advocate for the appellant/convicted accused that the prosecution has failed to establish the Charge in view of the fact that the victim female child/PW1 and her mother have not supported the prosecution case, in any manner. Therefore, the appellant/convicted accused is entitled to acquittal.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have carefully considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

6 Considering nature of the offence, fate of the prosecution case hinges on the testimony of the victim female child/PW1. It is in her evidence that she was born on 29th June

1997. Similar is evidence of her mother PW3 Seema. This oral evidence regarding age of the victim female child/PW1 went unchallenged. Moreover, the prosecution has placed on record Birth Certificate of the victim female child/PW1 issued by the Registrar under the Registration of Births and Deaths Act, 1969, who happens to be the Health Officer of the Municipal Corporation of Greater Mumbai. The said Birth Certificate at Exhibit 11 shows that the victim female child/PW1 was born to her mother PW3 Seema and her father Umesh on 29th June 1997. This Birth Certificate 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, 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 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.

7 This court in the case of **Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.**¹ 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;

¹ (2013) 14 SCC 637

(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, 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.”

With this evidence, the prosecution has proved the fact that at the time of the incident in question, which took place from April 2012 to March 2013, the victim female child/PW1 was a child as

defined by Section 2(d) of the POCSO Act and therefore, was below 18 years of age.

8 Now let us examined whether the prosecution has established commission of rape and penetrative sexual assault on the victim female child/PW1 by the appellant/convicted accused. The victim female child/PW1 seems to be a witness of truth. She candidly stated that when she was residing with her grandmother in April 2012, she started loving the appellant/convicted accused and then went to reside with him at his house in Morarji Nagar, Powai. She further stated that then physical relations developed between them and this fact was known to all her relatives as well as her mother – PW3 Seema. The victim female child/PW1 further deposed that she became pregnant from the appellant/convicted accused in the year 2013 and therefore, her mother took her to Rajawadi Hospital, Mumbai, but operation took place at the clinic at Kurla in Mumbai. As per version of the victim female child/PW1, she married the appellant/convicted accused and started residing with him. She has no complains

against the appellant/convicted accused. In the chief-examination itself she has stated that she has come to the court for adducing evidence with her husband i.e. the appellant/convicted accused and in cross-examination she stated that she is pregnant from the appellant/convicted accused. Her cross-examination reveals that the appellant/convicted accused was prepared to marry her and her mother was also prepared to marry her with the appellant/convicted accused. The appellant/convicted accused never forced her to do anything. According to the victim female child/PW1, wheels of investigation were set in motion as her mother lodged report because on one occasion, her mother quarreled with the appellant/convicted accused. Thus, version of the victim female child/PW1, cemented by the cross-examination, shows that from April 2012, the appellant/convicted accused had established sexual relations with the victim female child/PW1, who at that time was 16 years of age. Those relations continued even after April 2012 and till lodgement of the FIR in April 2013. At this juncture, it is worthwhile to note that POCSO Act, 2012 came in force from 14th November 2012 and as such, evidence

adduced by the victim female child/PW1 shows that the appellant/convicted accused had committed penetrative sexual assault on her when she was below 18 years of age.

9 PW3 Seema, who happens to be the mother of the victim female child/PW1, has turned hostile to the prosecution and was cross-examined at length by the learned prosecutor. However, nothing incriminating could be brought on record from her evidence. From her cross-examination by the prosecutor, whatever she had stated to the police is brought on record as her narrations to the police. Those narrations cannot become her evidence before the court. As such, evidence of PW3 Seema is of no assistance to the prosecution.

10 Other witnesses examined by the prosecution are Investigating Officers, who had done their role in investigation of the crime in question.

11 In the case in hand, evidence available against the appellant/convicted accused is only of the victim female child/PW1, who had married him, apparently even before lodging the FIR. However, evidence of the prosecution shows that the victim female child/PW1 had not attained the age of consent at the time of sexual intercourse with her by the appellant/convicted accused. Hence, the prosecution has established the offence of rape as well as penetrative sexual assault by the appellant/convicted accused on the victim female child/PW1.

12 Now the question which falls for consideration is whether the appellant/convicted accused is rightly convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code so also whether the quantum of sentence imposed on him is proper. Perusal of the Charge at Exhibit 3 shows that the appellant/convicted accused was charged for the offence punishable under Section 376(i) of the Indian Penal Code with a clear recital that he committed rape on the victim female child/PW1 from April 2012 to March 2013. No Charge for the

offence punishable under Section 376(2)(i) of the Indian Penal Code was framed and explained to the appellant/convicted accused. The offence punishable under Section 376(1) of the Indian Penal Code was warranting punishment not below 7 years but which could extend to imprisonment for life apart from imposition of fine, prior to its substitution by Act No.22 of 2018. We are dealing with the case prior to enactment of Act No.22 of 2018. Thus, at the relevant time, punishment prescribed for the offence punishable under Section 376(1) of the Indian Penal Code was not less than 7 years but extended up to imprisonment for life apart from imposition of fine. However, as against this, for the offence punishable under Section 376(2)(i) of the Indian Penal Code, the punishment prescribed at the relevant time was not less than 10 years but which could extend up to imprisonment for life apart from imposition of fine. This clause (i) to sub-section (2) of Section 376 of the Indian Penal Code came to be omitted by Act No.22 of 2018. Thus, as no charge for the offence punishable under Section 376(2)(i) of the Indian Penal Code was framed and explained to the appellant/convicted accused at the relevant time,

he ought not to have been convicted and sentenced for this serious offence, than that of the offence with which he was charged.

13 Apart from this, evidence of the victim female child/PW1 shows that she had joined company of the appellant/convicted accused by starting residing with him. She married the appellant/convicted accused. All her relatives as well as her mother were consenting to this act of the victim female child/PW1. Even during pendency of the trial, the victim female child/PW1 used to attend the court along with the appellant/convicted accused and when she was in the witness box, she was pregnant from the appellant/convicted accused.

14 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.

15 In the matter of **State of Himachal Pradesh vs. Mange Ram**² 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

² 2000 CRI.L.J. 4027

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 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.”

16 In the matter of Zindar Ali SK vs. State of West Bengal and Another³ 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 :

3 2009 CRI.L.J. 1324

“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, 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.”

17 In the matter of Phul Singh vs. State of Haryana⁴, 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

4 1980 CRI.L.J. 8

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.”

“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.”

18 Lastly, in the matter of State of Rajasthan vs. N.K. (Accused)⁵ 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 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

5 2000 CRI.L.J.2205

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.”

19 Considering the over all circumstances, the appeal needs to be allowed by altering conviction of the appellant/convicted accused of the offence punishable under Section 376(2)(i) of the Indian Penal Code to the one under Section 376(i) of the Indian Penal Code and sentence imposed on him on this count also needs to be reduced accordingly as per the directions of the penal statute as standing at the relevant time i.e. prior to 21st April 2018. Similarly, keeping in view provisions of Section 42 of the POCSO Act, the appellant/convicted accused is not liable for punishment for the offence punishable under Section 376 of the Indian Penal Code as well as to one under Section 4 of the POCSO Act. He is liable for punishment only under one penal provision because at the relevant time punishment for the offence punishable under Section 376(i) of the Indian Penal Code and under Section 4 of the POCSO Act were the same. Hence, I feel it

appropriate to punish the appellant/convicted accused for the offence punishable under Section 4 of the POCSO Act.

20 It is seen that the learned trial court has awarded excessive amount of fine to the appellant/convicted accused on both counts. For the offence punishable under Section 376(2)(i) of the Indian Penal Code, so also for the offence punishable under Section 4 of the POCSO Act, he is directed to pay fine of Rs.20,000/- each. Similarly, default sentence of six months rigorous imprisonment is imposed on him on both counts. In view of the facts and circumstances of this case, as discussed in foregoing paragraphs, such heavy fine as well as default sentence is not warranted. Therefore, the order :

ORDER

- i) The appeal is partly allowed.

- ii) Conviction and sentence imposed on the appellant/convicted accused is altered in the following manner :-

- ii(a) Conviction of the appellant/convicted accused for the offence punishable under Section 376(2)(i) of the Indian Penal Code is altered and he is convicted of the offence punishable under Section 376(i) of the Indian Penal Code.
- ii(b) His conviction for the offence punishable under Section 4 of the POCSO Act is maintained.
- ii(c) For the offence punishable under Section 4 of the POCSO Act, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.100/- and in default, to undergo rigorous imprisonment for 1 month.
- ii(d) In view of provisions of Section 42 of the POCSO Act, no separate sentence is awarded to the appellant/convicted accused for the offence punishable under Section 376(i) of the Indian Penal Code.

iii) The appeal stands disposed off accordingly.

(A. M. BADAR, J.)