

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****APPEAL NO.865 OF 2017**

Suresh Angloswami Naidu,
Aged about 33 years, at present
Undergoing a sentence of Ten years
at Kolhapur Central Prison, Kalamba
as convict Prisoner No. C-6516.

....Appellant.

Vs.

The State of Maharashtra

.....Respondent.

Mr. Abhaykumar Apte for the Appellant.
Mr. S.S. Hulke, APP for the Respondent.

CORAM : A. S. GADKARI, J.
RESERVED ON : 14TH SEPTEMBER 2020.
PRONOUNCED ON : 25TH NOVEMBER 2020.

JUDGMENT:-

The Appellant (Original Accused No.1), has impugned Judgment and Order dated 20th January, 2016 passed by the learned Additional Sessions Judge and Special Judge under the POCSO Act, Ichalkaranji, convicting him under Section 363 of the Indian Penal Code (for short, "*the IPC*") and is sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.5,000/-, in default of payment of fine, to further suffer simple imprisonment for 3 months; under Section 366 of the IPC and is sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.15,000/-, in default of payment of fine, to further suffer simple imprisonment for 9 months; and also convicting him for the offence under

Section 5(l) punishable under Section 6 of the Protection of Children from Sexual Offences Act (for short, "*the POCSO Act*") and is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.30,000/-, in default of payment of fine, to further suffer simple imprisonment for 1 year. The Trial Court has not awarded separate sentence under Section 376 of the IPC in view of the provisions of Section 42 of the POCSO Act. The Trial Court has also directed that, all the substantive sentences to run concurrently.

Kiran Mahadev Mokashi, Original Accused No.2 (for short, "*Org. A-2*") has been acquitted by the Trial Court from all the charges by the same impugned Judgment and Order.

2 Heard Mr. Apte, learned Advocate for the Appellant and Mr. Hulke, learned APP for the State. Perused entire record.

3 As per prosecution, the prosecutrix was aged about 13 to 14 years on the date of commission of alleged offence i.e. on 4th July, 2013 and with a view to protect her identity and in consonance with the provisions of Section 228(A) of the IPC and Section 33(7) of the POCSO Act, the names of material witnesses and detailed narration of facts mentioned in the evidence of the prosecutrix and relevant witnesses is hereby avoided.

4 The prosecution case in brief is that:-

(i) The Appellant was working in the office of Mr. Kiran Mokashi (Org. A-2). Mr. Kiran Mokashi was working as an agent of a

Co-operative Society. Prosecutrix (P.W. No.2) along with her father (P.W. No.1) and other family members was residing in the house of Mr. Kiran Mokashi (Org. A-2). The Appellant was residing adjacent to the house of P.W. No.1. The record indicates that, the prosecutrix was acquainted with the Appellant due to the said reason. The prosecutrix had left education after passing out of Class 8th examination. Father of the prosecutrix was running a power-loom factory of one Mr. Badashaha Mujawar on rent, which was situated at Kagawade Mala, Ichalkaranji. The prosecutrix was doing household work and also cleaning work in the said factory to help her father.

(ii) That, on 4th July, 2013, at about 1.30 to 2.00 p.m., prosecutrix along with her uncle namely Iresh Gobbur had been to the said factory for cleaning it. Her father thereafter went for having lunch. The prosecutrix did not return to house upto 4.30 to 5.00 p.m.. Despite taking search of the prosecutrix with her friends and relatives, she could not be traced. Her father, Bamlingappa S. Jeur (P.W.No.1) therefore, lodged a missing complaint (Exh.27) with Shivajinagar Police Station, Ichalkaranji on 6th July, 2013.

(iii) While taking search of prosecutrix, Mr. Kiran Mokashi (Org. A-2) told P.W. No.1 that, the Appellant and his daughter were talking on phone, when they had been to Barshi. The father of prosecutrix therefore, got suspicion about Appellant, who was also missing

from 4th July, 2013. He, therefore, again went to Shivaji Nagar Police Station, Ichalkaranji and lodged a complaint (Exh.28) under Sections 363, 366(A) read with Section 34 of the IPC. The said complaint was registered as CR No. 85 of 2013.

(iv) It is the further prosecution case that, on 4th July, 2013, the Appellant induced, lured and with a promise to marry prosecutrix, initially took her at Borgaon S.T. Stand and from there, he took her at Chikkodi (Karnataka State). They stayed at Hidkal Dam at one house for 2 nights. During that period, the Appellant established physical relations with the prosecutrix. The Appellant thereafter took prosecutrix to village Sipla Puttur, State of Tamil Nadu to the house of his sister namely Anasiya. The prosecutrix and the Appellant resided there up to 29th July, 2013. During that period, the Appellant was establishing physical relations with the prosecutrix by extending promise of marriage with her.

(v) That, on 29th July, 2013, the police along with Mr. Uttam Mokashi, brother of Org. A-2, visited the said place and brought them back to Shivajinagar Police Station, Ichalkaranji on 30th July, 2013. The statement of prosecutrix was recorded under Section 164 of the Code of Criminal Procedure (for short, '*Cr.P.C.*') by the learned Magistrate. The Investigating Officer visited the aforestated spots where the Appellant had taken prosecutrix and prepared spot panchanamas (Exhs. 39 and 40) in presence of panch witness Mr.Sadiq Pendhari, (P.W. No. 3). The

Investigating Officer also seized the clothes of Appellant and prosecutrix under panchanams which are at Exhs. 35 and 45 respectively. Medical Examination of prosecutrix was conducted by Dr. Vijay Koparde (P.W. No.5).

(vi) On completion of investigation, the Investigating Officer Smt. Archana K. Bodhade (P.W. No.9) submitted charge-sheet under Sections 363, 366, 366(A), 376 and 109 of the IPC against the Appellant and Kiran Mokashi (Org. A-2) and also under Section 4 of the POCSO Act against the Appellant before the Trial Court on 26th October, 2013. The Trial Court framed charge below Exh-8 on 27th January, 2014 for the offence punishable under the aforestated Sections. The contents of the charge were read over and explained to the accused persons in vernacular language to which, they denied and claimed to be tried.

(vii) The prosecution in support of its case, examined in all 9 witnesses viz. P.W. No.1-father of the prosecutrix; P.W. No.2-prosecutrix; P.W. No.3-Sadiq Pendhari, panch to spot panchanama; P.W. No.4-Raju Awale, panch for seizure of clothes of accused; P.W. No.5-Dr. Vijay Koparde, Medical Officer, who examined the prosecutrix; P.W. No.6-Ravi Gaikwad, friend of Appellant; P.W. No.7-Chandrappa Kodi, a witness; P.W. No.8- API-Dhananjay Dhone, Investigating Officer and P.W. No.9 PI-Smt. Archana Bodhade, Investigating Officer.

(viii) The Trial Court after recording evidence and

hearing the learned Advocates for the respective parties, has convicted Appellant by its impugned Judgment and Order dated 20th January, 2016. The Trial Court was pleased to acquit Kiran Mokashi (Org. A-2) by the same impugned Judgment and Order.

5 Mr. Apte, learned counsel appearing for the Appellant submitted that, though the prosecutrix had ample opportunity to tell the fact of her alleged abduction/kidnapping by the Appellant to the persons in whose contact she came during the period from 4th July, 2013 to 29th July, 2013, she did not tell it to anybody. He further submitted that, from the admissions given by the prosecutrix (P.W.No.2) and her father (P.W.No.1), a safe inference can be drawn that, the prosecutrix had attained the age of understanding and discrimination and she had willingly joined the company of the Appellant on 4th July, 2013 i.e. the date of commission of the present offence. He submitted that, except bare words of prosecutrix (P.W. No.2) and her father (P.W. No.1), no other material is produced on record and proved by the prosecution to show the correct age of the prosecutrix. He submitted that, the Appellant has not admitted documents, produced by the prosecution as per Section 294 of Cr.P.C. below Exh.13/C. In the said list of documents, prosecution had produced bonafide certificate of prosecutrix dated 8th July, 2013 at Serial No.6. The Appellant has not admitted the said document also. He submitted that, the date on Birth Certificate or other documents depicting correct age of the prosecutrix has

neither been produced nor proved by the prosecution and therefore, a safe inference can be drawn that, the prosecutrix was above the age of 18 years on the date of commission of the present offence.

He submitted that, the Trial Court had framed charge below Exh-8 against the Appellant under Section 4 of the POCSO Act only. However, the Trial Court has convicted the Appellant for the offence committed under Section 5(l) punishable under Section 6 of the POCSO Act, which is contrary to the settled principles of law. He submitted that, the Appellant was not granted an opportunity to contest and/or meet with the said charge. He submitted that, even in the statement of the Appellant recorded under Section 313 of the Cr.P.C., the material showing involvement of him for the offence under Section 5(l) of the POCSO Act was not put to him and therefore, great prejudice has been caused to the Appellant.

He lastly submitted that, if the Court is not inclined to acquit the Appellant from the charges framed against him, then the Appellant may be held guilty under Section 4 of the POCSO Act and a minimum sentence prescribed therein may be awarded to him. That the Appellant has already undergone approximately 5 years of actual imprisonment as of today. He therefore, prayed that, the present Appeal may be allowed by setting aside the impugned Judgment and Order.

6 Per contra, Mr. Hulke, learned APP vehemently opposed the

Appeal and submitted that, in view of the evidence of the prosecutrix (P.W.No.2) and her father (P.W.No.1), the prosecution has successfully proved that, on the date of commission of the present offence her age was below 18 years. He however fairly submitted that, except the version of prosecutrix and her father, no other material has been produced on record by the prosecution to show the exact age of the prosecutrix on the date of commission of the offence. He also fairly conceded to the fact that, bonafide certificate of the prosecutrix produced by the prosecution at Serial No.6 in Exh.13/C has not been proved by the prosecution. He submitted that, the Appellant was a married person and lured the prosecutrix by extending false promise of marriage and has sexually exploited her and therefore, no leniency be shown to the Appellant. He submitted that, the present Appeal therefore, may be dismissed.

7 A minute perusal of evidence on record would indicate that, though the prosecution has examined in all 9 witnesses to substantiate charges against the Appellant, the evidence of P.W. No.1 i.e. the father of prosecutrix, P.W. No.2 prosecutrix and P.W. No.5 Dr. Vijay Koparde, who examined the prosecutrix, is of much importance and relevant for deciding the present Appeal.

The evidence of P.W. No.6 Ravi Gaikwad, the friend of the Appellant who met him at Borgaon S.T. Stand is of no avail to the prosecution as he was declared hostile. P.W. No.7 Chandrappa Kodi, a

person who had seen prosecutrix in company with the Appellant on 4th July, 2013 has also resiled from his statement given to the police and has been declared hostile. The evidence of P.W. No.3 Sadiq Pendhari, a panch witness to the spots, where the Appellant and prosecutrix had stayed; the evidence of P.W. No.4 Raju Awale, a panch witness to the seizure of clothes of Appellant; P.W. No.8 Dhananjay Dhone, Assistant Police Inspector and P.W. No.9 Smt. Archana Bodhade, Police Inspector and Investigating Officer of the present crime, is formal in nature and therefore, their evidence is not discussed in detail hereinafter.

8 The father of the prosecutrix (P.W.No.1) has deposed about the facts of prosecutrix leaving her studies after passing out 8th Standard class, her help in household work and cleaning work in the factory to help him. He has also deposed about missing of prosecutrix on 4th July, 2013 and his lodgment of missing complaint (Exh.27) on 6th July, 2013. He has deposed that, the Org. A-2, Kiran Mokashi had told him to keep watch on his daughter as the Appellant used to talk with her on phone. That, the Appellant was also missing from 4th July, 2013 and therefore, he got suspicion about him and lodged first information report (Exh.28) on 25th July, 2013. He has proved the said documents at Exhs. 27 and 28.

In his cross-examination, he has admitted that, from 4th July, 2013 his daughter did not contact him or any other member of his family. That, the prosecutrix was born from his first wife namely Nirmala. He was

residing with his wife Vijayalaxmi, with whom he performed marriage prior to 2½ years. He admitted that, at the relevant time, the settlement of marriage of prosecutrix was going on with one Mr. Hires. He has admitted that, on the date of lodgment of missing report i.e. on 6th July, 2013, Mr. Hires and one other person had accompanied him to the Police Station.

9 The prosecutrix in her testimony has deposed that, her date of birth is 4th May, 2000. She left the school after attending IX Standard. The house, in which she was residing was owned by Mr. Kiran Mokashi (Org. A-2). The name of her mother was Nirmala who died in January, 2011. She got acquainted with the Appellant as she used to go for washing clothes in front of the office of the Appellant. She has deposed that, on 4th July, 2013 between 11.30 a.m. to 12.00 noon, she had been to the factory for work as usual. She was returning home at about 2.30 p.m.. At that time, the Appellant came on a motor-cycle near her and offered to leave her at her house. The prosecutrix sat on the motor-cycle as a pillion rider and thereafter, the Appellant took her near Apana Bazar situated near Sambhaji Chowk. The Appellant told her that, he likes her and intends to marry her. He told her that, her father was harassing her and therefore, he took her to the Nadi Vesh and telephoned someone and called him at Borgaon S.T. Stand to collect the motor-cycle.

The Appellant, thereafter took her at Borgaon S.T. Stand. Two

persons came there on motor-cycle. Out of two persons, one person inquired about the prosecutrix with the Appellant to which, the Appellant replied that, she was in his relation and he was taking her to drop her at Chikkodi. The Appellant introduced the said two persons as his friends namely Ravi (P.W. No.6) and Sachin. The Appellant handed over his motor-cycle to those persons and thereafter, took prosecutrix at Chikkodi (Karnataka State). They thereafter proceeded to Hidkal dam by a bus. At Hidkal dam, they stayed in one house for 2 nights and during that period, the Appellant committed sexual intercourse with her. The Appellant thereafter, took her to Tamilnadu State. They were travelling by bus and train for about 3 days. The Appellant took her in a house at one village. The said house was of Smt. Anasiya, the sister of Appellant. Smt. Anasiya was residing along with her husband and two daughters. The Appellant and prosecutrix stayed there for 12 to 15 days and during the said period, the Appellant was establishing sexual relations with her under the pretext that, he would marry with her. That, on 29th July, 2013, police visited the said house along with Mr. Uttam Mokashi i.e. the brother of Kiran Mokashi (Org. A-2). Police brought them back at Shivajinagar Police Station, Ichalkaranji on 30th July, 2013. Police seized her clothes by effecting panchnama (Exh.35).

In her cross-examination, the prosecutrix has admitted that, at the material time of incident, talks of her marriage were going on in her

house and the marriage proposal had come from her maternal uncle Iresh. She did not tell the fact of her minor age to her parents. An omission that, she tried to tell the friends of Appellant at Borgaon S.T. stand that, the Appellant has taking her forcibly has been brought on record. The prosecutrix has further admitted that, Apana Bazar at Sambhaji Chowk and Borgaon S.T. Stand are surrounded by thick population.

10 Dr. Vijay Pandurang Koparde, (P.W. No.5) has examined prosecutrix on 30th July, 2013. He has deposed that, he did not notice any external injury on the person of the prosecutrix. Secondary sex characters were found to be well developed on her examination. He opined that, intercourse was done with her. He noticed that, the PV Test was not painful to the prosecutrix. He accordingly made observations in the Medico Legal Certificate (Exh.49).

In his cross-examination, he has admitted that, he was informed age of the prosecutrix as 14 years from the record maintained by the hospital as well as from the appearance of the prosecutrix and information secured from her. He has admitted that, he did not perform ossification test to ascertain the age of prosecutrix. He has admitted that, from the appearance of the prosecutrix, she might have been major also.

11 It is to be noted here that, though from the evidence of P.W. Nos.1, 2 and 5 it can be inferred that, on the date of commission of present offence, the prosecutrix had attained the age of understanding and

discrimination, however it does not absolve the Appellant from the offences charged against him. Though the prosecution has failed to bring on record the date of birth certificate to reinforce its contention that, the prosecutrix was minor on the date of commission of the present offence, the version of prosecutrix and her father that, her date of birth is 4th May, 2000 has gone unchallenged. The Appellant is not successful or rather has failed to bring on record any material even to infer that, on the date of commission of offence, the prosecutrix was more than 18 years of age and was not a minor as per the provisions of POCSO Act.

12 At this stage useful reference can be made to two decisions of the Hon'ble Supreme Court in the case of (i) State of Himachal Pradesh Vs. Shree Kant Shekari, reported in AIR 2004 SC 4404 and (ii) Aman Kumar & Ors. Vs. State of Haryana, reported in AIR 2004 SC 1497. The Hon'ble Supreme Court has held that, the prosecutrix is not an accomplice in the crime. Mere delay in lodging the FIR does not render prosecution version brittle. It is held that, the evidence of prosecutrix stands at higher pedestal than an injured witness and it needs no corroboration.

Thus, it is clear that, the prosecutrix is not accomplice in crime of sexual assault and her testimony stands on higher pedestal than an ordinary witness.

13 Perusal of evidence of prosecutrix would clearly indicate that her testimony is fully reliable and trustworthy. The offence of rape as

contemplated under Section 375 of the IPC has been clearly made out. The Appellant by taking undue advantage of the family background and adolescent age of prosecutrix, by giving her promise of marriage enticed her to leave her house and abducted her from the lawful guardianship of her father. Even if it is presumed that, on the date of commission of the present offence, the prosecutrix had attained the age of understanding and discrimination and she herself joined the company of the Appellant without any demur, technically in the eyes of law an offence under the provisions of POCSO Act is clearly made out and proved by the prosecution against the Appellant.

14 This leads me to deal with the contention of the learned counsel for the Appellant that, though the charge was framed under Section 4 of the POCSO Act, the Appellant has been convicted for an offence under Section 5(l) punishable under Section 6 of the POCSO Act.

The record reveals that, para No.9 of the charge (Exh.8/C) framed by the Trial Court reads as under:-

“9) Ninethly on the abovesaid date, time and place you accused No.1 Suresh Nayadu committed penetrative sexual assault by penetrating your penis into the vagina of a child Anita Bamlingappa Jevur or made her to do so with you and thereby committed an offence punishable U/s. 4 of the Protection of Children from Sexual Offences Act, 2012 and

within the cognizance of Special Court of Sessions.”

The Trial Court has formulated point Nos. 4 and 6 for its determination as under:-

Number	POINTS	FINDINGS
4.	Whether the prosecution proved that, from 04-07-2013 till 29-07-2013 accused no.1 committed rape on the victim girl of minor age and committed penetrative sexual assault upon her?	In the Affirmative
6.	What offence, if any, has been committed by the accused persons?	Accused No.1 is guilty u/sec. 363, 366, 376 IPC & u/sec 5(1), punishable u/sec 6 of POCSO Act.

15 Section 4 (1) of POCSO Act, prescribes punishment for penetrative sexual assault with imprisonment of either description for a term which shall not be less than (ten years) but, which may extend to imprisonment for life and also with fine.

Section 3 of the said Act defines '*penetrative sexual assault*'. Section 5 defines aggravated penetrative sexual assault and Sub-Section (1) mentions that, whoever commits penetrative sexual assault on the child more than once or repeatedly. Section 6 of the POCSO Act prescribes punishment for aggravated penetrative sexual assault with rigorous imprisonment for a term which shall not be less than 20 years, (prior to amendment of 2019, it was 10 years) but which may extend to

imprisonment for life and also with fine or with death.

16 In the present case, the Trial Court while holding the Appellant guilty for an offence committed under Section 5(l) and punishable under Section 6 of POCSO Act, (though not charged) has held that, the Appellant was charged under Section 4 for penetrative sexual assault and was not charged with Section 5(l) punishable under Section 6 of the said Act, however, perusal of the charge shows that, ingredients of Sub-Section (l) of Section 5 have been well founded in it, which were made aware to the Appellant and therefore, no prejudice would be caused if the Appellant is held guilty under Sub-Section (l) of Section 5 punishable under Section 6 of the POCSO Act than under Section 4 of the said Act. This is the only discussion made by the Trial Court in paragraph No. 43 of impugned Judgment while holding the Appellant guilty under Section 6 of the POCSO Act.

17 As noted hereinabove, it is an admitted fact on record that, the Appellant was charged with Section 4 of the POCSO Act. It is the settled position of law that, an accused can be tried for the charges framed against him and not otherwise. Even if a charge is altered or modified, it is necessary and imperative for the concerned Court to make the accused aware/understand it and hear him/her on the said charge and thereafter convict him/her. Convicting an accused for a charge which was not framed and which attracts higher punishment than the one prescribed for an

offence of lesser gravity and for which an opportunity to defend was not granted, would certainly cause irreparable harm and prejudice to the accused in the eyes of law.

18 In the present case, the evidence of prosecutrix is self eloquent and needs no further corroboration. Dr. Vijay Koparde, (P.W. No.5) has corroborated the version of prosecutrix about the sexual assault on her. As noted earlier, an offence as contemplated under Section 375 of the IPC has clearly been made out against the Appellant. As the prosecutrix was a '*child*' within the meaning of Sub-Section (d) of Section 2 of the POCSO Act on the date of commission of the offence, the provisions of the said Act are applicable.

However, as the charge for offence under Section 5(l) punishable under Section 6 of the POCSO Act was not framed and the Appellant was not granted an opportunity to defend the same by the Trial Court, there is no other alternative for this Court than to hold the Appellant guilty for an offence of lesser gravity i.e. under Section 4 of the POCSO Act. This Court accordingly modifies the conviction of the Appellant from Section 6 to Section 4 of the POCSO Act. The Appellant is thus, hereby held guilty for an offence punishable under Section 4 of the POCSO Act.

19 The date of commission of offence in the present case was 4th July, 2013. The prosecutrix was in the company of Appellant from 4th July, 2013 to 29th July, 2013. The words '*ten years*' mentioned in Section 4 and

as noted hereinabove have been substituted for the words '*seven years*' by an Amendment Act of 25 of 2019 which has been brought into effect from 16th August, 2019. Thus, prior to 16th August, 2019, the minimum punishment prescribed under Section 4 of the POCSO Act was seven years of imprisonment of either description.

20 As per the learned counsel for the Appellant, as of today, he has undergone approximately 5 years of actual imprisonment. Perusal of evidence on record would reveal that, all the ingredients of offence under Section 3 punishable under Section 4 of the POCSO Act have been made out. In the absence of charge framed under Section 6 of the POCSO Act, the Trial Court ought to have convicted and sentenced the Appellant under Section 4 of the said Act. As noted in foregoing paragraphs, the Trial Court has committed grave error in convicting the Appellant under Section 6 of the POCSO Act. In view of the above and after taking into consideration over all view of the present matter, this Court is of the considered opinion that, the Appellant deserves to be awarded minimum sentence under Section 4 of the POCSO Act, which was prevailing prior to the amendment of 2019 i.e. seven years of rigorous imprisonment and is accordingly awarded.

21 After taking into consideration aforestated discussion, the Appeal is partly allowed by modifying conviction of the Appellant from Section 6 to Section 4 of the POCSO Act.

Hence the following Order:-

- (a) Paragraph No.8 of the impugned Judgment and Order is hereby set aside and the Appellant is convicted for the offence punishable under Section 4 of the POCSO Act and is sentenced to suffer rigorous imprisonment for seven years.
- (b) Rest of the operative Order of the impugned Order passed by the Trial Court, including the imposition of fine amount and in default sentences prescribed thereon, by its impugned Judgment and Order dated 20th January, 2016 is hereby maintained.
- (c) It is needless to mention that, all the sentences shall run concurrently and the Appellant will be entitled for the benefit of Section 428 of the Cr.P.C..
- (d) Appeal is partly allowed, in the aforesaid terms.

Sanjiv S.
Mashalkar

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(A.S. GADKARI, J.)