

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.865 OF 2023
WITH
INTERIM APPLICATION NO.522 OF 2023

The State of Maharashtra .. Appellant
Versus
Majnuwali Rabiul Sardar .. Respondent

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Mr.S.R.Agarkar, A.P.P. for the State/ Appellant.
Mr.Sandeep Mishra for the Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 22nd AUGUST, 2023

P.C:-

1. Heard the learned A.P.P. Mr.Agarkar for the State in support of Appeal filed under Section 377 of the Code of Criminal Procedure, seeking enhancement of sentence imposed on the Accused, on being convicted by the Special Judge, POCSO Court, vide the Judgment and Order dated 05/08/2022 in Special Case No.72 of 2013.

On the notice being served, the Respondent is represented through learned counsel Mr.Sandeep Mishra.

2. The prosecution charged the Respondent under Sections 370(A)(1)(2) read with Section 34 of the Indian Penal Code

(for short, “**IPC**”) and Sections 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 (for short, “**PITA Act**”) alongwith Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, “**POCSO Act**”) on the basis of the charge-sheet filed by Dahisar Police Station, Mumbai.

The prosecution alleged that the Accused alongwith two other accused persons, who are separately charged, indulged himself in the business of prostitution of minor girl and induced them to earn their livelihood from the said business. On a complaint being filed by an NGO to rescue the minor children, a raid was conducted on the given date with the help of decoy customer and the accused persons were trapped and apprehended.

The prosecution allege that the Respondent alongwith other accused habitually forced the victim girl, aged below 16 years, to indulge into prostitution/flesh trade and earned out of the same.

This resulted in C.R. being registered with the concerned police station, invoking Section 370(A)(1) read with Section 34 of IPC alongwith the provisions of PITA as well as the POCSO Act.

3. On being tried by the Special Judge in POCSO Special Case, the learned Judge recorded a finding of guilt in favour of the Respondent on the basis of the evidence produced before him and arrived at a conclusion that the Accused has committed an offence under Section 370(A)(1)(2) read with Section 34 of IPC alongwith Section 4 and 5 of the PITA Act,

1956 and Section 12 of the POCSO Act, against the minor girl. In the ultimate paragraph of the judgment, the Special Judge recorded as under :-

“22. No doubt, the court should have to take the aggravating as well as mitigating circumstances into consideration while awarding the punishment but it is seen from the record that the accused has committed the offences punishable u/s 370(A)(1)(2) R/W 34 of The Indian Penal Code along with 4 & 5 of the PITA Act, 1956 and 12 of The Protection Of Children From Sexual Offences Act, 2012 which are against the minor girl. No doubt, the accused is married & no one is to look after his family & he has a old aged parents & there is no antecedents against his name but the same can not be the mitigating circumstances as the offences committed by the accused are against the victim minor girl by which the accused is not entitled for the lenient view as contended by the accused & his learned counsel or the benefit of the provisions laid down under The Probation of Offenders Act, of 1958. Therefore, taking into consideration the facts & circumstances of the case, as discussed above, including the evidence on record I am going to impose the following sentences to the accused as provided u/s 370(A)(1)(2) R/W 34 of The I.P.C along with 4 & 5 of the PITA Act, 1956 & 12 of The Protection Of Children From Sexual Offences Act, 2012 which would certainly meet out the ends of justice from both the sides.”

4. In the wake of the aforesaid conclusion being recorded, the operative portion of the judgment record as under :-

“The accused namely Majnuali Rabiul Sardar is hereby convicted u/s 235(2) of The Cr.P.C for the offence punishable u/s 370(1) (2) of The I.P.C & sentence to undergo rigorous imprisonment for 5 (five) years and to pay a fine of Rs.50/- I.D to suffer S.I for 2 days.”

Apart from this, the Accused also stand convicted for the offences punishable under Sections 4 and 5 of the PITA Act and Section 12 of the POCSO Act and is directed to undergo R.I. for five years and two years respectively. He is acquitted for

the offences punishable under Section 4 and 8 of the POCSO Act. All the sentences are directed to run concurrently.

5. The Appeal under Section 377 of Cr.P.C. is filed for enhancement of the said sentence and Mr. Agarkar would submit that what is attracted in the present facts of the case is Section 377(4), since it provides punishment for an offence, which involves trafficking of a minor and upon being found guilty of committing such offence and the minimum punishment prescribed is R.I. of 10 years, which may extend to imprisonment for life and also fine.

Admittedly, sub-section (4) prescribes the punishment for an offence of involving trafficking of minor girl, but the Respondent was not charged under the said provision. He faced a charge under Section 370(A)(1)(2), which prescribes the punishment for exploitation of a trafficked person. The prosecution was expected to be careful, when it filed the charge-sheet and when the charge was framed, it was possible for it to request the learned Judge to alter the charge. However, this was not done and, therefore, the Respondent faced a trial under Section 370(A)(1) (2) and on finding him guilty, the impugned judgment has imposed punishment accordingly.

Now, the prosecution seeks enhancement of the sentence by deriving benefit of sub-section (4) of Section 370, which prescribes the punishment for a term not less than ten years, but which may extend imprisonment for life. I do not think that such a recourse is available to the prosecution, as it chose

to try the Accused/Respondent under Section 370(A)(1) (2) and, therefore, now it cannot pray that the sentence be enhanced, taking into account that the Accused has been found guilty in dragging the minor into prostitution and, hence, the punishment should be enhanced to the one prescribed under sub-section (4).

6. It is a trite position of law that when the Accused is tried for an offence, he should be well aware of the charge, which he has to face and when the prosecution charge him under a particular provision, which he faced and defended, now the prosecution cannot say that he is also guilty under some other provision, with which he was never charged and not tried.

7. The Appeal, being without any merit and substance, is not tenable under Section 377 and, hence, is dismissed.

In view of the dismissal of the Appeal, interim application does not survive and stands disposed off.

(SMT. BHARATI DANGRE, J.)