

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 2745 OF 2022
IN
CRIMINAL APPEAL NO.833 OF 2022

Rodu Bhaga Wagh

.. Applicant

Versus

The State of Maharashtra & Anr.

.. Respondents

...

Mr. Samay Pawar a/w Mr. Ramnik P Pawar for the applicant/appellant.

Mr.Y.M. Nakhwa, APP for the State.

Mr. Abbas Z Mookhtiar, appointed Advocate for respondent no.2.

CORAM: BHARATI DANGRE, J.

DATED : 5th SEPTEMBER, 2023

P.C:-

1 The counsel for the respondent no.2 has invited my attention to the impugned judgment, and in specific the sentence imposed upon the accused, on being found guilty of committing an offence under Sections 4 and 6 of the Protection of Children from Sexual offences Act.

 He would submit that on being convicted under Sections 4 and 6 of the Act, even before the Amending Act, 25 of 2019 was introduced in the statute, under Section 4, it was not permissible to impose a punishment less than 7 years and on being convicted for an offence under Section 7, the Judge had no discretion to impose a punishment lesser than 10 years.

 The counsel is justified in making the submission, but the question is whether the prosecution had made out the case for penetrative sexual assault and aggravated penetrative sexual assault.

2 On the information received from the mother of the victim girl aged 10 years and 8 days, when she had disclosed about an incident, which had occurred on 21/10/2018, CR No. I- 167 of 2018 was registered, which invoked section 376(1), 376(3), 376-AB of the IPC and Section 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act. The statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure and on completion of investigation, the charge-sheet was filed.

3 Charge was framed against the accused for offence punishable under Section 376-1A, 506 of IPC and Section 4 and 6 of the POCSO Act.

 During the course of trial, the Special Judge attempted to determine whether the prosecution has proved that the accused committed sexual intercourse with her and committed an offence under Section 376-1A of IPC. He also proceeded to determine whether the prosecution had proved that the accused committed penetrative sexual assault on the minor and committed an offence under Section 4 r/w Section 3 of the POCSO Act and whether the accused had committed aggravated penetrative sexual assault, which amounted to an offence punishable under Section 6 r/w Section 5 of the POCSO Act.

4 During the course of the trial, the victim girl as well as her mother was examined as PW-1 and PW-2. Her 164 statement was also exhibited. PW-6, cousin sister of the victim girl is a relevant witness examined by the prosecution.

 On appreciation of the evidence, the Special Judge derived the following inference:

“ True it is that in her statement before police, the victim has alleged that by removing her pant, the accused committed penetrative sexual assault on her. This fact also finds place in the FIR lodged by the informant. However, the victim in her evidence has only stated that the accused initially touched her private organ and then touched his private organ to her private organ. Thus, allegation about penetrative sexual assault on the victim girl is totally absent in her oral evidence”.

Referring to the evidence of PW-5, Gynecologist, who had opined that there was no sign of sexual assault and issued the medical certificate accordingly.

The Special Judge therefore, arrived at a conclusion that from, the evidence of the victim and the medical evidence there is scope to deny the factum of penetrative sexual assault but, there is substantial evidence on record indicative of the fact that there was an attempt to commit penetrative sexual assault on the victim as the allegation in the FIR and the 164 statement, as regards penetrative sexual assault are totally missing in the oral evidence and what has surfaced on record is inappropriate touch of her private part with his hand and touching of his private organ to her private organ.

5 On the basis of the evidence placed before the Court, by drawing the presumption under Section 29 of the Act, the Special Judge concluded as under:

“Net result of the foregoing discussion is that prosecution has made out that the accused attempted to rape and/or commit aggravated penetrative sexual assault on her. As such, offence under Section 511 of the Indian Penal Code read with Section 376(1) of the Indian Penal Code is made out. Similarly, offence under Section 18 read with Section 4 read with Section 6 of the Protection of Children from Sexual Offences Act is made out. It is also proved that the accused threatened to kill the victim, if she discloses the

incident to anyone in the family. Thus, offence under Section 506 of the Indian Penal Code is also proved by the prosecution. Hence, before penalizing the accused, he needs to be heard under Section 235(2) of the Code of Criminal Procedure.”

6 When it came to sentencing of the accused for the offences made out against him, the learned Judge referred to Section 42 of the POCSO Act and recorded as under:

“Section 18 of the Protection of Children from Sexual Offences Act provides punishment for attempt to commit an offence and it is imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. Therefore, on account of substantive sentence, the accused will have to be awarded punishment under Section 18 of the Protection of Children from Sexual Offence Act being greater in degree.”

The Special Judge record that the accused is 64 years old whereas the victim was barely 10 and was about to be ravished but fortune was with her side and she was prevented from rape.

On the question of sentence, the accused pleaded that he was ailing and is the only earning member of the family and this prompted the Special Judge to award the sentence by the following order, which read thus:

“ (1) Accused Rodu Bhaga Wagh stands convicted under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 376(1) read with Section 511 of the Indian Penal Code and Section 6 read with Section 5(m) and Section 4 read with Section 3 of the Protection of Children from Sexual Offences Act. However, in view of the provision of Section 42 of the Protection of Children from Sexual Offences Act, accused Rodu Bhaga Wagh is convicted for the offence punishable under Section 18 read with Sections 4 and 6 of the

Protection of Children from Sexual Offences Act and is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.7,000/- (Rupees Seven Thousand Only), in default to suffer simple imprisonment for a period of six months,

(2) In view of clause (1) above, no separate sentence is passed under Section 376(1) read with Section 511 of the Indian Penal Code and Section 3 read with Section 4 and Section 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act against the accused,

(3) Accused Rodu Bhaga Wagh stands convicted under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 506 of the Indian Penal Code and is sentenced to suffer imprisonment for a term of two year and to pay fine of Rs. 3,000/- (Rupees Three Thousand only), in default to suffer further simple imprisonment for a term of one month,”

7 Section 18 of the POCSO Act, prescribe punishment for an attempt to commit an offence and it reads thus:

“18 Punishment for attempt to commit an offence.—Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.”

8 Before the amendment in the POCSO Act by Act 25 of 2019, the punishment prescribed for penetrative sexual assault was for a term which shall not less than 7 years but which may extend to imprisonment for life and as far as Section 6 is concerned the punishment prescribed for aggravated penetrative sexual assault, was of rigorous imprisonment for a term, not less than 10 years but which may extend to imprisonment for life and also liable for fine.

When Section 18, prescribe that an attempt towards commission of the offence shall be punished with an imprisonment of description provided for the offence, for a term which may extend to one-half of the imprisonment for life or as the case may be one-half of the longest term of imprisonment provided for that offence, one fail to understand what promoted the learned Judge to impose sentence of RI for 3 years on being convicted, under Section 4 and 6 of the Act r/w Section 18 since the accused is found guilty of an attempting to commit an offence under Section 4 and 6 for which the maximum punishment prescribed is imprisonment for life but not less than 7 years in case of Section 4 and not less than 10 years in case of Section 6.

The catena of judgments has decided the period of imprisonment to be undergone when an accused is inflicted with the punishment of imprisonment for life, as prescribed in Section 53 of the IPC and recently in the case of *ShivaKumar @ Shiva @ Shivamurthy Vs. State of Karnataka, (2023) SCC Online, SC 345*, their Lordships of the Apex Court while construing the conspectus of 'Life Imprisonment' have held as under:

“13. Hence, we have no manner of doubt that even in a case where capital punishment is not imposed or is not proposed, the Constitutional Courts can always exercise the power of imposing a modified or fixed-term sentence by directing that a life sentence, as contemplated by "secondly" in Section 53 of the IPC, shall be of a fixed period of more than fourteen years, for example, of twenty years, thirty years and so on. The fixed punishment cannot be for a period less than 14 years in view of the mandate of Section 433A of Cr. P.C”

9 It is not open to a Court to impose a punishment lesser than the minimum that is prescribed and the only discretion vest is between the lesser punishment and the maximum punishment. If

Section 18 contemplate imprisonment for life, as a longest punishment, then in no case, the punishment could have been restricted to 3 years of rigorous imprisonment.

10 The prosecution and the Judges presiding over the POCSO cases are expected to be conversant with the provisions of the special enactment, enacted to protect the children from the offence of sexual assault, sexual harassment and pornography and since the enactment has made it imperative to provide establishment of Special Courts for trial of such offences, also contemplate appointment of a Special Public Prosecutor, there is abject failure on their part, to notice the above glaring flaw, committed by Court imposing the punishment, as above.

Neither the Special Public Prosecutor brought it to the notice of the concerned Court, nor is there any recommendation, made for filing of an appeal, being aggrieved by the judgment dated 14/07/2022, which suffer from grave illegality.

11 The State and the Special Public Prosecutor continue to act mute spectators to the flawed implementation of the legislation, which is specifically intended to protect the children from commission of serious offences of sexual assault, which are considered to be heinous in nature and a need was felt for the special statute, as the provisions in the IPC were found to be inadequate to tackle this menace.

In dealing with the special statute which is brought into force with this avowed purpose by the Parliament, not only the Judges who are assigned, the trial thereunder, but even the Special Public Prosecutors, who assist the Court, are expected to be cognizant of the provisions of the Enactment and the question that arises is, in such a case of miscarriage of justice, who is to be blamed?

12 I do not intend to leave this question open and direct the learned APP to file an appropriate affidavit from the Principal Secretary of Law and Judiciary Department, as to what steps should be taken if the Special Public Prosecutor do not notice such gross errors in implementing the provisions of the Act, particularly when they are appointed as Special Prosecutors for effective assistance to the Special Courts, which are expected to do justice to the children, whose protection is a duty cast on all the stakeholders.

The affidavit shall also specifically state as to what it intend to do, once this glaring aspect is brought to its notice.

The Public Prosecutor shall place the necessary material before the Principal Secretary, Law and Judiciary Department, who shall file his affidavit within period of two weeks from today.

13 I am constrained to issue direction for the affidavit to be filed by the Principal Secretary, Law and Judiciary as it can be seen that even the Investigating Agency has not bothered to invoke the correct sections of the POCSO Act and when it filed the charge-sheet, it had invoked Sections 4, 8, 10 and 12 of the POCSO Act, which definitely have different shades of sexual assault and the classification is very pertinent. It is therefore imperative on part of the prosecution agency to ascertain as to which Sections are attracted in the facts placed in the complaint, instead of randomly invoking all the possible provisions, unmindful of the distinction between each of them.

Let the Principal Secretary suggest a mechanism to create awareness about the statute, brought into force a decade ago, particularly at the prosecution level. As far as the judicial level is concerned, upon the affidavit being received from the Principal Secretary, Law and Judiciary, I intend to pass appropriate directions,

which would also fix accountability upon the Judges and expect them to be sensitive, in dealing with POCSO cases.

Let the affidavit be filed within period of two 2 weeks from today.

Re-notify to 3/10/2023.

IA No.2745 of 2022

1 On expressing my disinclination to entertain the request of the applicant contained in the Interim Application No.2745 of 2022, for suspension of sentence and for his release on bail, the learned counsel, on instructions, seek permission to withdraw the application. It is pertinent to note that, at present the applicant is on bail since on the first date of hearing of this application without ascertaining the merits of the matter, this Court extended the temporary bail granted to the accused/the convict by Additional Sessions Judge, Nashik on 3/07/2019 and as such, the relief was extended from time to time, and the application was never heard on its own merits.

2 The learned counsel for the applicant make a specific statement that the applicant shall surrender before the Special Court, (POCSO Judge, Nashik) on or before 13/09/2023.

The application is permitted to be withdrawn, but it is directed to be listed for compliance on 15/09/2023. It is made clear that if the applicant do not surrender, the Investigating Officer shall take appropriate steps to confine him to prison.

(SMT. BHARATI DANGRE, J.)