



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 167 OF 2020

Balaji S/o. Malhari Devkate,
Age 43 years, Occ. Nil.
R/o. Phulenagar, Himayatnagar,
Tq. Himayatnagar, Dist. Nanded.

.. APPELLANT

VERSUS

1. The State of Maharashtra
2. XYZ.

.. RESPONDENTS.

Mr. Santosh K. Bhosale, Advocate for the appellant,
Mr. N.S. Tekale, APP for respondent No.1.
Ms. Naseembanu I. Deshmukh (appointed)

**CORAM : SANDIPKUMAR C. MORE AND
MEHROZ K. PATHAN, JJ.**

**RESERVED ON : 9TH SEPTEMBER, 2025.
PRONOUNCED ON : 13TH OCTOBER, 2025.**

JUDGMENT [PER MEHROZ K. PATHAN, J] :-

1. Present appeal is filed by the appellant, thereby challenging the judgment dated 14.1.2020, passed by Additional Sessions Judge, Bhokar, District Nanded, whereby, appellant has been convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012.

2. The case of the prosecution is that, complainant PW 4 "A" aged 50 years, is the grandmother of the victim and that she was residing

with her husband, two daughters, 3 sons, one daughter in law and two grand-daughters out of which one of the grand-daughters is the victim , aged 8 years.

3. That, on 16.3.2019, at about 5.00 p.m., her two grand-daughters i.e. victim "X" and another grand-daughter were playing in an auto-rickshaw in front of the house. After some time, when she came to the courtyard of the house after cooking, she could not see the granddaughters, who were playing there earlier. The son in law of the complainant and the complainant "A" took search of the victim "X" and another grand-daughter . However, they could not find them. After taking search for some time, when they were returning to their home they could see the victim "X", and another grand-daughter and another minor girl "Y" coming to the house. When she asked the victim and other grand daughter as to where they had been, at that time, victim "X" started crying. There were remains of grass in her hair and on the back. Victim "X" narrated her about the criminal act of the present appellant, whom she referred as "Balumama" . That , another neighbouring girl "Y" had taken victim "X" to the ditch, where Balumama was waiting. While they were going to the ditch, one person was passing near the ditch who asked the appellant (Balumama), as to why he was present there alongwith little girls. Accused told him that he came to answer the nature's call and the girls were following him. When the victim "X" and her sister tried to run away from the spot, at that time, appellant – Balumama caught hold of the victim from her backside, removed her Salwar and committed illegal act of intercourse upon the victim. Balumama inserted his private part into the private part of the victim due to which there was pain. The victim was crying and her sister was shouting to leave the victim. After some time, accused – Balumama left the victim "X" and thereafter the victim and her sister were returning to her house. At that time, the victim found some sticky liquid appearing on

the Salwar, which she referred to as, like “Shembud”. The victim further narrated that she was suffering pain in her private part and was finding it difficult to discharge the urine.

The complainant then lodged the report against the present appellant/accused for committing rape on the minor victim girl “X”.

4. The Police Station Officer registered FIR under Section 376(A) and (B) of IPC and Sections 4 and 6 of the POCSO Act. After completing investigation, the charge sheet was filed and the learned Sessions Judge framed charge. The prosecution in all examined 9 witnesses to bring home the guilt of the accused having committed rape on the minor girl “X” and has also relied upon various documents in support of the prosecution case. The statement of accused under Section 313 was recorded. The defence of the accused was that of total denial and false implication.

5. The learned Sessions Judge, after sifting the evidence led by the prosecution and defence raised by the accused, in his cross examination as well as his statement under Section 313 of Cr.PC. had found that the prosecution has successfully proved the guilt of the present appellant/accused and has thus, convicted him under Section 376(2)(i) and sentenced him to suffer life imprisonment which shall mean the remainder of accused persons natural life and to pay fine of Rs. 5,000/-, in default, to suffer simple imprisonment for six months. The learned Sessions Judge, has further convicted the appellant/accused for the offence punishable under Section 4 and 6 of the POCSO Act and also sentenced him to suffer Life imprisonment and to pay fine of Rs. 5,000/-, in default, to suffer simple imprisonment for 3 months. The sentences were directed to run concurrently .

6. Aggrieved thereby, the appellant is before this court, putting

challenge to the said judgment and order on various grounds.

7. We have gone through the entire evidence led by the prosecution and defence raised by the appellant/accused. We have also scrutinized the record and proceedings with the assistance of the learned counsel for the appellant and the learned APP .

8. It is found that Victim "X" PW-1 is the prime witness aged 8 years at the time of incident, who has narrated the entire incident as per her statement under Section 161 of Cr.PC. , wherein, she was ravaged by the present appellant, who was the neighboring resident. The learned Sessions Judge has verified the understanding of the victim by putting her relevant questions and importance of oath. The victim PW-1 had further stated that she and her sister were playing in the auto owned by her father. The neighbouring minor girl "Y" had come on the spot and asked her to come near the ditch. The victim thereafter stated that when she started running , at that time, "Y" had caught hold of her and appellant Balu referred as Balumama was present in the ditch and she refused to go in the ditch. The girl "Y" had thereafter asked the appellant to give her money as she had brought the victim "X" to him, upon which the appellant asked her to wait. The victim "X" was made to sleep on the earth by appellant and thereafter, her Salwar was removed and after removing his own underwear, Balu is alleged to have slept on her for some time doing bodily movement of up and down. After some time, appellant Balu had woke up and asked victim to wear the Salwar and gave Rs. 10/- note , she threw the note there and when she was coming back to house, she found some sticky substance like "Shembud" on her salwar and grass garbage in her head when the grandmother PW-2 asked her about the whereabouts she informed her about the incident that the appellant committed rape on her. The maternal uncle of the victim had come to their home and thereafter complaint was lodged. The cross

examination of the victim 'X' does not prove out any omissions or contradiction from her previous statements .

9. The another witness, relied upon by the prosecution is PW-6 ,grandmother of the victim, who has narrated the entire incident as stated to her by the victim "X" on the date of incident. She had corroborated the version of minor victim PW-1 and had also corroborated immediate lodging of the report by her before the police station, on the date of incident. The testimony of the aforesaid prime witnesses have not been shaken in the cross examination. There is nothing to disbelieve her testimony, which appears to be natural .

10. The prosecution has further relied upon the testimony of PW-7 - Bashir Khan Ahmed Khan Pathan, who happened to be a chance witness, and has last seen the appellant and the minor victim girl near the ditch, where the villagers used to normally visit, for answering nature's call. The said fact is also corroborated in the version of PW-1 victim, wherein, she had clearly stated about the presence of one uncle, who had asked the accused as to why he is taking the girls. Said PW-7 Bashir Khan had also scolded the little girls including the victim to go to their houses, as it was dark, about 6.30 PM. The testimony of aforesaid witnesses also appears to be cogent and reliable as there is nothing in his cross examination to disbelieve the said witness. Nor there was any enmity of the appellant with PW-7 Bashir Khan brought on record. Therefore, the learned Sessions Judge has rightly believed the testimony of PW-7 as a natural witness, who was present on the spot of incident, where the appellant has committed rape upon the minor victim girl "X".

11. Another important circumstance relied upon by the prosecution to support their case is the medical examination report Exh.30 and the testimony of PW-8 Dr. Sunil Madhewad. The testimony of

Dr. Sunil Madhewad - PW-8, shows that the victim was brought by the police for medical examination. He had obtained consent of the mother for medical examination on 17.3.2019. The history narrated by the victim was noted in the medical examination papers and the victim was thereafter examined. Important notings made by said Dr. Madhewad, PW-8, pertaining to Column of Hymen in the Medical Examination Report Exh.30 is as under ;

- (I) evidence of fresh hymenal tears present at 3.00 O'Clock, 6.00 O'Clock, 7.00 O'Clock .
- (ii)Edges - inflamed
- (iii) Bleeding - Absent
- (iv)Oedema -present

12. The medical examination provisional report which is at Exh.30, would clearly show that the same was conducted on the next date of incident 17.3.2019 at 8.30 a.m. and the incident is dated 16.3.2019 The Doctor PW 08 has stated about the evidence of fresh hymnal tears present at 3.00 O'Clock, 6.00 O'Clock, 7.00 O'Clock with edges were inflamed with slight oedema present clearly corroborates the allegation of rape as reported by the victim. Thus the ocular testimony of PW-8 is also supported by the medical evidence in the form of medical report ex.30. There is nothing in the cross examination of the witness PW-8, which would shatter his testimony about the findings in the report at Exh.30.

13. The forensic evidence relied upon by the prosecution is the Chemical Analyzer (CA) report Ex.50, which shows that kurta Exh. 4 of victim was having two semen stains, each of about 1 cm diameter on the back portion and the semen detected at Exh.4 is human. The said finding of the forensic expert also corroborates the prosecution case and testimony of the victim wherein, she has narrated the incident of rape

committed by the present appellant.

14. The PW4 Dr. Devidas Gaikwad had examined the accused about his fitness to commit sexual inter-course and has given positive report. PW 5 Gangadhar Komwad was examined by the prosecution to establish the date of birth from the school admission register. The date of birth of the victim as appearing from the school extract Exh.21 is recorded as 24.5.2010. Thus, the learned trial court has rightly considered the age of the victim as 9 years and was a child under the definition of POCSO Act. The trial court has rightly relied upon the judgment of Jarnail Singh vs. State of Haryana, 2013 All MR (Cri.) 2946, in coming to the conclusion that the age of the victim can be proved through the School Admission register, which is one of the 3 documents mentioned in the said judgment which can be relied upon to prove the date of birth of the victims under the POCSO Act.

15. Thus, having found that the prosecution has proved the commission of rape by the appellant on the minor victim girl who was a child as per the definition under Section 2(d) of the POCSO Act, corroborated by the medical and CA report, the learned trial court has rightly considered the presumptions under Sections 29 and 30 of the POCSO Act, which provides that where a person is being prosecuted for committing offence under the POCSO Act, and where the victim is a child below age of 16 years, the Special Court shall presume that such person committed offence unless contrary is proved by the accused. The learned sessions Judge has rightly found that age of the victim was nine years as proved from document Ex.22 and that the independent witness Bashirkhan and grandmother of the victim had also supported and corroborated the version of the victim. The medical evidence also supports the prosecution case. Therefore, the trial court has rightly found the appellant guilty of commission of offence under Section 376(2)

(i) of the IPC and Sections 4 and 6 of the POCSO Act. We therefore do not find any ground for interfering with the findings of the learned Trial Court.

16. It is pertinent to point out here that the charge was framed under Section 376(2)(i) of IPC and the date of commission of offence is 16.3.2019. The perusal of Section 376(2)(i) shows that the said provision was deleted from the Indian Penal Code on 21.7.2018 by way of amendment to IPC vide Act No. 22 of 2018. The learned counsel for the appellant therefore submits that the appellant was convicted of offence under Section 376(2)(i) even though the same was deleted from Indian Penal code . The charge was therefore, erroneous and that the appellant was wrongly convicted under Section 376(2)(i). The conviction of the appellant under Section 376(2)(i), may therefore be quashed and set aside .

17. It is further submission of the appellant that as per Section 42 of the POCSO Act, 2012, any act or omission constitutes offence under the POCSO Act as also other offences under the IPC mentioned in section 42, then, either of the sentence under the POCSO Act or the IPC, whichever is greater in degree is to be imposed. The learned Trial court has committed an error in sentencing the appellant of both the sentences under 376(2)(i) of IPC as well as sections 4 and 6 of the POCSO Act 2012 and directed them to run concurrently .

18. It is thus submitted by the appellant that, the learned Sessions Judge, without applying its mind the the fact that Section 376(2)(i) of IPC had already been deleted, for which charge No.1 was framed, had awarded punishment of life which shall mean remainder of life. The learned Judge has also failed to take into consideration the fact that the appellant has been punished with life imprisonment under

Section 6 of the POCSO Act again without even discussing the mitigating or aggravating circumstances., though the offence was earlier made punishable with minimum punishment of 10 years rigorous punishment which may extend to imprisonment for life and also be liable to fine .

19. The learned APP Shri Tekale submits that the Honourable Supreme Court while deciding the case in the reported judgment in the matter of Dalvir Singh Vs. State of U.P. 2004(5)SCC Pg 334 considered Sections 222 and 464 of Cr.PC. The observations pertaining to Section 464 CrPC are as under :-

“ Chapter XXXV deals with irregular proceedings and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this section provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent court unless the appellate or revisional court comes to the conclusion that a failure of justice has in fact been occasioned thereby.”

20. It is submitted by learned APP that though the charge was only under Section 376(2)(i) an offence under Section 376(3) which was in existence at the time of the commission of crime was clearly made out from the evidence led by the prosecution . Thus, in view of the judgment in the matter of Dalvir Singh (Supra) , even though the charge is not framed under Section 376(3) conviction of the appellant under Section 376(2)(i) cannot be set aside only on the ground of error/omission or irregularity in view of Section 464 of Cr.PC. and the appellant can be

convicted under section 376(3) which provided for the identical quantum of imprisonment as is imposed by the learned Trial court .

21. We have considered the submissions made by the learned counsel for the appellant and the learned APP Shri Tekale for the State on the point of the sentence awarded by the learned Trial Court while pronouncing the appellant guilty of committing rape and aggravated sexual assault on the victim below 12 years . After going through the relevant provisions i.e. Section 376(2)(i) of IPC and Section 5 and 6 of the POCSO Act 2012 as it was then was on the date of commission of crime i.e.16.3.2019 , it is found that there is an error committed by the learned Trial Court in framing the charge as well as sentencing the appellant .

22. The charge under Section 376(2)(i) of IPC ought not to have been framed in the first place by the learned Sessions Judge. However, though Section 376(2)(i) was deleted by the Act No. 22 of 2018, a new clause in the form of Section 376(3) was added by the legislature vide the same Act no 22 of 2018 w.e.f. 21.4.2018 which is identical with with the earlier deleted section except for the minimum sentence of 20 years Rigorous imprisonment .

23. It would be apposite to refer to the Landmark Constitution Bench Judgment of the Hon'ble Supreme Court in the case of ***William Slaney Vs State of Madhya Pradesh AIR 1956 S.C. 116*** wherein it is held as under :-

“Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full

and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere consequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.”

24. Reference can also be had to the three Judge Bench Judgment of the Apex Court in ***Dalbir Singh Vs The State of U.P 2004 (5) SCC 334.***

“Therefore, in view of Section 464 Cr.PC., it is possible for the appellate or recessional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.”

25. Perusal of the aforesaid judgments would show that even though the charge under Section 376(3) IPC was not framed and there is an error in framing charge under Section 376(2)(i) of IPC, which was not in existence at the time of commission of offence, nor at the time of framing of charge, however, it appears from record that the understanding of the nature of offence was given to the accused for which he was tried and the case against him was fully explained to him. The provision of Section 376(3) IPC is an identical offence except that

the minimum sentence provided is 20 years of rigorous imprisonment .

26. The charge under Section 376(2)(i) of IPC ought not to have been framed in the first place by the learned Sessions Judge. However, though Section 376(2)(i) was deleted by the Act No. 22 of 2018, a new clause in the form of Section 376(3) was added by the legislature vide the same Act no 22 of 2018 w.e.f. 21.4.2018 which is identical with with the earlier deleted section except for the minimum sentence of 20 years Rigorous imprisonment. The evidence led by the prosecution clearly makes out an offence as against the appellant under Section 376(3) of IPC, which provides as under :-

“376(3)Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine:Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:Provided further that any fine imposed under this sub-section shall be paid to the victim”.

27. In view of the provisions of Section 464 of IPC, no finding, sentence or order of a court of competent jurisdiction shall be deemed to be invalid, merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any mis-joinder of charges only in the opinion of the Court of appeal, confirmation or revision , failure of justice has in fact been occasioned thereby.

28. After having gone through the charge framed by the learned Sessions Judge, and the evidence led by the prosecution and the provisions of Section 376(2)(i) which is deleted and provision of Section 376(3) which is newly added on the same date, we are of the considered

opinion that there is hardly any failure of justice and therefore, the finding and sentence rendered by the Sessions Judge cannot be deemed to be invalid and hence is not liable to be quashed and set aside. We are, therefore, of the opinion that the conviction of the appellant will have, to be converted from the one under Section 376(2)(i) of IPC to the one under Section 376(3) of IPC. We are, therefore, of the opinion that the conviction of the appellant will have to be converted from the one under Section 376(2)(i) of IPC to the one under Section 376(3) of IPC.

29. Another factor involved in the present case is the punishment imposed upon, by the learned Sessions Judge, simultaneously under Section 6 of the POCSO Act, wherein, the appellant was imposed with punishment of life imprisonment by the learned Sessions Judge ignoring the provisions of Section 42 of the POCSO Act. The perusal of Section 42 of the POCSO Act would show that if the act constitutes an offence punishable under the POCSO Act and also under the concerned Sections of IPC, then notwithstanding anything contained in any Act for the time being in force, the offender found guilty shall be liable to be punished under the POCSO Act or under Indian Penal Code as provides for punishment which is greater in degree.

30. Perusal of the impugned judgment shows that the learned Sessions Judge has imposed punishment not only under Section 376(2)(i) but also under Section 6 of the POCSO Act. Moreover, the substantive sentences are also directed to run concurrently by the special court.

31. Since the provision of Section 42 of the POCSO Act, provides for punishment which is greater in degree shall be imposed, we find that the provision of Section 376(3) of IPC provides for greater punishment, inasmuch as, the same provides for imprisonment for life which shall be remainder of that persons natural life, but also provides for a minimum

sentence of 20 years Rigorous imprisonment. On the other hand, provision of Section 6 of the POCSO Act though provides for identical punishment of life imprisonment which shall mean remainder of the life of person, or death and the minimum sentence to be that of 20 years, however, it is pertinent to note that the said punishment of minimum 20 years and maximum for remainder of life or death was only inserted in the statute book by way of amendment to the POCSO Act, 2012 vide Act No. 25 of 2019 w.e.f. 16.8.2019. The punishment of aggravated penetrative sexual assault was liable for punishment on the date of incident i.e. 16/03/2019 only with minimum sentence of 10 years and extended upto maximum sentence of imprisonment of life without there being any clause for life which shall mean remainder of natural life of that person. The incident which has taken place on 16.3.2019 is prior to the amendment to the POCSO Act vide Act No. 25 of 2019 w.e.f. 16.3.2019. In view of Article 20(1) of the Constitution of India, the appellant cannot be punished for an offence much higher in degree than the offence which was on the date of commission of offence. Thus, considering the entire provisions involved in the present case, we are of the considered opinion that appellant can be sentenced either under Section 376(3) of IPC or under Section 6 of the POCSO Act, as on the date of commission of offence which ever is greater in degree. We therefore find punishment u/s 376 (3) IPC as on the date of commission of the offence i.e. on 16.03.2019 provided punishment greater in degree than Section 6 of POCSO Act.

32. The learned advocate for the appellant argued on the quantum of punishment contending that the maximum punishment is imposed upon by the learned Sessions Judge, without even considering the minimum punishment provided by the said provision. The learned advocate for the petitioner submits that the appellant is now aged 50 years and if he is required to undergo imprisonment for life which shall

mean remainder of his natural life, there would be no chance of the appellant coming out of jail and if the life imprisonment is converted to 20 years of R.I., it can be said to be adequate punishment commensurate with the offence committed by the accused as the section also provides for minimum punishment in the case of aggravated sexual assault. It is further submitted by learned advocate for the appellant that the appellant is a married man and has a family to look after and would never be in a position to come out of jail if remainder of life punishment is imposed. It is contended that the trial court has failed to take into consideration the mitigating circumstances and then pronounced the punishment. However, in the appeal, learned advocate for the appellant has advanced alternate arguments on the point of sentence. He would submit that if this court is not inclined to interfere with the conviction of the appellant, then atleast the appeal could be considered for reduction in the sentence, looking to the advanced aged of the appellant.

33. We have considered the arguments on quantum of the punishment . The appellant was aged 43 years at the time of commission of offence and is presently aged around 50 years and if the appellant is imposed with minimum sentence of 20 years from the date of offence even then he would be released only after completing 63 years of age . The Honble Supreme court in the judgment delivered ***Pintu Thakur @ Ravi etc. vs. State of Chhattisgarh (arising out of SLP Cri. Nos. 16689-16690/2024)***, reported in MANU/SC/0804/2025 was pleased to observe as under : -

8. However, the minimum sentence under Section 6 of the POCSO Act is twenty years. Bearing in mind the fact that the appellants herein were in their early twenties when the incident took place and the fact that now they have completed only five years of incarceration and even for completion of the minimum sentence it would mean another fifteen years, we find that the appellants are now in their mid-twenties and even if the minimum sentence is to be completed they would be in their early forties.

9. We find that the interest of justice would be served in the instant case, if we reduce the sentence imposed on them from imprisonment for life which shall mean imprisonment for the remainder of natural life to twenty years.”

34. We have therefore, considered the advanced age of the appellant at the time of commission of offence i.e. 43 years. As of now, the appellant has already put in 6 years of imprisonment and another 14 years of imprisonment means, the appellant could not be released till the age of 63 of years, if minimum sentence of 20 years RI is imposed.

35. We, therefore, find that it would be appropriate in the interest of justice that the sentence of the appellant shall be reduced from imprisonment of life which shall mean remainder of natural life of the appellant, to rigorous imprisonment for 20 years, which is the minimum sentence provided under Section 376(3) of IPC. As a result thereof, we partly allow the appeal filed by the appellant, by reducing the sentence from imprisonment for life which shall mean remainder of natural life of appellant to rigorous imprisonment for 20 years.

36. The appeal is partly allowed in aforesaid terms. Fees of the counsel appointed to represent respondent No.2 be quantified as per Rules.

[MEHROZ K. PATHAN]
JUDGE

[SANDIPKUMAR C. MORE]
JUDGE

grt/-