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(2020) 11 BOM CK 0038

In the Bombay High Court

Case No : Appeal No. 865 0f 2017

Suresh Angloswami Naidu — APPELLANT

Vs

State Of Maharashtra — RESPONDENT

Date of Decision : 25-11-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 228(A), 294, 363, 366, 366(A), 375, 376
Protection Of Children From Sexual Offences Act, 2012 — Section 2(d), 3, 4, 4(1), 5, 5(l), 6, 33(7), 42
Code Of Criminal Procedure, 1973 — Section 164, 428

Citation : (2020) 11 BOM CK 0038

Hon'ble Judges : A. S. Gadkari, J

Bench : Single Bench

Advocate : Abhay Kumar, S.S. Hulke

Final Decision : Allowed

Judgement

,,

1. 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, â??the IPCâ?)",,

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, â??the POCSO Actâ?) and is sentenced to suffer",,

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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, â?? Org. A-2â?) 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)",,

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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, â??Cr.P.C.â??) 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",,

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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. Archna 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

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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",,

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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 2Â½",,

years. He admitted that, at the relevant time, the settlement of marriage of prosecutrix was going on with one Mr. Hiresh. He has admitted that, on",,

the date of lodgment of missing report i.e. on 6th July, 2013, Mr. Hiresh 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",,

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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",,

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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.",,

Number,POINTS,FINDINGS

4.,"Whether the prosecu(cid:25)on proved that, from

04-07-2013 (cid:25)ll 29- 07-2013 accused no.1

commi(cid:41)ed rape on the vic(cid:25)m girl of minor

age and commi(cid:41)ed penetra(cid:25)ve sexual

assault upon her?",In the Affirmative

6.,"What offence, if any, has been commi(cid:41)ed by

the accused persons?","Accused No.1 is guilty u/sec. 363, 366, 376 IPC &

u/sec 5(l), punishable u/sec 6 of POCSO Act.

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",,

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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.",,

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