IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 419 OF 2019.

APPELLANT : Pradip @ Golu s/o Suresh Dandge, Aged about 20 years, Occupation – Labour, resident of Shiv Sena Vasahat, Old City, Akola, District Akola.

VERSUS

RESPONDENT : The State of Maharashtra, through Police Station Officer, Police Station Old City Akola, District Akola.

Shri R.M. Daga, Advocate for the Appellant.
Shri H.D. Dubey, A.P.P. for the Respondent.

CORAM : VINAY JOSHI AND
MRS.VRUSHALI V. JOSHI, JJ.

CLOSED FOR JUDGMENT ON : 16.11.2022.
JUDGMENT PRONOUNCED ON : 02.12.2022.

JUDGMENT : (PER VINAY JOSHI, J)

Challenge in this appeal is to the judgment and order of conviction dated 21.02.2019 passed by the Special Judge,

Akola in Sessions Case No.173/2013, by which the appellant/ accused was held guilty for the offence punishable under Sections 376 [2][i] of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). By virtue of Section 42 of the POCSO Act, the trial Court has sentenced the appellant/accused for the offence punishable under Section 376[2][i] of the Code to suffer imprisonment for life, which shall mean imprisonment for the remainder of his natural life along with fine of Rs.25,000/- with stipulation of default.

2. At the inception, we may note that the learned Counsel for the appellant/accused has fairly conceded that the accused has no case on merits. He has advanced submission only to the extent of proportionality of punishment. He would submit that though the offence was committed in the year 2013, the trial Court has sentenced the accused in accordance with the amended provisions of the Indian Penal Code and POCSO Act. Apart from above, he submits that considering the young age and family background of the accused, the sentence imposed by the trial Court is too harsh and disproportionate.

3. The prosecution case as unfolded before the trial Court is that the minor victim aged 7 years, was daughter of the informant. On the date of occurrence i.e. 24.09.2013, the informant, a labourer as usual went for her work. Her husband was away for the work, whilst her two other daughters had been to the school in morning hours. Around 11 hours, the informant returned to her house, however, in the way her sister [P.W.6 - Dnyaneshwari] met and told that something untoward has happened about the minor victim. She informed that the victim is crying and her nicker is full of blood.

4. The informant rushed to her house and enquired the things with the victim. She started to cry and disclosed that neighbouring person namely Golu Suresh Dandge [accused] called her while she was playing. The accused asked her to bring some articles from nearby shop. The victim bought the things and went to the house of the accused to deliver the same. The accused made her to stand on a chair, forcibly removed her nicker, inserted his penis into her vagina. The victim started

bleeding, as well as there was paining at her private part. The accused also told her not to disclose the things to anybody.

5. After realizing the things, the informant and victim went to the police station, who in turn sent the victim for medical examination. In the late night, the informant – mother lodged report regarding the incident. The police registered Crime for the offence punishable under Sections 376[2][i] of the Code and Section 3 read with Sections 4, and 5 [m] read with Section 6 of the POCSO Act. Panchnama of the scene of offence was drawn. Blood stained clothes of the victim were seized, medical examination report was procured. The accused was arrested and his undergarments were seized. Necessary samples were collected and sent for medical examination. After completing the formalities of investigation, charge sheet came to be filed.

6. On denial of the charge by the accused, the prosecution endeavoured in to examining as many as 7 witnesses to establish the guilt with requisite standard of proof. The prosecution also relied on certain documents. On appreciating the oral and documentary evidence, the trial Court held that the

prosecution has successfully proved the leveled charges and passed the aforementioned sentence.

7. Though the learned Counsel for the appellant/ accused conceded that there is sufficient evidence, however, we deem it necessary to re-examine the entire material to find out whether the conviction is justified. Though the prosecution has examined as many as 7 witnesses, the entire thrust of the prosecution is on the evidence of the informant [P.W.1], victim girl [P.W.2] and Dnyaneshwari [P.W.6]. Besides that the prosecution has examined headmaster of the School to prove the age of the victim, panch on spot panchnama, medical officer and investigating officer.

8. We prefer to directly deal with the evidence of victim which assumes significance. While recording evidence of the minor victim, aged 7 years, the learned trial Court has taken necessary precautions contemplated under Section 33 of the POCSO Act. It is the evidence of victim that on the date of occurrence, around 10 a.m. she was playing near her house. The

accused who was of his acquaintance gave her Rs.5/- and asked to bring oil pouch. She brought the same and went to give to the accused. In turn the accused gave her Rs.3/- for chocolate. Accused made her to stand on the chair and removed her nicker. The victim stated that the accused removed his pant and inserted his penis into her vagina. It started paining and blood was oozing from her vagina. She questioned the accused as to why he is doing so, on which the later said not to disclose the things to anybody. She stated that within short time, she met her maternal aunt Dnyaneshwari, to whom she pointed towards her vaginal portion and told about the paining. The minor victim is cross examined at length, but, besides denial there is nothing on record.

9. The prosecution has examined P.W. 1 – informant, whose evidence also carries importance. She deposed that when she returned from work, P.W.6- Dnyaneshwari told her that her daughter was crying. The informant enquired with the victim to which she disclosed the act of the accused, as narrated above. The informant saw blood oozing from vagina of victim, therefore

took her to the police station and then the victim was examined by the medical officer.

10. Contextually we have gone through the evidence of P.W.6 Dnyaneshwari, who met the victim soon after the occurrence. It is her evidence that when she saw the victim crying, she enquired the things. It is her evidence that the victim by touching her vaginal portion started to cry. She informed the things to her sister i.e. informant, and then both of them enquired the victim on which the victim repeated the story.

11. Since it is a case of sexual assault on a minor of tender age, medical evidence bears relevance. The prosecution has examined P.W.5- Dr.Rujuta Mate, who was attached to the medical hospital at the relevant time. It is her evidence, that on the date of occurrence at the instance of police, she has examined the victim, who stated history about sexual assault by neighbouring person. Medical officer opined that hymen was torn and inflamed. Oedema was present. Bleeding was present in victims vagina and thighs. Nicker of victim was stained with blood, and accordingly she has issued medical certificate [Exh.43]. We have

also gone through the medical certificate, which bears reference as per the version of the medical officer.

12. The prosecution has examined P.W.6- Raju, who was headmaster of the Municipal School. He has produced birth certificate [Exh.33] and abstract of admission register [Exh.34], showing victim's date of birth as 23.02.2006. His examined remained unshattered during cross examination. Besides that, there is no reason to discard his testimony, which is supported by public document. Therefore, it is evident that the victim was 7 years of age at the time of occurrence, meaning thereby she was a "child" within the meaning of Section 2[d] of the POCSO Act.

13. The prosecution has also examined panch witness, in whose presence clothes of the victim as well as of the accused were seized. Chemical Analyzer's report has been produced. Blood of victim was reported to be of group "B". Chemical Analyzers report indicates that the blood of "B" group was found on the nicker of the victim as well as on the undergarment of the accused. Certainly finding of blood group of victim on the

undergarments of the accused strongly connects him with the crime.

14. Having regard to the above evidence, there is no scintilla of doubt that the accused has sexually assaulted the minor vulnerable child. Though a faint attempt was made to show old rivalry, however, the said facile defence is not acceptable in the context of trustworthy and consistent evidence. Therefore, on re-appreciation of entire material, we hold that the prosecution has duly proved the guilt of the accused. The trial Court has rightly recorded finding of guilt, which calls for no interference.

15. This takes us to the another chapter which relates to the proportionality of sentence. The trial Court though held appellant guilty of the offence punishable under Sections 4 and 6 of the POCSO Act, and Section 376[2][i] of the Code, however, by virtue of Section 42 of the POCSO Act, has imposed the sentence under Section 376[2][i] of the Indian Penal Code being the punishment greater in degree. Accordingly the accused is sentenced to suffer imprisonment for life, which shall mean

imprisonment for the remainder of his natural life, along with fine.

16. The learned Counsel for the appellant/accused would submit that the alleged incident took place on 24.09.2013 i.e. prior to the amendment of Sections 4 and 6 of the POCSO Act, and Section 376 of the Code. There can be no dispute that the accused is liable for punishment which is prescribed by law and in force at the time of commission of the offence. Sections 4 and 6 of the POCSO Act suffered an amendment w.e.f. 16.08.2019, meaning thereby much after the incident. Therefore, the punishment which was in the statute book prior to said amendment, is relevant. Punishment prescribed for Section 4 which was existing on the date of commission of offence, was of imprisonment of either description for a term which shall not be less than 7 years, but, which may extend to imprisonment for life along with fine. Likewise, prevailing Section 6 of the POSCO Act has prescribed punishment of imprisonment of either description for a term which shall not be less than 10 years, but, which may extend to the imprisonment for life along with fine. Accordingly,

the punishment for Section 6 was greater in degree at the relevant time which shall not be less than 10 years, but, may extend to imprisonment for life.

17. So far as Section 376[2][i] of the Code is concerned, Clause [i] has been omitted w.e.f. 21.04.2018, since a new Section i.e. Section 376 DB has been introduced providing punishment for rape on women under 12 years of age. Since the mandate of Section 376 DB came into force from 21.04.2018, the same is not relevant. Since Section 376[2][i] was existing at the time of commission of offence, one has to see the then prevailing punishment prescribed in law for said offence. Category [i] to Section 376[2] provides for the punishment of rigorous imprisonment for a term which shall not be less than 10 years, but, which may extent to imprisonment for life, which shall mean imprisonment for remainder of that persons natural life.

18. Thus the punishment of imprisonment for life, which would shall mean imprisonment for the remainder of that persons natural life, imposed by the trial Court was well within the statute books at the relevant time. Therefore, the submission that the

trial Court has imposed a punishment which was not prescribed at the time of commission of offence, is untenable. Since the punishment prescribed for Section 376[2][i] of the Code was greater in degree, it has been imposed by the trial Court.

19. Apart from that, the learned Counsel appearing for the appellant/accused has submitted that the punishment imposed by the trial Court is quite harsh and disproportionate. He would submit that while imposing the maximum punishment prescribed by law, the trial Court has not assigned adequate reasons to justify the necessity. He took us through paragraph nos. 82 to 84 of the judgment relating to deliberation on the point of sentence. No doubt paragraph nos.82 and 83 speaks about the seriousness of the offence of sexual abuse of a child. In paragraph no.84, the learned trial Court has stated that the accused has committed a heinous crime with 7 years 7 months old child, therefore, he does not deserve for leniency, as well as, if leniency is shown it will pass a negative message in the society.

20. The learned Counsel for the appellant would submit that while considering the proportionality of the sentence, the

Court shall equally weigh the side of accused, including variety of related factors. He has pointed to the submissions made by the accused before the trial Court that the accused is the only bread earner of the family. He has no father, but, has a widowed sister who along with her minor son, are dependent on him. Besides that the learned Counsel for the appellant has invited our attention to the charge sheet to state that the accused was a young boy of 20 years of age at the relevant time. It is submitted that the accused is not a hardened criminal, nor there are bad antecedents. He urged that the punishment of imprisonment of life that too till the remainder of his natural life, is quite harsh. It is submitted that if till the end of life the accused is kept behind bars, then his dependents would also be sufferer. It is submitted that opportunity of correction be given to the accused.

21. The learned Counsel for the appellant has relied on the decision of the Supreme Court in case of **Manoj Mishra @ Chhotkau .vrs. State of Uttar Pradesh – [2021] 10 SCC 763**, to contend that imprisonment of 7 years for the offence of rape punishable under Section 376 of the Code, is held to be a

sufficient deterrence. He has also invited our attention to the observations made by the Supreme Court in case of **Mohd. Firoz .vrs. State of Madhya Pradesh – [2022] 7 SCC 443**, wherein the punishment for the offence of murder and rape has been converted into imprisonment for a period of 20 years, instead of imprisonment for remainder of natural life. Particularly, he has invited our attention to paragraph no.61 of the judgment which reads as under :

> "*61. One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under section 376A, IPC. The conviction and sentence recorded by the courts below for the other offences under IPC and POCSO Act are*

affirmed. It is needless to say that all the punishments imposed shall run concurrently."

22. The entire endeavour of the learned counsel for the appellant was to convince that the maximum punishment prescribed in law may not always be necessary as a deterrence, but, the position of accused, his age, dependency and surrounding circumstances needs consideration.

23. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles : the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of

proportionality, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict.

24. Since the punishment prescribed for the offence punishable under Section 376[2][i] of the Indian Penal Code is greater in degree than the punishment prescribed for the offence punishable under Sections 4 and 10 of the POCSO Act, the accused is to be sentenced for the offence punishable under Section 376[2][i] of the Indian Penal Code. As observed above, at the relevant time the offence under Section 376[2][i] was punishable with rigorous imprisonment for a term which shall not be less than 10 years, but, which may extent to imprisonment for life, which shall mean imprisonment for remainder of that persons natural life and shall also be liable to fine. The Section has put a minimum rider of imprisonment for 10 years, which may extend further. The Legislature purposefully left the judicial discretion to the Court to award punishment with a rider of minimum sentence. The purpose behind leaving discretion with the Court is to mould the sentence in accordance with the

prevailing circumstances befitting to the crime and all other relevant factors.

25. Certainly always the imposition of appropriate sentence is an issue of delicacy. The Court has to consider variety of circumstances namely - manner of crime, atrocities committed by the accused, victims condition, age of the accused and other related factors. There is no denial that the accused was a young boy of 20 years shouldering responsibility of his widowed sister and her son. Moreover, he has no father. There can be no dispute that the accused has committed an offence relating to innocent child who has not even seen the world. If he has been incarcerated for considerable period, that would serve the purpose. The imprisonment for a term of 14 years would be adequate, to teach him a lesson. It is not a case that the accused has already undergone a major portion of sentence so that he would be freed in the proximity. It reveals from the record that the accused was in jail from 30.09.2013 to 30.03.2014, and then from the date of judgment i.e. 21.02.2019, till date he is in jail. Approximately he is in jail for the period of near about 4 years 2

months. Imposition of 14 years terms would require him to still remain behind bars for further considerable period. Therefore, we are of the considered view to maintain the conviction, but, to reduce the sentence to undergo rigorous imprisonment for 14 years with fine along with default clause.

26. In view of above, Criminal Appeal is partly allowed and disposed of. The sentence imposed by the Special Court, Akola in Sessions Case No.173/2013 vide judgment and order dated 21.02.2019 is reduced and the appellant/accused is directed to suffer rigorous imprisonment for a term of 14 years with fine and default clause, as ordered by the trial Court. The appellant/accused is entitled for set off under Section 428 of the Code.

JUDGE **JUDGE**