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IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 03RD DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR. JUSTICE V. SRISHANANDA

CRIMINAL APPEAL No.200060/2016

BETWEEN:

THE STATE OF KARNATAKA
THROUGH BHALKI TOWN
POLICE STATION,
BIDAR DISTRICT

... APPELLANT

(BY SRI GURURAJ V. HASILKAR, HCGP)

AND:

SHAIK ROUF S/O PASHA MIYAN
AGE: 35 YEARS, OCC: LABOUR,
R/O BASAVANAGAR, KALWADI
TQ. BHALKI, DIST. BIDAR.

... RESPONDENT

(BY SRI ISHWARAJ S. CHOWDAPUR, ADVOCATE)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION
377(1)(B) OF CR.P.C., PRAYING TO MODIFY THE ORDER
DATED 07/09/2015 PASSED BY THE LEARNED SPECIAL
JUDGE AND ADDITIONAL DISTRICT AND SESSIONS
JUDGE, BIDAR, IN SPECIAL CASE NO.58/2014 WHERE BY

IMPOSING MAXIMUM SENTENCE ON THE RESPONDENT FOR THE OFFENCE PUNISHABLE UNDER SECTION 376 OF IPC AND SECTION 4 OF THE POCSO ACT, 2012; CONVICT AND SENTENCE THE RESPONDENT/ACCUSED FOR ALL THE OFFENCES WITH WHICH HE HAS BEEN CHARGED, IN ACCORDANCE WITH LAW.

THIS APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

J U D G M E N T

The present appeal is filed by the State with the following prayer:

"WHEREFORE, The Appellant/State most respectfully prayed that this Hon'ble Court may kindly be pleased to call for the records of Special Case No.58/2014 Additional District and Sessions Judge, Bidar.

a) GRANT LEAVE to appeal against the judgment and order of Inadequate punishment /sentence dated: 07.09.2015 passed by the Learned Special Judge and Additional District and Sessions Judge at Bidar, in Special Case No.58/2014 may be modified by imposing maximum punishment and imposing fine

amount to the respondent for offence punishable under Section 376 of IPC and Section 4 of the POCSO Act, 2012.

b) Modify the order dated: 07.09.2015 passed by the Learned Special Judge and Additional District and Sessions Judge, Bidar, in Special Case No.58/2014 where by imposing maximum sentence on the respondent for the offence punishable under Section 376 of IPC and Section 4 of the POCSO Act of 2012.

c) CONVICT AND SENTENCE the respondent/accused for all the offences with which he has been charged in accordance with law, in the interest of justice and equity."

2. Brief facts which are necessary for disposal of the appeal are as under:

Accused/respondent was chargesheeted for the offence punishable under Section 376 of IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012, (for short, hereinafter referred to as 'POCSO Act'). Accused pleaded not guilty and therefore, the trial was held.

Prosecution in order to prove its case, examined 21 witnesses as P.Ws.1 to 21 and relied on 17 documentary evidence which are exhibited and marked as Exs.P.1 to P.17. The prosecution also placed reliance on 9 material objects which are marked as M.Os.1 to 9. Thereafter, statement of accused as contemplated under Section 313 of Cr.P.C., was recorded wherein accused denied all the incriminating materials that are found against the accused. Accused did not chose to place any defence evidence or his written statement as is contemplated under Section 313 (5) of Cr.P.C.

3. In other words, the presumption contemplated under Section 29 and 30 of the POCSO Act, were not rebutted by the accused by placing rebuttal evidence on record.

4. Thereafter, learned Special Judge heard the parties in detail and after considering the material evidence on record, passed an order of conviction, convicting the respondent/accused for the offence

punishable under Sections 376 of IPC and Section 4 of the POCSO Act. The order of sentence is extracted as under:

“1. Convict / accused is sentenced to undergo Simple Imprisonment for a period of 05 years and shall pay a fine of Rs.2,000/-, for the offence punishable under section 376 of IPC. In default to pay fine, he shall undergo further S.I. for a period of two months.

2. Convict / accused is sentenced to undergo Simple Imprisonment for a period of 05 years and shall pay a fine of Rs.2,000/-, for the offence punishable under section 4 of POCSO Act. In default to pay fine, he shall undergo further S.I. for a period of two months.

Both the above sentences shall run concurrently.

Furnish free copy of this judgment to the convict/accused forthwith.

Convict / accused is given benefit of set off, for the period of imprisonment undergone by him as provided under section 428 of Cr.P.C.

Further it is ordered that the victim i.e, P.W.1 approached District Legal Services Authority for victim compensation under sec. 357(a) of Cr.P.C.,

M.O.1 to 9 are worthless and valueless ordered to be destroyed after appeal period is over.”

5. Being aggrieved by the order of sentence passed by the learned Special Judge in respect of the offence under Section 4 of the POCSO Act, the State has preferred the present appeal with the following grounds:

- It is submitted that, the offence punishable under Section 376 is for life or imprisonment for 10 years and fine but the trial court in order to reduce the period of imprisonment for the said offence against the respondent/accused has not given any reasons. So the sentence and fine ordered by the trial court for the above offence is totally inadequate and liable to be modified and pass the order of sentence and fine as proved under Section 376 of IPC, so the*

order under challenge require interference by this Hon'ble Court.

- *That, the Trial Court had found that the prosecution has proved the case by examining all material important witnesses, as discussed in the judgment under appeal. So, the Trial Court is not correct in getting reduced the quantum of sentence and fine amount against the respondent/accused. So the order under challenge required modification and there by enhanced the period of sentence and fine amount.*
- *It is submitted that, the Trial Court has not considered the material important evidence of victim girl and has not awarded maximum punishment under Section 4 of the POCSO Act, this Hon'ble Court to please to modify the order under challenge and there by convict by awarding maximum punishment to the respondent/accused.*
- *It is submitted that, on going through the judgment under challenge the respondent/accused has not given any acceptable explanation and reasoning,*

when he was heard on the quantum of sentence by Trial Court. The explanation given by the respondent/accused that he had wife and Children's also coming from poor family is not at all acceptable. Since, the respondent/accused by committing heinous offence had ruined future life of just 12 years old minor girl and her well reputed status in the society is defamed and caused social concern to society at large. So, the sentence fine amount order by the Trial Court is very much in adequate and same is not in accordance with IPC and the POCSO Act. The Learned Trial Court Judge has not applied the provision of Section 357 of Cr.P.C. while imposing the maximum fine amount on the respondent/accused, so the appeal may kindly be allowed.

- In viewed of the above grounds urged and catena of decision of this Hon'ble Court and appeal may kindly be allowed.*

6. Reiterating the grounds urged in the appeal, Sri Gururaj V.Hasilkar, learned High Court Government

Pleader vehemently contended that approach of the trial Court in sentencing the respondent/accused for a period of five years for the offence under Section 4 of the POCSO Act is illegal as minimum sentence that is prescribed under the provisions of Section 4 of the POCSO Act is seven years and there is no discretion vested in the learned Special judge to reduce the minimum sentence of seven years to five years and sought for allowing the appeal.

7. *Per contra*, Sri Ishwaraj S. Chowdapur, learned counsel for the respondent/accused vehemently contended that the trial Court was not justified in convicting the accused both under Sections 376 of IPC and 4 of the POCSO Act and therefore, taking note of the fact that he has been convicted for both the offences and sentencing the accused for a period of five years is justified in the facts and circumstances of the case, more so, in view of Section 42 of the POCSO Act and hence, sought for dismissal of the appeal.

8. In view of the rival contentions urged by the parties, this Court perused the material available on record meticulously. On such perusal of the records, the sole point that would arise for consideration is:

Whether sentencing the accused/respondent for a period of 5 years for the offence under Section 4 of the POCSO Act is justified?

9. In the case on hand, the order of conviction passed by the trial Court insofar as convicting the accused under Section 376 of IPC and under Section 4 of the POCSO Act is not challenged by the respondent / accused. As such, the conviction order has become final. The accused did not choose to file cross appeal after the present appeal was admitted by this Court.

10. Therefore, it is necessary for this Court to delve into the merits of the matter and the validity of the order of conviction passed by the learned Special Judge.

11. Even otherwise the material on record clearly disclose that the victim girl having supported the case of

the prosecution and other material on record having corroborated the oral testimony of the victim girl, the learned Special Judge was justified in passing the order of conviction for the offence punishable under Section 376 of IPC and Section 4 of POCSO Act.

12. Section 42 of the POCSO Act reads as under:

*"42. **Alternate punishment.**-Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.]"*

13. It is the argument of the learned counsel for the respondent/accused, Sri Ishwaraj S. Chowdapur that the learned Special Judge ought not to have convicted the accused for the offence punishable under Section 376 of

IPC, when once accused was convicted for the offence punishable under Section 4 of the POCSO Act. Said argument loses its significance in view of the fact that punishment prescribed under Section 376 of IPC and Section 4 of POCSO Act are one and the same.

14. Section 4 of the POCSO Act reads as under:

"4. Punishment for penetrative sexual assault.-

[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with 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 natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”

15. As could be seen from Section 4 of the POCSO Act (Unamended), the minimum sentence that was to be imposed after finding the accused guilty under Section 4 of the POCSO Act is seven years. It is pertinent to note that since the statute has prescribed a minimum sentence of seven years for the offence punishable under Section 4 of the POCSO Act, learned Special Judge did not have any power whatsoever to reduce minimum sentence to five years. Perhaps, the said aspect of the matter has missed the notice of the learned Special Judge while passing the order of sentence.

16. It is settled principle of law and requires no emphasis that when a statute prescribes minimum sentence, the trial judge or the appellate judge has no

discretion whatsoever to reduce the minimum sentence prescribed by the statute.

17. Said view of this Court in this regard, is fortified by the judgment of the Hon'ble Apex Court in the case of **Mohd. Hashim vs. State of Uttar Pradesh and Others** reported in **(2017)2 SCC 198**. The relevant paragraph of the said judgment reads as under:

" 15. The three-Judge Bench while adverting to the concept of "minimum sentence", relied on the observations made in Bahubali (supra) which we have reproduced hereinabove, and opined that:-

"9. The above observations also clearly show that where there is a statute which bars the exercise of judicial discretion in the matter of award of sentence, the Probation of Offenders Act will have no application or relevance. As Rule 126-P(2)(ii) of the DI Rules manifestly bars the exercise of judicial discretion in awarding punishment or in releasing an offender on probation in lieu of sentencing him by laying down a minimum sentence of imprisonment, it

has to prevail over the aforesaid provisions of the Probation of Offenders Act, 1958 in view of Section 43 of the Defence of India Act, 1962 which is later than the Probation of Offenders Act and has an overriding effect.”

18. Applying the said principle of law enunciated in the aforesaid decision to the case on hand, awarding sentence of five years to the respondent/accused by the learned trial judge ignoring the fact that statute has prescribed the minimum sentence of seven years for the offence punishable under Section 4 of POCSO Act, is thus, clearly illegal and calls for interference by this Court in this appeal.

19. Therefore, in the facts and circumstances of the case, the State has made out a case for enhancing the sentence to seven years which is minimum sentence prescribed by statute under Section 4 of POCSO Act.

20. However, the material on record would not make out a case for sentence to be passed for more than seven years, having regard to the fact that the incident is

of the year 2013 and victim was aged 13 years at that point of time and accused has already spent the period of imprisonment as ordered by the trial Court, therefore, the only modification that is required insofar as the sentence imposed by the learned Special judge which is impugned in this appeal, is to now enhance the sentence of five years to seven years.

21. Accordingly, the point is answered in negative and following order is passed:

ORDER

- i) Appeal is allowed.
- ii) While maintaining the conviction of the respondent/accused for the offence punishable under Section 376 of IPC and Section 4 of POCSO Act, the sentence ordered by the learned Special Judge for the offence under section 4 of the POCSO Act is enhanced to seven years.

iii) Needless to emphasise that respondent/ accused shall surrender before the trial Court on or before 31.01.2023 and in the event of respondent failing to surrender to serve balance period of sentence before the trial Court, the trial Court is at liberty to issue modified conviction warrant and secure the presence of accused for serving remaining part of the sentence.

**Sd/-
JUDGE**

VNR