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IN THE COURT OF ADDITIONAL SESSIONS JUDGE,
PUNE AT PUNE.

Presided over by A.S.MAHATME

SPECIAL (POCSO) CASE NO.125/2014.

EXH.

The State of Maharashtra Through Lonawala City Police station. (Crime No. 37/14)	Complainant.
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Versus

Mitraprasad @ Govind Shivilal Bhurtel Age: 32 Years, Occ. Gardener. R/o.: B-3, Seven Heaven Society, Tungarli Road, Lonawala, Tal. Mawal, District Pune. Originally inhabitant of Naigaon, Vishnunagar, Shivmandir, Gavisir Dist. Navalpurasi, Lumini, NEPAL	Accused.
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Offences U/s. 376(2)(i) of I.P.C. &
Section 3 r.w. 4 of POCSO Act.

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Mr. R.W.Ghorpade, learned A.P.P. for State.
Mr. A.S. Hushing, advocate for the accused.

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J U D G M E N T.

(Delivered on 29/09/2017)

1) Accused Mitraprasad @Govind Shivilal Bhurtel is being prosecuted for the offences punishable under Sections 376(2)(i) of

(2)

Indian Penal Code and Section 3 punishable under section 4 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as "POCSO Act"), alleging that on 08/02//2014, about 8.00 hours, in bungalow No. 19 of Seven Heaven Society located at Tungarli, Road, Lonawala, District Pune, accused committed rape upon the victim aged below 16 years.

2) The prosecution case can be summarized as follows:

The victim lodged FIR on 01/03/2014 in Lonawala police station. She resides with her mother Laxmi Tak and father Sesaram Tak. Her mother works as maid servant in Bungalow No. A-19 of Seven Heaven Society. Her father is working as watchman in the office of Shantiwan Society. The accused resides near the house of victim and the victim was knowing him since prior to the occurrence. As per the averments made in the FIR, on 07/02/2014, mother of the victim had gone to her native and the victim was residing with her father in the house. On the next day i.e. on 08/02/2014, father of the victim went on his duty and thereafter at about 8.00 a.m., the victim came in Bungalow No.A-19 to discharge the work of her mother. The accused entered into bungalow A-19 and told her that he loves her and assured to marry with her. He also requested her to accompany him to Delhi and assured to keep her happy by giving whatever she wants. Thereafter the accused brought the victim in

the bed-room, removed her clothes forcibly and committed rape upon her against her will.

3) Immediately, on the date of lodging of the FIR, the investigation officer visited the spot of occurrence and recorded panchnama Exh.26 in presence of two panch witnesses, including PW3 Nitin Mhatre. The accused was arrested on 02/03/2014 at 13.45 hours. The victim was sent to Sassoon Hospital, Pune for her ossification test. Accordingly she was examined. On the next date, i.e. on 04/03/2014, the victim was again sent to Sassoon Hospital for medical examination and she was examined by Dr. Shailendra Pawar (PW6) accompanied by Dr. Shweta. Accordingly medical certificate Exh. 54 was issued. The clothes of the victim were seized on 05/03/2014 under panchnama Exh.27 and clothes of the accused were seized on 08/03/2014 under panchnama Exh.43. Samples collected after medical examination of the accused and victim along with their clothes were sent to the office of C.A. for examination on 03/04/2014 vide report Exh.44. The prosecution produced birth certificate of the victim at Exh.55 and as per the said certificate her birth date is 28/08/1998, therefore, on the date of occurrence the victim was aged 15 years 5 months and 11 days. The I.O. recorded statements of several witnesses, collected reports from hospital and filed the charge-sheet against the accused. The learned Magistrate seized with the matter committed the case to the sessions Court for trial according to law.

4) On 01/10/2014, charges came to be framed against the accused for the offences punishable under sections 376(2)(i) of I.P.C. and section 3 r.w. 4 of the POCSO Act to which accused pleaded not guilty and claimed trial.

5) The prosecution examined following witnesses to substantiate charges against the accused.

(1) The Victim PW1 at Exh. 28.

(2) Laxmi Sesaram Tak, PW2 at Exh.23, the mother of the victim,

(3) Nitin Narayan Mhatre, PW3 at Exh. 25, the panch witness,

(4) Dr. Vijay Tarachand Jadhav, PW4 at Exh. 29,

(5) PSI Chandrakant Bhimrao Kamble, PW5 at Exh. 40 , the investigation officer and

(6) Dr. Shailendra B. Pawar, PW6 at Exh. 56, the medical officer.

The prosecution has also relied upon the FIR Exh. 19, panchnama drawn at the spot of occurrence Exh.26, seizure panchnama of clothes of the victim and accused at Exh. 27 and 43 respectively, ossification test report Exh. 30, medical certificate Exh.54, C.A. reports Exh. 58/1, 58/2, 58/3 and birth certificate of the victim Exh.55.

6) The accused, while cross-examining the prosecution witnesses and also in his statement recorded under section 313 of Cr. P.C., has taken defence of false implication. He alleged

that elder sister of the victim wanted to take away the victim to Mumbai, however, the victim does not want to go there, therefore, she approached him and thereafter he brought the victim to her house. After this incident, the parents of the victim have filed false case against him.

7) The learned APP submitted that age of the victim was below 16 years on the date of incident, therefore she is child within the meaning of section 2(d) of the POCSO Act. He further submitted that the evidence of victim and her mother give particulars of rape committed by the accused and there is no reason to discard their testimony. The learned APP concluded his arguments with submission that in view of presumption laid down in section 29 of the POCSO Act, it was incumbent on the part of the accused to prove that he is innocent, however he failed, resultantly, the accused deserves to be punished according to law.

8) Per contra, the learned advocate Mr. Dushing for the accused unfolded before me the evidence on record and submitted that the incident occurred on 08/02/2014 and the FIR has been lodged on 01/03/2014. This unreasonable delay caused in lodging FIR has not been explained. The victim was in emotional bonding with the accused and her parents were against the behaviour of the victim, therefore, they have falsely implicated the accused. Advocate Mr. Dushing further attracted my attention towards the fact that age certificate of the victim

was produced after the completion of prosecution evidence, therefore, it cannot be relied upon and age of the victim was above 18 years as per her testimony. The learned advocate concluded his arguments with submission that conduct of the victim is sufficient to infer that false FIR has been lodged against the accused, therefore, the accused deserves to be acquitted.

9) In the light of prosecution case, evidence on record and having heard both the sides, following points arise for my determination and I have recorded findings thereon in the following manner for the reasons discussed below.

POINTS.

FINDINGS.

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| 1) Has prosecution further proved that, on 08/02/2014 at 8.00p a.m., in Bungalow No. 19 of Seven Heaven Society located at Lonawala, District Pune, the accused committed rape upon the victim aged below the 16 years of age and thereby committed the offence punishable under section 376(2)(i) of I.P.C. and section 3 r.w. 4 of the POCSO Act? | ..Affirmatively. |
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[2] What order ?

Accused is convicted as per final order.

REASONS.

POINTS NO. 1 :

10) The age of the victim is material circumstance in the present case. According to the prosecution, on the date of occurrence, the victim was aged below 16 years, however, her birth certificate was not produced on record earlier. Certificate Exh. 55 has been produced after completion of prosecution evidence and before recording statement of the accused under section 313 Cr. P.C. It is the case of the prosecution since beginning that the accused has committed offence punishable under section 376(2)(i) of Indian Penal Code i.e. rape upon the girl below 16 years. Accordingly charge has been framed against the accused. Unfortunately, the I.O. could not collect the birth certificate of the victim and initially the prosecution relied upon the testimony of the prosecution witnesses only, coupled with report of ossification test Exh. 30.

11) The medical officer who conducted ossification test i.e. PW4 Dr. Vijay Jadhav opined that age of the victim on the date of occurrence was above 16 years and below 18 years. Subsequently the age certificate of the victim is placed on record. Before dealing with the contents of certificate Exh.55, it is necessary to note that this certificate has been issued under the Registration of Births and Deaths Act, 1969. As per the section 17 of the said Act, all extracts given under the provisions of

Registration of Births and Deaths Acts, 1969, shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates as provided in section 76 of the Indian Evidence Act. As per section 76 of Indian evidence Act, contents of public documents can be proved by producing certified copy. Needless to say that once age of certificate of the victim is issued under section 17 of Registration of Births and Deaths Act, 1969, and produced before the Court, it has to be presumed that birth date of the victim is 28/08/1998.

12) The advocate of the accused strongly relied upon the admissions given by the victim in her cross-examination to substantiate his submission that her age was above 18 years on the date of occurrence. However, I do not find any substance in his submission. The victim in her cross-examination stated that her elder sister Usha Devi married prior to the year 2014. Her brother Somesh is younger than Usha Devi and elder than the victim. PW1 further stated that Usha is elder than Somesh by two years and Somesh is elder than her by two years. In the light of birth certificate Exh.55 and presumption attached thereto, testimony of PW1 regarding her age cannot be looked into. As per certificate Exh.55, the birth date of the victim is 28/08/1998, therefore her age was 15 years 5 months and 11 days on the date of occurrence i.e. on 08/02/2014. In short, the victim was a child on the date of occurrence as defined in section 2(d) of the POCSO Act.

13) The learned advocate further relied upon the fact that the incident occurred on 08/02/2014 and the FIR has been lodged on 01/03/2014. This unreasonable delay is un-explained. I do not find substance in this submission also. A girl aged below 16 years was forcibly ravished in absence of her parents, therefore, she was in a trauma. Her mother had gone to her native place and after returning her mother, she narrated the occurrence to her. In the same night mother of the victim gave information of the incident to victim's father and thereafter on the next day they lodged the FIR. It is common knowledge that it is very shameful fact for any girl to disclose sexual assault made upon her by anybody. The incident was disclosed by the victim to her mother on 28/02/2014 and the FIR came to be lodge don 01/03/2014. According to me, delay caused in lodging FIR is not fatal to the case of prosecution.

14) In light of above facts, lets have a careful look on the testimony of the victim. PW1 alleged that on the date of occurrence, she was alone in the house because her mother had gone to her native place and her father had also gone to his work. She had come to bungalow No.19 to do cleaning work. She further stated, while giving account of the occurrence, in following words.

“While I was working in that Bungalow No. A-19 closing the door of that bungalow, from inside, the accused entered into that bungalow through the glass

window. He caught hold my hand and he had taken me to the bed room of that bungalow. Then he removed my clothes. The accused had thrown me on the bed and made me lay supine. Then he committed rape upon me. He had threatened me stating that I should go home and I should not disclose about it to my parents, else he would commit their murder. Because of that I had not disclosed anything to my father. After four days of that my mother had returned back. I was scared and I was weeping. Upon seeing that my mother had asked me as to what had happened with me. Despite that I had not disclosed to my mother anything about that incident.”

15) Testimony of PW1 is nicely supported by her mother i.e. PW2. As per version of PW 2, she has gone to her native place Dhanoda on 07/02/2014 and she returned on 11/02/2014. The victim was asked to put electricity bill in the bungalow No. A-19 which was received by PW2. Accordingly the Victim had gone there. Thereafter the accused followed the victim and went inside the bungalow No. A-19. PW2 further stated that victim came out from bungalow and when she asked the reason, the victim disclosed the incident dated 08/02/2014. She further deposed that prior to 2 days of lodging report by the victim, the accused enticed away the victim and brought her back at 5.00 p.m. Immediately thereafter the family members decided to lodge the report in police station.

16) The testimony of PW1 and PW2 shows that the victim below aged 16 years was subjected to sexual assault by the accused on 08/02/2014. After the occurrence there was nobody in the house of the victim except her father. It was natural on the

part of the victim not to disclose the incident to her father, probably for two reasons, firstly she was threatened by the accused to kill her parents and secondly for a girl aged 15 ½ years it is very difficult to disclose the incident to her father when she was all alone in the home. Before lodging the FIR also the family members of the victim have had discussion whether to perform marriage of the victim or to file report against the accused in police station. After the incident also, the victim was taken away by the accused for about whole day and brought her back at 5.00 p.m. Taking into consideration the conduct of the accused, the family members of the victim, decided to lodge FIR against the accused. The conduct of the victim, PW2 and father of the victim is natural and consistent with the normal course of behaviour of a poor family working in the bungalow of another to met their both the ends.

17) I do not find any reason to discard testimony of the victim and PW2. The learned advocate of the accused strongly relied upon the fact that the victim was roaming with accused and having emotional bonding with him. For that purpose the accused has placed reliance upon the transcriptions of the SMS Exh.22. These are 16 SMS allegedly sent by the victim to accused on 28/02/2014. The submission made on behalf of the accused and the SMS relied upon needs to be looked into in the light of prosecution evidence and section 29 of the POCSO Act which reads as under.

“Section 29. Presumption as to certain offence: Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections, 3, 5 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved.”

18) Above provision unambiguously makes it clear that once rape upon the child is established, the Court has to presume that the accused is guilty. Needless to say that in view of section 90 of the Indian Penal Code, the consent, if any, given by the victim under misconception and threats of the accused, is not the consent. The testimony of the victim shows that she was threatened to kill her parents, if incident is disclosed. The evidence brought on record by the accused, in fact, makes the prosecution case more stronger. Defence on record shows that the victim aged 16 years was induced to run away and admittedly on 28/02/2014, the victim was in the company of the accused for about whole day. Except the transcriptions of the SMS on record, no evidence has been led by the accused to substantiate his defence that there was emotional bonding between the victim and and accused. This fact, if admitted, then also it is not sufficient to disprove the presumption arising under section 29 of the POCSO Act because age of the victim is below 16 years. The accused alleged in his statement recorded under section 313 of Cr.P.C. that on 28/02/2014, he brought the victim to her home because she wanted to run away. The story

alleged by the defence is exclusively based upon the alleged consent of the victim and consent of a child, as contemplated under section 2(d) of the POCSO Act, is absolutely immaterial.

19) As I have observed hereinabove that testimony of the victim can safely be relied upon in toto, because there is no reason to discard her version. The victim in rape cases stands on footings of injured witness. Her testimony requires no corroboration. In present case seizure evidence is not useful for the prosecution for simple reason that the incident occurred on 08/02/2014 and clothes of victim and accused were seized on 05/03/2014 and 08/03/2014 respectively. In result thereof C.A. reports at Exh. 58/1 to 58/3, do not fully support the prosecution case. However, the seized bed-sheet and nicker of victim were examined by experts and blood stains were found thereon. To some extent, C.A. report fortifies the testimony of the victim.

20) The learned advocate of the accused strongly relied upon the fact that CCTV cameras were in operation in front of the bungalow where the incident occurred, but the I.O. has not collected the CCTV footages. So also the statements of the witnesses were not recorded by I.O. immediately. According to me, the loopholes of the investigation cannot be the foundation to prove the innocence of the accused. Undoubtedly, the I.O. has not taken serious steps to collect the CCTV footages and also not seized the clothes of the accused immediately. But that does not

mean that the testimony of the victim needs to be put under shadow of doubt.

21) In view of birth certificate Exh.55 of the victim, she was aged below 16 years of age on the date of occurrence. The sole testimony of the victim is sufficient to establish that the accused committed rape upon her on the date of occurrence. As per presumption laid down under section 29 of POCSO Act, the Court has to infer that the accused committed the offence, resultantly I have answered point No. 1 affirmatively and proceed to hear the accused on the point of sentence to be awarded.

Pune.

(A.S. Mahatme)

Dated: 29/09 /2017.

Additional Sessions Judge, Pune.

22) Advocate Mr. Nitin Bhalerao holding for the advocate Mr. Dushing, submitted that the accused is in jail since last 3½ years. Furthermore, the accused shoulders several family responsibilities, therefore, lenient view be taken against him and minimum punishment be awarded with set off under section 428 of Cr. P.C. Accused also states that he is innocent and does not deserve any punishment.

23) Section 376 of I.P.C. provides minimum punishment of 10 years imprisonment for the offence of rape on the victim aged below 16 years. Section 4 of the POCSO Act provides minimum punishment of 7 years imprisonment. Needless to

say that if guilt is proved and accused is convicted for the offence punishable under section 376(2)(i) of I.P.C., then he cannot be again punished for the offence under section 3 r.w. 4 of the POCSO Act. Taking into consideration the age of the victim and the manner in which she was ravished, the Court cannot take sympathetic view in respect of the accused. Furthermore, if at all the court want to show sympathy to the accused, such misplaced sympathy cannot override the statutory provisions of law. Section 376 of Indian Penal Code provides minimum punishment of 10 years imprisonment, therefore, Court cannot inflict lesser punishment than 10 years imprisonment.

24) The victim belongs to poor family, therefore the accused has to pay compensation for the mental agony and trauma which she has been experienced. According to me to impose fine of Rs.25,000/- and direct to pay said fine to the victim will be just and proper relief for her.

25) For all reason narrated herein above, the accused is convicted and sentenced with following order.

ORDER

(1) Accused Mitraprasad @ Govind Shivlal Bhurtel is hereby convicted under Section 235(2) of the Code of Criminal Procedure, of the offences punishable under Sections 376(2)(i) of Indian Penal Code, as well as section 3 Punishable under

section Section 4 of the Protection of Children from Sexual Offences Act, 2012.

(2) Accused Mitraprasad @ Govind Shivilal Bhurtel is sentenced to suffer 10 years rigorous imprisonment for the offence punishable under section 376(2)(i) of Indian Penal Code, however, no separate sentence has been inflicted for the offence under section 3 punishable under section 4 of the Protection of children from Sexual Offences Act, 2012. The accused shall also pay fine of Rs. 25,000/- (Rs. Twenty five thousand only), in default, to suffer rigorous imprisonment for six months .

(3) Fine, if deposited, be given to the victim by way of compensation after appeal period is over.

(4) The accused is entitled to have set off under section 428 of Cr. P.C. for the period from the 02/03/2014 since when he is in judicial custody.

(5) Muddemal clothes being worthless property shall be disposed of, after the period of appeal is over.

(6) Copy of this judgment shall be given to the accused free of cost.

Pune.

Dated: 29/09/2017.

(A.S. Mahatme)

Additional Sessions Judge, Pune.

I affirm that the contents of this P.D.F. file judgment are same word for word as per original Judgment.

Name of steno: S.S.Chimbalkar

Name of the Court: A.S.Mahatme, Additional Sessions Judge, Pune

Order signed by P.O. on: 03/10/2017

Order uploaded on : 03/10/2017

