IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 22ND DAY OF APRIL 2022

PRESENT

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

AND

THE HON'BLE MR. JUSTICE RAJENDRA BADAMIKAR

CRL.A. NO.100242/2018

BETWEEN

THE STATE OF KARNATAKA
REPRESENTED BY THE
ADDL. STATE PUBLIC PROSECUTOR,
ADVOCATE GENERAL OFFICE,
HIGH COURT, DHARWAD

.....APPELLANT

(BY SRI V.M. BANAKAR, ADDL. SPP)

AND

SHANKAR URF SHANKRAPPA

…..RESPONDENT

(BY SMT ANURADHA DESHPANDE, ADV.)

THIS CRIMINAL APPEAL IS FILED U/S 377 OF CR.P.C. SEEKING TO CALL FOR THE RECORDS AND TO SET ASIDE THE JUDGMENT AND ORDER SO FOR IT RELATES IMPOSITION OF INADEQUATE SENTENCE FOR OFFENCE P/U/S 5(1) OF POCSO ACT, IN S.C.NO.44/2014 DATED 26.03.2018 AND TO SENTENCE THE

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RESPONDENT/ACCUSED FOR THE OFFENCES P/U/S 5(1) OF THE POCSO ACT I.E., LESS THAN TEN YEARS BUT WHICH MAY EXTEND TO IMPRISONMENT FOR LIFE AND SHALL ALSO BE LIABLE TO FINE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 18.04.2022, THIS DAY, **RAJENDRA BADAMIKAR, J.** PRONOUNCED THE FOLLOWING:

JUDGMENT

The State has filed this appeal under Section 377(1) (b) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.', for short) challenging the inadequate sentence of imprisonment imposed against the accused.

2. For the sake of convenience, the parties herein are referred to with their original ranks occupied by them before the trial Court.

3. Brief factual matrix leading to the case is as under:

The P.S.I. of Mundaragi has charge sheeted the accused for the offences punishable under Sections 363, 342, 343, 376(i) and 506 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC' for short) and Sections 4 and 5(L) of the Protection of Children from Sexual Offices Act, 2012 (hereinafter referred to as 'POCSO Act', for short). According

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to prosecution on 21.05.2014, the victim came to Mundaragi for attending the marriage of their relative and accused came there in a car bearing No.KA-37/A-3170 and then persuaded the victim girl to accompany him and around about 1 O'clock, he kidnapped the victim girl in the said car and took her to his sister's house situated in Savadi village of Ron Taluk by introducing the victim as his wife. It is also alleged that accused had kept the victim in the house of his sister and had forcible sexual intercourse over her in spite of her protest and thereafter confined her in a rented house situated in Koppal wherein he repeatedly had sexual intercourse with the victim in spite of her protest. He had also threatened her when she attempted to contact her parents. The complainant has lodged a missing complaint and later on the victim was traced in the company of the accused and she was secured by the police and then she was subjected to medical examination. She has also given statement under Section 164 of Cr.P.C. before the learned Magistrate. Then the charge sheet came to be submitted against the accused for the above said offences.

4. The accused was arrested and was remanded to judicial custody. He was represented by the counsel and prosecution papers were furnished to him and charges framed against him were read over and explained to him and he pleaded not guilty. Then the prosecution examined in all 29 witnesses as PW-1 to PW-29 and placed reliance on 44 documents marked as Exs.P-1 to P-44. Further, prosecution has also placed reliance on 6 material objects marked as M.Os.1 to 6. After conclusion of evidence of the prosecution, the statement of accused under Section 313 of Cr.P.C. was recorded to enable the accused to explain the incriminating evidence appearing against him. The case of accused is of total denial and he did not choose to lead any oral or documentary evidence in support of his case. Thereafter, the learned Special Judge after hearing the arguments and after perusing the material evidence placed on record, has convicted the accused for the offences punishable under Sections 363, 342, 343, 376(i) and 506 of IPC and Sections 4 and 5(L) of POCSO Act and passed the following sentence:

> Accused is sentenced to undergo simple imprisonment for 5 years and to pay fine of

Rs.10,000/- in default to undergo SI for 1 year for the offence punishable under Section 363 of IPC.

He is sentenced to undergo RI for 7 years and to pay fine of Rs.30,000/- in default to undergo RI for 2 years for the offence punishable under Section 376(i) of IPC and Sections 4 and 5(L) of POCSO Act.

He is further sentenced to undergo SI for 6 months for the offence punishable under Section 342 of IPC.

He is further sentenced to undergo SI for 1 year for the offence punishable under Section 343 of IPC.

He is further sentenced to undergo SI for 2 years and to pay fine of Rs.1,000/- in default to undergo SI for 3 months for the offence punishable under Section 506 of IPC.

The maximum sentence imposed was 7 years for the offence under Section 376(i) of IPC and Sections 4 and 5(L) of POCSO Act and he directed that all sentences shall run concurrently.

5. Being aggrieved by the sentence, the State has filed this appeal.

6. We have heard the arguments advanced by the learned Addl. State Public Prosecutor and learned counsel for respondent/accused. We have also perused the records.

7. Addl. State Public Prosecutor contended that the imposition of lesser/inadequate sentence for the offence under Section 376(i) of IPC and Sections 4 and 5(L) of POCSO Act is contrary to law, facts and evidence on record. He would also contend that under Section 42 of the of POCSO Act, if the offender is found guilty of the offence under such other law, he is liable for punishment under the provisions of POCSO Act as well as under other law, then he shall be punished for the offence which is greater in degree. He would further contend that Section 42A of the POCSO Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and in case of any inconsistency, the provisions of POCSO Act will have overriding effect on the provisions of other law to the extent of inconsistency. He would contend that under Section 5(L) of POCSO Act which is punishable under Section 6 of POCSO Act for aggravated penetrative sexual assault the minimum sentence shall not be less than ten years along with fine and

it may extend to life. He would contend that though the learned Special Judge has convicted the accused for the offence punishable under Section 5(L) of POCSO Act, he has not imposed minimum sentence prescribed under the statute but imposed only 7 years of imprisonment which is against the statutory mandate. Hence, he would contend that the impugned judgment in respect of imposition of sentence calls interference and modification and as such, he prayed for allowing the appeal in this regard.

8. *Per contra*, learned counsel for respondent/ accused has contended that the accused was granted remission by the State and he was compelled to withdraw the appeal filed by him and now the present appeal is not maintainable as the State being a parental party, cannot take dual stand for remission and for enhancement of the sentence. She would also contend that the State cannot be permitted to blow hot and cold simultaneously. She would invite the attention of the Court towards the Doctrine of legitimate expectation by the public authority which is responsible in this regard. She would contend that doctrine is not engraved but it is followed by practice and though the

accused had challenged the judgment of conviction, due to persuasion by the State under the guise of seeking remission, he was compelled to withdraw Crl.A.No.100248/2018. She would further contend that the act of the State in this regard is a compulsion and also violates the human rights. As such, she would contend that the State having given remission to the accused, is not entitled to pursue this appeal and as such, she would seek for dismissal of the appeal.

9. Having heard the arguments and perusing the oral as well as documentary evidence, now the following point would arise for our consideration:

> *"Whether the Trial Court is erred in not imposing adequate minimum sentence as prescribed under the statute?"*

10. It is evident from the records that accused was convicted for the offence punishable under Sections, 363, 342, 343, 376(i) and 506 of IPC and Sections 4 and 5(L) of POCSO Act. Though the accused had challenged the judgment of conviction in Crl.A.No.100248/2018 initially, he withdrew the said appeal and the appeal came to be dismissed by order dated 04.12.2019 in view of the memo

filed by the counsel for the appellant. Under such circumstances, now the question of considering merits of conviction cannot be gone into. Though learned counsel has tried to argue on the ground that there is dispute regarding the age of the victim so as to non-application of the provisions of POCSO Act, this defence is not available to the accused. Even otherwise, on perusing the evidence of the victim, it is evident that her age was not at all challenged in her entire cross-examination. As such, the said ground now cannot be urged.

11. The offence is said to have committed on 21.05.2014 and thereafter for two months. The accused is found guilty of the offence under Section 5(L) of POCSO Act, which reads as under:

5. Aggravated penetrative sexual assault.—

(a) xxx
(b) xxx
(c) xxx
(d) xxx
(e) xxx
(f) xxx
(g) xxx
(h) xxx
(i) xxx
(j) xxx
(k) xxx

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) xxx
(n) xxx
(o) xxx
(p) xxx
(q) xxx
(r) xxx
(s) xxx
(t) xxx
(u) xxx

It is not under the serious dispute that the victim was minor and she suffered penetrative sexual assault by the accused regularly for nearly two months. The said offence is punishable under Section 6 of POCSO Act. Section 6 of POCSO Act is amended with effect to 16.08.2019 wherein the minimum sentence is 20 years but in the instant case the offence is committed on 21.05.2014 and for two months thereafter. Hence, prior to amendment to Section 6 reads as under:

> *"6. Punishment for aggravated penetrative sexual assault.—Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a terms which shall not be less than* ***ten years*** *but which may extend to imprisonment for life and shall also be liable to fine."*

12. Hence, even prior to amendment, the minimum sentence prescribed for the offence under Section 5(L) is imprisonment which shall not be less than ten years with fine.

13. Section 4 of POCSO Act deals with penetrative sexual assault and since Section 5 is more grave, offence under Section 4 merges with Sections 5 and 6.

14. Section 376(2) (i) of IPC is pertaining to rape of a woman when she is under sixteen years of age. Even under Section 376(2)(i) of IPC, the minimum sentence imposed is 10 years.

15. Section 42 of POCSO Act deals with alternative sentence which 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 or section 509 of the Indian Penal Code, 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*

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Penal Code as provides for punishment which is greater in degree."

16. Further, Section 42A makes it clear that act is not in derogation of any other law and if there is any inconsistency with any other law for the time being in force, the provisions of POCSO Act shall have overriding effect. In the instant case, there is no inconsistency as the offence under Section 376(2)(i) as well as Section 6 of POCSO Act are punishable with minimum imprisonment of ten years. But the judgment discloses that though the Trial Court has considered Section 42 of POCSO Act, it has proceeded to impose sentence of 7 years with fine of Rs.30,000/- with default clause of RI for two years. This is against the statute and the State is harping on this point.

17. The main contention of the respondent/accused is that by the act of the State, the accused was compelled to withdraw Crl.A.No.100248/2018 in order to get remission and hence, learned counsel contended that the appeal is not maintainable as the State being a parental party cannot by way of compulsion blow hot and cold simultaneously.

18. It is an undisputed fact that the appeal filed by the accused was withdrawn. The memo of withdrawal was filed along with the letter forwarded by the accused. The memo of withdrawal as well as letter forwarded by the accused are extracted hereinbelow:

MEMO FOR WITHDRAWAL OF APPEAL

The advocate for the petitioner submits herein as under:

That the appellant in the above appeals does not want to continue the appeal any further for the reasons stated in his letter to the Seceratary, Legal Aid High court Dharwad. This case was entrusted to me through the Legal Aid and hence I am filing this memo for withdrawal of this appeal.

Sd/-

<u>Letter forwarded by the accused</u>

Respected sir,

I Shankar s/o. Ramappa Hubballi, CTP No.4255, central prison Dharwad, do hereby submits and prays as under.

That I had filed Crimanal appeal No.100248/2018 before the Hon'ble High Court of

Karnataka Dharwad. That my sentence of imprisonment period is about to end in the year of march 2020. If my appeal will not decided n time it will adversely affect to my release. And I am not willing to continue with my above said case. my advocate is Smt. Aruna Deshpande.

Hence I request you to kindly withdraw the said Criminal Appeal No.100248/2018 and same may intimate to me for which I shall be ever grateful to your kind self.

Sd/-

19. In the memo, there is no specific reasons quoted but in the letter, it is contended by the accused that his sentence of imprisonment period is about to end in the March, 2020 and if his appeal is not decided in time, it would adversely affect his release and as such, he withdrew the appeal. On what basis he asserted that his appeal will not be decided in time is not forthcoming. This letter is dated 05.10.2019 and memo was filed on 22.11.2019. The appeal was dismissed as withdrawn on 04.12.2019. However, the imprisonment period according to accused was till the end of March 2020. In that event, he would have insisted for early hearing of the appeal but that is not done by him.

20. The main contention of the learned counsel for respondent/accused is that accused has given remission by the State and now again the State cannot file appeal for enhancement of sentence and he was not made aware of filing of the appeal. But the records disclose that the notice of this appeal was served on accused through Jailor prior to filing of the memo. Apart from that, the remission was granted as per the statute and it is not a discretionary remission granted to the accused. In this context, learned Addl. State Public Prosecutor has invited the attention of the Court to Rule 35 and 36 of Chapter VI of Karnataka Prisons Rules, 1974 which read as under:

> *35. Remission of sentence.—(a) Remission system means the system of regulating award of marks to an to consequential shortening of sentence of prisoners in prisons in accordance with the rules for the time being in force.*
>
> *(b) Remission can be granted to prisoners by the State Government or Inspector General or Superintendent subject to withdrawal or forfeiture or revocations. The State Government may debar any prisoner or categories of prisoners from the concession of remission.*

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(c) Remission is an incentive for good behaviour and good work and is not the matter of right for any prisoner.

(d) Remission is of three kinds :—

(i) Ordinary remission;

(ii) Special remission;

(iii) Remission by the State Government.

36. Ordinary Remission.—(1) Ordinary remission may be granted at the scale shown below to prisoners who are eligible for earning remission other than those employed on conservancy work.

(i) three days per month for good behaviour discipline and scrupulous attention to all prison regulations.

(ii) three days per month for industry and due performance of allotted work at prescribed standard.

(2) Convict Warders shall receive eight days ordinary remission per month and convict night watchman seven days per month.

(3) (a) Prisoners employed on prison service such as cooks, etc., who work on Sundays and Holidays may be awarded three days remission per

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quarter in addition to any other remission earned under these rules.

(b) Prisoners employed on conservancy work and who work on Sundays and holidays may be awarded seven days ordinary remission per month.

(4) any prisoner eligible for ordinary remission under these rules, who, for a period of one year reckoned from the first day of the month following the date of the month following the date of his sentence, or the date on which he was last punished for a prison offence has committed no prison offence thereafter, shall be awarded fifteen days ordinary remission in addition to any other remission earned under the rules.

(5) Thirty days remission shall be granted to all classes of convicts on the following scale for attending literacy classes and completing the literacy course or award of certificates by the concerned authorities.

(6) the award of ordinary remission shall be made as nearly as possible on 1st January, 1st April and 1st July and 1st October and the amount of remission recorded in the history ticket.

(7) No prisoner shall be granted ordinary remission for the month in which he is released.

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21. The remission was granted to the accused under Karnataka Prisons Rules and it is an ordinary remission in respect of good behavior incentive and other conditions incorporated in Rule 36. The remission was not granted by the State by passing any special law or treating it as special case but the remission was statutory remission under the provisions of Karnataka Prisons Rules, 1974.

22. Further, the learned Addl. State Public Prosecutor has also brought to the notice of the Court with regard to Karnataka Prisons Manual 1978 and invited the attention of the court to Chapter XII and Rules 214 to 220. Rule 216 deals with original remission and procedure is also incorporated thereunder.

23. Learned counsel for respondent/accused has vehemently contended that the State has compelled the accused to withdraw the appeal in order to get remission under the provisions of the Karnataka Prisons Rules, 1974. But in these Rules, there is no provision to show that remission cannot be granted in case of any pendency of the appeal. It is argued by the learned counsel for respondent/accused that there is a practice for refusing the

remission in case of pendency of the appeal but no evidence is placed to show that any such practice is being followed. Further, the remission is under statute and pendency of appeal has no relevancy and in any event accused is going to get the benefit of remission if he is entitled under law. Under such circumstances, the said arguments do not have any relevancy and cannot be accepted. When the remission is granted under the statute, it cannot lie in the mouth of the accused that the State is taking dual stand regarding granting remission and also seeking enhancement of the sentence. It is to be noted here that remission is granted under the statute. The enhancement of sentence is also sought only under the statute wherein minimum sentence is prescribed. Hence, there is no inconsistency with each other. The arguments advanced by the learned counsel regarding doctrine of legitimate expectation cannot be made applicable to the facts and circumstances of the case in hand. In this context, learned counsel for respondent has placed reliance on a decision of the Delhi High Court in W.P.(C) No.4760/2010 dated 12.11.2010 but the facts and circumstances of the said case are entirely different and it was

pertaining to educational qualification and seat matrix. It has nothing to do with the present case and as such, the doctrine of legitimate expectation cannot be applied in the instant case as the remission was granted under the statute and enhancement of sentence is also being sought only under the statute. Even if the sentence is enhanced, the remission will not be taken away and the accused will get the remission and Rule 36(8) of Karnataka Prisons Rules 1974 which deals with re-admission and earning remission thereunder. Under such circumstances, these rules are not contradictory to each other.

24. Learned counsel for respondent has further relied on a decision of the Hon'ble Apex Court in the case of ***M.P. Sharma and others Vs. Satish Chandra*** reported in ***AIR 1954 SC 300*** and the decision of the Hon'ble Apex Court in the case of ***Tofan Sing Vs. State of Tamil Nadu*** in Crl.A.No.152/2013 but both these decisions are pertaining to Article 20(3) of Constitution in respect of no person accused of any offence shall be compelled to be a witnesses against himself. In the instant case, no such violation of Article 20(3) is applicable. It is not a case of double jeopardy. Merely

because State has given remission and seeking minimum sentence under the statute, it cannot be held that it amounts to violation of Article 20(3) of Constitution of India. The facts and circumstances of both the cases relied are entirely different. Hence, they cannot be made applicable to the facts and circumstances of the case in hand. The question of doctrine of self incrimination is not applicable as trial is already concluded and accused is also convicted. This is not a case of self incrimination but it is only a case of imposition of minimum sentence prescribed under the statute. Apart from that, the remission given to the accused will not be taken away in any event and if he is entitled for further remission for the subsequent period of imprisonment, he is entitled under the Karnataka Prisons Rules, 1974 and under the provisions of Karnataka Prisons Manual. Under such circumstances, the argument advanced by the learned counsel in this regard holds no water. The act of the State in this regard cannot be termed as contradictory and the doctrine of legitimate expectation and doctrine of self incrimination cannot be made applicable to the facts and circumstances of

the case in hand. Further, there is no compulsion for withdrawal of the appeal by the accused.

25. Learned counsel has also invited the attention of the Court to Section 377 of Cr.P.C. and contended that when the State has filed an appeal for enhancement of sentence, the accused is at liberty to plead for his acquittal or for reduction of sentence. At the first instance, question of seeking reduction of sentence in this case does not arise at all as the Trial Court erred in not imposing minimum statutory sentence prescribed under the law. The second aspect regarding accused arguing for acquittal also does not arise, since the appeal filed by him was withdrawn and now after having withdrawn the appeal, he cannot argue for acquittal. Hence, the said ground is also not sustainable. Under these circumstances, the argument advanced by the learned counsel for respondent/accused in this regard cannot be entertained and admittedly, the Trial Court has failed to impose the minimum sentence prescribed under the law. Under such circumstances, the appeal filed by the State requires to be allowed and the sentence so far as it relates to the offence under Section 376(i) of IPC and under Section 5(L) read with

Section 6 of POCSO Act needs to be altered by enhancing it from 7 years to 10 years as no other special reasons are forthcoming to enhance it to life imprisonment. Accordingly, we answer the point under consideration in the affirmative and proceed to pass the following:

ORDER

The appeal filed by the State is partly allowed.

The sentence so far as it relates to Section 376(i) of IPC and Sections 4 and 5 (L) read with Section 6 of POCSO Act is enhanced and accused is sentenced to undergo rigorous imprisonment for a period of ten years along with fine as imposed by the Trial Court.

The rest of the sentence imposed by the Trial Court pertaining to other offences including the fine imposed remained unaltered.

The Trial Court is directed to secure the presence of the accused for undergoing reminder part of the enhanced sentence in this appeal.

Send back the Trial Court records along with a copy of this order immediately for compliance.

Sd/-
JUDGE

Sd/-
JUDGE

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