THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 6th August, 2024

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.29 of 2023

Appellant **:** Bed Prakash Adhikari

versus

Respondent **:** State of Sikkim

Appeal under Section 374(2) of
the Code of Criminal Procedure, 1973

Appearance

Mr. Rajendra Upreti, Advocate with Ms. Kanchan Rai, Advocate for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The victim was a six year old child when she was sexually assaulted by the Appellant, who resided near the government residential quarters of the victim and her family. On 26-04-2023, the FIR Exhibit P4/PW-2, was lodged by PW-2, the Counsellor of the District Child Protection Unit (DCPU), before the concerned Police Station, informing therein that the child aged about ten years had been brought that day to her office, by PW-4 her mother, for counselling. The child PW-1 revealed that in the year 2018-19, when she was playing outside her home, the Appellant called her to him, put her on his lap, facing away from him, caressed her and while she was still on his lap made some movements. He then turned her to face him and she felt a thrust inside her vagina, as he moved, while she was on his lap. The FIR also revealed that according to the victim she had also been sexually assaulted by a person named Lalit Subba in 2019. She

did not disclose the incident to anyone but complained of frequent urinary infection. Before lodging the FIR she had participated in *Taekwondo* in school, upon which she had excess vaginal white discharge and thereafter revealed the incident of sexual assault to her mother, who took her to PW-2, for counselling.

(i) The case was registered by the Police Station against the Appellant, under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act"). Investigation was completed and Charge-Sheet filed against the Appellant under Sections 376/377 of the Indian Penal Code, 1860 (hereinafter, "IPC") read with Sections 6 and 10 of the POCSO Act, by the Investigating Officer, PW-16. The Learned Trial Court framed Charge against the Appellant under eight counts, viz., Sections 5(l)/6, 5(m)/6, 9(l)/10, 9(m)/10 of the POCSO Act and Sections 375(a)/376(1), 376(2)(n)/376(2), 376AB, 354A(1)(i)/ 354A(2) of the IPC. He pleaded "not guilty" to all the Charges and claimed trial, following which the Prosecution examined sixteen witnesses. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), where the incriminating evidence against him was put to him. He claimed innocence and sought to clarify that he was not an ambulance driver as alleged in the evidence. That, the mother of the survivor and he had a quarrel in February, 2023 regarding money, hence she was tutored to depose against him. The Appellant sought to disprove the Prosecution case by examining three DWs. Thereafter, final arguments were heard.

(ii) Vide the assailed Judgment dated 30-09-2023 in Sessions Trial (POCSO Act) Case No.02 of 2023 of the Court of

Special Judge (POCSO ACT), Mangan District, Sikkim, the Appellant was convicted of the offence under **Section 9(m)/10** of the POCSO Act. He was however sentenced under **Section 9(l)/10** of the POCSO Act to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only, with a default stipulation.

(iii) He was acquitted of the offences under Sections 5(l)/6, 5(m)/6, **9(l)/10** of the POCSO Act and Sections 375(a)/376(1), 376(2)(n)/376(2), 376AB, 354(1)(i)/354A(2) of the IPC.

(iv) Aggrieved, the Appellant is before this Court impugning both the Judgment and Order on Sentence.

2. Learned Counsel for the Appellant contended that the Prosecution case must fail for the reason that the FIR was lodged after a delay of 4/5 years of the alleged incident with no reasons having been furnished for the delay. Reliance was placed on ***Makraj Limboo*** vs. ***State of Sikkim***[1], ***State of Andhra Pradesh*** vs. ***M. Madhusudhan Rao***[2], ***Bhaiyamiyan alias Jardar Khan and Another*** vs. ***State of Madhya Pradesh***[3], ***State of Karnataka*** vs. ***Mapilla P.P. Soopi***[4] to fortify his argument. In the second leg of his arguments, Learned Counsel contended that the victim did not raise any alarm neither did she inform her mother of the sexual assault after its occurrence. There is no evidence to indicate that after such sexual assault she became unconscious, did not sleep or was even taken to the Doctor. She continued to be a regular student and did not remain absent from the school. That, strangely the incident came to light only in April, 2023, when she allegedly had excess vaginal white discharge and informed her mother of it and of the incident.

[1] 2019 SCC OnLine Sikk 220
[2] (2008) 15 SCC 582
[3] 2011 CRI.L.J. 3577 (SC)
[4] 2004 CRI.L.J. 44 (SC)

That, the identification of the Appellant is also not reliable as PW-4 did not name him in her Section 161 Cr.P.C. statement and did so only in her evidence in Court. The medical report Exhibit P-10/PW-6 of the victim, fails to establish any sexual assault. The counselling report of the Complainant is not on the records and in all likelihood PW-1 was tutored by the Counsellor PW-2 to depose against the Appellant. Exhibit P4/PW-2 alleges that the Appellant resided in government quarters which is erroneous as he was living in the rented house of DW-3 who has deposed as much. DW-1 has stated that the Appellant was a "programme vehicle driver" and not an "ambulance driver" as alleged in the FIR. As the evidence of the Prosecution on the above aspects are erroneous, it cannot be relied on to convict the Appellant. That, the location of the sexual assault alleged to be a drain has not been indicated in the rough sketch map, Exhibit P-24/PW-14. That, there is a discrepancy in the Birth Certificate of the alleged victim. That, the Charge itself is defective being devoid of date, time and place of offence. That, in the said circumstances it is settled law that the decision ought to be in favour of the accused and he ought to be acquitted of all Charges. On this aspect, reliance was placed on ***State of M.P.*** vs. ***Bacchudas alias Balram and Others***[5].

3. *Per contra*, Learned Additional Public Prosecutor stated that, the victim's statement regarding the sexual assault has not been demolished in cross-examination. That, the child was about six years old when the offence was committed and her failure to raise a hue and cry was due to her lack of comprehension of the import of the act, after which she started playing with her friends. That, the allegation of strained relationship between the Appellant

[5] (2007) 9 SCC 135

and PW-4 is a figment of the imagination of the Appellant as both parents of the victim are government servants and financially sound. That, the Supreme Court has time and again reiterated that delay in the lodging of FIR in cases of sexual assault can be disregarded, in view of the sensitivity of the offence and the reluctance of the family to report such matters. Attention in this context was drawn to the decision in ***Tulshidas Kanolkar*** vs. ***State of Goa***[6]. That, in ***State of Himachal Pradesh*** vs. ***Manga Singh***[7] the Supreme Court has propounded that the sole testimony of the victim can be relied on if it is cogent, consistent and inspires the confidence of the Court. There being no reason to doubt the testimony of the victim, the Judgment of the Learned Trial court requires no interference.

4. The Learned Counsel for the parties were heard *in extenso* and all evidence on record carefully examined and the impugned Judgment perused.

5. The question that falls for consideration is, Whether the Learned Trial Court has arrived at a correct conclusion in convicting the Appellant?

6. In order to gauge the above, it is essential to consider the evidence of the Prosecution witnesses. There are no eye-witnesses to the incident, accordingly the testimony of the victim is of importance and therefore it has to be examined to assess whether it is consistent, cogent, reliable and inspires the confidence of the Court. She was examined by the Court on 25-07-2023, at the said time she was 10 years old, the offence having been committed when she was around six years old. Questions

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[6] (2003) 8 SCC 590
[7] (2019) 16 SCC 759

were put to her to assess her competence to depose as provided under Section 118 of the Indian Evidence Act, 1872 and she was accordingly found competent. That having been said, it may necessarily be pointed out that Section 4 of the Oaths Act, 1969, provides as follows;

> "**4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—**(1) Oaths or affirmations shall be made by the following persons, namely:—
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> (a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
>
> (b) interpreters of questions put to, and evidence given by, witnesses; and
>
> (c) jurors:
>
> **Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.**
>
> ...." [emphasis supplied]

(i) The proviso (*supra*), lays down that a child under twelve years of age need not be administered oath if the Court is of the opinion that, though the witness understands the duty of speaking the truth, she does not understand the nature of an oath or affirmation. It is also evident that the absence of an oath or affirmation would not render any evidence given by such witness as inadmissible nor affect the obligation of the witness to state the truth. In the instant matter, however oath was administered to her. In response to question no.9 put to her, to test her competence, she stated that to take oath means to state facts

truthfully. The identification of the Appellant was done by her virtually, via video conferencing. Her deposition was that; between 2018 and 2019 when she was playing alone outside her quarters, the Appellant came and called her to him. He then placed her on his lap with her back towards him and started rocking back and forth. She felt as though a stick kind of object had been inserted into her vagina and experienced a sharp pain. She then asked him to stop and managed to flee from the place. A similar incident was perpetrated on her by one Lalit when she was again alone in the quarters. That, on 25-04-2023 she informed her mother of her vaginal white discharge and her mother wanted to take her to the hospital, but she was afraid. As her mother kept enquiring of her, if someone had touched her or done anything wrong to her, she narrated both the incidents to her mother. On 26-04-2023 her mother's elder sister, came to her school and took her to an office where on enquiry by a lady as to what had happened, she narrated both incidents. That, she made her statement under Section 164 Cr.P.C. before a Magistrate. She identified Exhibit P3/PW-1 as her Birth Certificate. Despite a verbose cross-examination, the deposition of the victim pertaining to the sexual assault could not be decimated.

(ii) PW-2 was the Counsellor, she had counselled the victim who had narrated the facts of sexual assault to her. She was witness to the seizure of the Birth Certificate of the victim. PW-3 an outreach worker who was also present with PW-2 and PW-1 at the relevant time, vouched for the appearance of PW-1 at the DCPU, on 26-04-2023. She too was witness to the seizure of Exhibit P3/PW-1. PW-4 the mother of the victim narrated the

incident of sexual assault as told to her by PW-1 and that the police seized the Birth Certificate Exhibit P3/PW-1 from her possession and her daughter's date of birth is 19-02-2013. The evidence of PW-5 the victim's father lent credence to the seizure of Exhibit P3/PW-1. He categorically deposed that his daughter's date of birth is 19-02-2013. That, when he collected his daughter's Birth Certificate he had signed on a register and identified his name marked as "informant's name", on Exhibit P7/PW-5, the certified copy of the page in the Live Birth Register 2013, where he had signed while collecting the Birth Certificate. PW-8 supported the evidence of PW-5 regarding the entries in Exhibit P7/PW-5. PW-11 also vouched for the entry in Exhibit P3/PW-1 and Exhibit P7/PW-5 and that by referring to the latter he could state that the document had been handed over to PW-5. The entries in the Birth Certificate went undecimated.

(iii) PWs 6 and 7 were the Doctors who examined the victim on 26-04-2023 and 01-05-2023 respectively, in connection with the offence. PW-6 opined that there was nothing to suggest recent sexual intercourse but an old hymen tear was present and suggested that further expert opinion be obtained to rule out previous sexual intercourse or assault. PW-7 opined that there was no fresh injury on the body of the survivor but also found an old healed hymen tear at 5'0 clock position. That, penetrative sexual violence of the vagina could not be ruled out.

(iv) PW-10 the Doctor who examined the Appellant found no abnormality on his genital.

(v) The evidence of PW-12 was supported by the evidence of PW-11 with regard to the seizure of the two documents referred Exhibit P3/PW-1 and Exhibit P7/PW-5.

7. The Learned Trial Court while considering whether the victim was a child in terms of the POCSO Act, discussed at great length the evidence of PWs 1, 4, 5, 8, 9, 11 and 12 and thereafter concluded that the Prosecution had established the age of the survivor to be six years beyond reasonable doubt. I find no reason to differ with the finding of the Learned Trial Court on the age of the victim as seen from the evidence (*supra*).

8. Whether sexual assault was perpetrated on the victim was the other question that the Learned Trial Court had delved into in detail, during which the evidence of PW-1 was discussed. It was found by the Learned Trial Court that the victim had worn her underwear during the incident, besides the medical examination took place five years after the incident and hence, no injuries were found in her vaginal area. The Learned Trial Court after discussing the evidence of PWs 6 and 7, concluded that, from their evidence, the medical reports and the uncertain evidence of the survivor with regard to penetrative sexual assault she did not qualify as a "*sterling witness*", hence concluded that the Prosecution case of aggravated penetrative sexual assault remained unproved. It was also observed that it is not the case of the Prosecution that the accused/Appellant removed his clothes and disrobed the survivor and committed penetrative sexual assault.

(i) Having considered the findings *supra*, while differing with the observation of the Learned Trial Court that the victim did not qualify as a "*sterling witness*", it is found that the victim had

informed PW-6 that the accused Lalit and one ambulance driver of the Public Health Centre (PHC) had grabbed her on two different incidents separately and placed her on their lap. She was not able to articulate the exact nature of the act in the two incidents, but complained of pain in the lower abdomen and burning sensation while passing urine. As per PW-7, the Doctor who examined the victim, she narrated to her that sometime during 2018-19 the Appellant saw her playing outside her house alone. He grabbed her and put her on his lap. She then felt a sharp stabbing pain in her private part, after which, he held her tightly and started rocking back and forth. That, she ran away and did not share the fact of occurrence of the incident with anyone. The evidence of PW-1 the victim in Court reveals the exact same narration of the incident. Thus, I find that after the Learned Trial Court based the conviction of the Appellant on the victim's statement, although correctly not for penetrative sexual assault, hence the observation made that she was not a "*sterling witness*" is indeed a preposterous proposition.

9. In light of the foregoing discussions and on consideration of the entire evidence on record,, having differed from the Learned Trial Court only with regard to the finding on the "*sterling witness*", I do not see any reason to differ from the conclusions arrived at. The assailed Judgment is upheld, however the Order on Sentence requires modification for the reasons that follow hereinbelow.

10. At Paragraph 85 of the impugned Judgment dated 30-09-2023, the Learned Trial Court has *inter alia* held as follows;

> **"**85. ……………. The accused also stands **acquitted of the charge under Section 9(l), POCSO Act**, punishable under Section 10, POCSO Act. ………

> However, the Prosecution has succeeded in establishing the charge framed **under Section 9(m), POCSO Act, punishable under Section 10, POCSO Act, and the accused stands convicted of the same**.
> ………………………………….." [emphasis supplied]

11. The provisions of Section 9(l) and Section 9(m) of the POCSO Act are extracted hereinbelow;

> **"9. Aggravated sexual assault**.—………………..
>
> **(l) whoever commits sexual assault on the child more than once or repeatedly;** or
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> ……………………………………………………………
>
> **(m) whoever commits sexual assault on a child below twelve years;** or
> ………………………………." [emphasis supplied]

The penalty provision is Section 10 of the POCSO Act which is extracted hereinbelow;

> **"10. Punishment for aggravated sexual assault**.—Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.**"**

12. In the impugned Order on Sentence dated 30-09-2023, at Paragraph 7, contrarily, after having acquitted the Appellant under Section 9(l) of the POCSO Act as seen (*supra*), the Learned Trial Court ordered as follows;

> **"**7. …………………………………..
>
> **The convict is sentenced to undergo rigorous imprisonment** for a period of three years and a fine of ₹5000/- (Rupees five thousand only) **for the offence defined under Section 9(l), POCSO Act, committed against the survivor**. ……………
> ………………………………." [emphasis supplied]

(i) The above order is a clear display of the Learned Judicial Officer being unmindful of what had been recorded in the impugned Judgment as regards the offence under which the Appellant was convicted. Not only has the Section under which the Appellant convicted been mentioned erroneously in the Order on Sentence, the imprisonment meted out also does not adhere to the

incarceration prescribed in Section 10 of the POCSO Act. Consequently, the sentence of "three years" meted out by the Learned Trial Court on the Appellant, for the offence under Section 9(l) [*sic, Section 9(m)*] punishable under Section 10 of the POCSO Act is alien to the legal provision and flies in the face of the mandate of law. The Learned Trial Court ought to be mindful of the penal provision and not hand out sentence as deemed appropriate by the Court, but must adhere to the law and where minimum sentence is prescribed by the law it has to be applied without exception.

13. The Supreme Court while discussing the aspect of imposition of minimum sentence in ***Mohd. Hasim*** vs. ***State of Uttar Pradesh and Others***[8], at Paragraph 19 held as follows;

> "**19.** The learned counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in ***Arvind Mohan Sinha*** [(1974) 4 SCC 222] and ***Ratan Lal Arora*** [(2004) 4 SCC 590]. **We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court.** However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such discretion includes the discretion not to send the accused to prison. **Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed.** If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. **A provision that gives discretion to the court not to award minimum sentence cannot be equated with a**

[8] (2017) 2 SCC 198

> **provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications**, which should be recognised and accepted for the PO Act.**"**
> **[emphasis supplied]**

(i) In ***Harendra Nath Chakraborty*** vs. ***State of West Bengal***[9], the Supreme Court in Paragraphs 27 and 28 held as follows;

> **"27.** The appellant was dealing with an essential commodity like kerosene. **If Parliament has provided for a minimum sentence, the same should ordinarily be imposed save and except some exceptional cases which may justify invocation of the proviso appended thereto.**
>
> **28.** In India, we do not have any statutory sentencing policy as has been noticed by this Court in *State of Punjab* v. *Prem Sagar* [(2008) 7 SCC 550]. Ordinarily, the legislative sentencing policy as laid down in some special Acts where the parliamentary intent has been expressed in unequivocal terms should be applied. Sentence of less than the minimum period prescribed by Parliament may be imposed only in exceptional cases. No such case has been made out herein.**"** **[emphasis supplied]**

(ii) In ***State of Uttar Pradesh*** vs. ***Sonu Kushwaha***[10], the Supreme Court *inter alia* held that;

> **"13.** …………….. **When a penal provision uses the phraseology "shall not be less than….", the courts cannot do offence to the section and impose a lesser sentence. The courts are powerless to do that unless there is a specific statutory provision enabling the court to impose a lesser sentence.** …………….**"**
> [emphasis supplied]

(iii) In ***Suman Gurung*** vs. ***State of Sikkim***[11], this Court while considering an Appeal for decreasing the sentence imposed by the Court of Learned Special Judge (POCSO), West Sikkim, at Gyalshing opined that sentence to be imposed has to be the minimum prescribed by the statute. It was observed as follows;

> **"*6.*** In light of the provisions of law, the principles of law enunciated and extracted above and having duly perused and considered the Sentences imposed by the Learned Trial Court, it is evident that only the minimum imprisonment prescribed by the Statute has been meted out by the Learned Trial Court to the Appellant. Any Order of this Court cannot fly in the face of the Statute or the settled position of law.**"**

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[9] (2009) 2 SCC 758
[10] (2023) 7 SCC 475
[11] 2022 SCC OnLine Sikk 135 : 2022 SCC OnLine Sikk 135

(iv) In ***State of Punjab*** vs. ***Prem Sagar and Others***[12], the Supreme Court observed that there are certain offences which touch our social fabric, and we must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences have been kept out of the purview thereof. While imposing sentences the said principles should be borne in mind. That, a sentence is a Judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice-delivery system.

(v) In ***Dhananjoy Chatterjee alias Dhana*** vs. ***State of W.B.***[13] the Supreme Court observed that imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. That, justice demands that Courts should impose punishment befitting the crime so that the Courts reflect the public abhorrence of the crime. That, it requires application of mind and the purpose of imposition of sentence must also be kept in mind.

(vi) Thus, the law is now well-settled with regard to the imposition of minimum sentence and the absence of discretionary powers of the Court in such circumstances.

14. At this juncture, it is imperative to consider that as per Section 377 of the Cr.P.C., the State Government can direct the Public Prosecutor to present an Appeal to the High Court against the sentence on grounds of its inadequacy. The State-Respondent in the instant matter has failed to take note of the provisions of

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[12] (2008) 7 SCC 550

[13] (1994) 2 SCC 220

Section 377 of the Cr.P.C. to exercise the prerogative granted to it by the legislature and thereby fallen short of the duty vested on it.

(i) Notwithstanding such remissness of the State-Respondent, Section 386 of the Cr.P.C. which deals with powers of the Appellate Court, is to be considered and is extracted below for ready reference;

> "**386. Powers of the Appellate Court.**—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
>
> (a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction—
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
>
> (ii) alter the finding, maintaining the sentence, or
>
> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
>
> (c) in an appeal for enhancement of sentence—
>
> (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
>
> (ii) alter the finding maintaining the sentence, or
>
> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
>
> (d) in an appeal from any other order, alter or reverse such order;

> **(e) make any amendment or any consequential or incidental order that may be just or proper;**
>
> **Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:**
>
> **Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.**
>
> [emphasis supplied]

(ii) It is thus clear from Section 386(e) Cr.P.C. that the High Court in appeal is clothed with powers to make any amendment or any consequential or incidental order that may be just and proper. The first proviso thereto necessitates that the sentence shall not be enhanced unless the accused has had the opportunity of showing cause against such enhancement. The Appellate Court shall also not inflict greater punishment for the offence which in its opinion has been committed by the accused, than might have been inflicted for that offence by the Court passing the sentence.

(iii) In ***Prithipal Singh and Others*** vs. ***State of Punjab and Others***[14], the Supreme Court while discussing the scope of Section 386(e) of the Cr.P.C. observed as follows:

> "**36.** In *Surendra Singh Rautela* v. *State of Bihar* [(2002) 1 SCC 266] this Court reconsidered the issue and held: (SCC p. 271, para 8)
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> > **"*8.* … It is well settled that the High Court, suo motu in exercise of revisional jurisdiction can enhance the sentence of an accused awarded by the trial court and the same is not affected merely because an appeal has been provided under Section 377 of the Code for enhancement of sentence and no such appeal has been preferred."**
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> [See also *Nadir Khan* v. *State (Delhi Admn.)* {(1975) 2 SCC 406}, *Govind Ramji Jadhav* v. *State of Maharashtra* {(1990) 4 SCC 718} and *K. Pandurangan* v. *S.S.R. Velusamy* {(2003) 8 SCC 625}]**."**
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> **37.** In *Jayaram Vithoba* v. *State of Bombay* [AIR 1956 SC 146] this Court held that the suo motu powers of enhancement under revisional jurisdiction can be

[14] (2012) 1 SCC 10

> exercised only after giving notice/opportunity of hearing to the accused.
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> **38. In view of the above, the law can be summarised that the High Court in exercise of its power under Section 386(*e*) CrPC is competent to enhance the sentence suo motu. However, such a course is permissible only after giving opportunity of hearing to the accused."** [emphasis supplied]

15. Consequently, the neglect and laxity of the State-Respondent in not preferring an Appeal against the erroneous sentence and seeking its enhancement as per the mandate of law in no manner precludes the High Court from exercising its powers of revision under Section 397 read with Section 401 of the Cr.P.C. to enhance the sentence. The convict is of course required to be put to notice and to be extended an opportunity of being heard on the question of sentence, either in person or through his Advocate.

16. In view of the above observations and considering that the Appellant was convicted under Section 9(m) of the POCSO Act, punishable under Section 10 of the POCSO Act, but meted out sentence of imprisonment under Section 9(l) of the POCSO Act, that too for three years only, short of the mandate of law, to rectify the error, the Appellant is put to Notice for hearing on enhancement of sentence.

17. Issue Notice and list accordingly.

18. Copy of this Judgment be forwarded to the Learned Trial Court for information.

(Meenakshi Madan Rai)
Judge
06-08-2024

Approved for reporting : **Yes**

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