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.33 of 2023

Appellant : Lalit Subba

versus

Respondent : State of Sikkim

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

Appearance

Mr. Sunil Baraily, Leada T. Bhutia with Mr. Amit Rai, Advocates for the Appellant.

Appellant present in person.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. A girl child, aged about six years at the time of the incident, was the victim of sexual assault, perpetrated on her by the Appellant, aged about forty years, when they were residing in residential quarters situated close to each other.

2. The Learned Trial Court in the impugned Judgment settled seven questions for determination, viz.;

I. Whether the survivor is a minor?

II. Did the accused commit the offence of aggravated penetrative sexual assault repeatedly upon the survivor?

III. Did the accused commit the offence of aggravated penetrative sexual assault upon the survivor, a child of less than 12 years?

IV. Did the accused commit the offence of aggravated sexual assault repeatedly upon the survivor?

V. Did the accused commit the offence of aggravated sexual assault upon the survivor, a child of less than 12 years?

VI. Did the accused make unwelcome and explicit sexual overtures with the survivor?

VII. Other issues raised during argument.

(i) On carefully analysing the evidence on record the Learned Trial Court observed that, the Prosecution had established beyond reasonable doubt that the victim was six years old, her date of birth being 19-02-2013 as established by the evidence of PWs 1, 4, 5, 8, 9, 10, 11.

(ii) The Learned Trial Court on considering the evidence of PWs 6 and 7, the Doctors who examined the victim, concluded that it was apparent that the victim herself was unsure if there was penetration at all, although the Doctors found an old hymen tear which could be due to strenuous exercises, *Taekwondo*, etc. Thus, penetrative sexual assault could not be established. The Learned Trial Court was also not inclined to rely on the statement of the survivor on this aspect, who according to the Trial Court thereby did not qualify as a *"sterling witness"*, the Court having observed contradictions in her statements before the Court and before PWs 6 and 7.

(iii) While discussing whether the Appellant committed the offence of aggravated penetrative sexual assault repeatedly on a child less than twelve years, the Trial Court considered the evidence of PW-1, her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), the evidence of PWs 6 and 7, and observed that, the Prosecution had established the offence of repeated sexual assault on a child below twelve years of age.

(iv) It was further observed that the charge of sexual harassment defined under Section 354A(1)(i) of the Indian Penal

Code, 1860 (hereinafter, "IPC") would not sustain as the offence of sexual assault had already been established.

(v) The Court attributed the non-disclosure of the offence by the Appellant to her parents for a prolonged period to her fear of retribution and to her tender years, which led to the delay in the lodging of the FIR. That, there was no evidence on record to explain why a child would make false allegations against the Appellant sans animosity between her family and the Appellant.

(vi) The Learned Trial Court found no basis in the arguments of the Learned Counsel for the accused that, the survivor had been tutored by the staff of the District Child Protection Unit (DCPU) and to the argument that the Charge did not specify the date or month when the incident took place. Strength was drawn from the decision of this Court in ***Ishwar Das Darjee*** vs. ***State of Sikkim***[1] where it was held *inter alia* that the charge does not necessarily need to contain elaborate details but there should be no doubt left in the mind of the accused as to what the case against him was and the allegations he had to meet, to prevent any prejudice to him.

(vii) The Appellant was consequently acquitted of the offence under Sections 5(l) and 5(m) [*repeated penetrative sexual assault on a child and penetrative sexual assault on a child below twelve years, respectively*] punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act").

(viii) He was also acquitted of the offence under Sections 375(a)/376(1), 376(2(n)/ 376(2), 376AB and 354A(1)(i)/354A(2) of the IPC.

[1] 1998 CRI.L.J. 4447 : 1998 SCC OnLine Sikk 3

(ix) Conviction was handed out to him under Sections 9(l) and 9(m), both offences being punishable under Section 10 of the POCSO Act, for which he was sentenced to undergo rigorous imprisonment for three years, under each of the offences and to pay a fine of ₹ 1,000/- (Rupees one thousand) only, each, under each of the offences, with default stipulations. The periods of imprisonment were ordered to run concurrently.

3. Assailing the Judgment of the Learned Special Judge (POCSO Act), Mangan District, Sikkim, in Sessions Trial (POCSO Act) Case No.03 of 2023 and Order on Sentence, both dated 30-09-2023, Learned Counsel for the Appellant emphasised that the victim stated that her aunt took her to the DCPU, but the FIR reveals that it was her mother. Her aunt was not named as a Prosecution witness. In the FIR, the victim has stated the age of the accused, revealing that she was tutored. The evidence of PWs 16 and 17 are devoid of reference to any sexual assault by the Appellant, although the victim claims in her Section 164 Cr.P.C. statement to have been playing with their children in their living room, with the Appellant also present. The Learned Trial Court itself has found that the witness is not a "*sterling witness*", in view of her contradictory evidence in her Section 164 Cr.P.C. statement and before the Court. That, the evidence of PWs 6 and 7 does not reveal that the Appellant had violated the private parts of PW-1. That, despite the offence having been committed as alleged, PW-1 did not raise an alarm after the incident, but went back to playing nor was she absent from School thereafter. The evidence of the victim being inconsistent, it is unreliable and the Appellant thereby deserves an acquittal.

4. *Per contra*, Learned Additional Public Prosecutor contended that the statement of the victim regarding the incident has remained undecimated, is cogent and consistent on the details. The child did not raise an alarm as she did not understand the import of the act committed by the Appellant, which is vindicated by the evidence that she went back to playing. Her evidence inspires confidence and has correctly been relied upon to mete out conviction to the Appellant. That, the impugned Judgment of conviction and and Order on Sentence deserves no interference.

5. Having heard the arguments of the Learned Counsel for the parties and examined the records, it appears that the FIR Exhibit P4/PW-2 came to be lodged against the Appellant on 26-04-2023, before the concerned Police Station by PW-2, the Counsellor of the concerned DCPU, where the victim PW-1 was taken by her mother PW-4. PW-2 was informed by PW-4 that the victim had told her that she had been sexually assaulted by two individuals and that of late she had vaginal white discharge. PW-2 counselled PW-1, during which she revealed the incident of sexual assault perpetrated on her by the Appellant. Accordingly, in the FIR, PW-2 stated that in the year 2019, when PW-1 was about six years old and the Appellant was working at the Block Administrative Centre, he had come to the residence of PW-17, located near the Doctors and Nurses' quarters. When PW-1 was playing with the children of PW-17, the Appellant dragged her and put her on his lap facing him, she then felt a sharp pain in her vagina like a pen being inserted and the Appellant started moving vigorously. She escaped to the kitchen but this time she was caught by the Appellant, placed on his lap and made to turn her

back towards him. She felt a sharp pain in her anus. That, she had not disclose the incident to anyone although she frequently complained of urinary tract infection and pain in her genital to her mother. On the victim having participated in *Taekwondo* in school she had excess vaginal white discharge. She then revealed the incident to her mother who brought her to PW-2 for counselling.

(i) The case was registered against the Appellant by the concerned Police Station under Section 6 of the POCSO Act and investigated into by PW-19 the IO, on completion of which he submitted Charge-Sheet against the Appellant, under Sections 376/377 of the IPC read with Section 6 of the POCSO Act. The Learned Trial Court framed Charge against the Appellant on eight counts, informing the Appellant therein *inter alia* that the incident pertained to the year 2019. On the plea of "not guilty" by the Appellant, the trial commenced with nineteen witnesses furnished by the Prosecution being examined. The incriminating evidence against the Appellant was put to him as provided under Section 313 of the Cr.P.C., during which, he claimed that he had not committed any offence against the victim and on the day of the incident he was elsewhere with his family. The Appellant sought to and examined five witnesses. The Learned Trial Court on analysing the evidence on record and the arguments advanced, pronounced the impugned Judgment and Order on Sentence *supra*.

6. Now, while considering the age of the victim and whether she fell within the ambit of the definition of child as provided in the POCSO Act, as per PW-5 the father of the victim, Exhibit P3/PW-1 the Birth Certificate of the victim was seized from him. That, the date of birth of his daughter is 19-02-2013. That,

his daughter was born in the hospital at Gangtok and he collected her Birth Certificate from the said hospital having signed on a page of Exhibit P7/PW-5, a Register, where his name appeared in Column No.12 as "informant's name". Cross-examination could not decimate the above facts. The Birth Certificate of the victim was also identified by PW-8, the Additional Medical Superintendent – II of the concerned hospital, the contents of which had been tallied with the Live Birth Register and found at Sl. No.335, the certified copy of the Live Birth Register having been marked as Exhibit P7/PW-5. PW-9 also identified the Birth Certificate and his own signature, appearing at Sl. No.335 in Column No.15, when he was posted as Registrar, Births and Deaths at the Hospital. PW-10 vouched for the averments of PWs 8 and 9, as also PW-11, who stated that she had made the entry in Exhibit P7/PW-5 and handed over the Birth Certificate to PW-5 the victim's father. He was the informant of the victim's date of birth. On the basis of the entire evidence on record, it is clear that PW-1 was a child of six years when the offence took place as correctly concluded by the Trial Court.

7. Whether the Appellant in fact perpetrated the offence is now to be considered. The Learned Trial Court *inter alia* observed that the survivor did not qualify as a "*sterling witness*" to convict the Appellant for the offence of aggravated penetrative sexual assault. On this aspect, it appears that PW-6 the Doctor, examined the victim on 26-04-2023 at around 7 p.m. and deposed as follows;

> "…………………………………………..……………….
>
> 3. I examined the patient on the same day at 7:10 pm. Consent for examination of the survivor was taken from her mother. I took the

history of sexual assault from the survivor. **She informed that the accused Lalit Subba and one ambulance driver of Pxxx PHC had grabbed her on two different incidents separately. And in both the incidents, the accused persons had grabbed her and placed her on their lap.** The survivor was not able to describe what exactly had happened in the two incidents. However, after that she complained of pain in the lower abdomen and burning sensation while passing urine.
……………………………………..” **[emphasis supplied]**

(i) PW-7 the Doctor, examined the victim on 01-05-2023 at 12.30 p.m. and deposed as follows;

"……………………………………….…………….
That on 01.05.2023 at 12:30 pm, I examined the survivor at STNM Hospital. She had been brought by her mother. I also took the consent from the mother before examining the survivor. …………………… **The survivor also told me that in 2019 when she was playing in her neighbor's house and was left alone in the house with the accused Lalit Subba, he had grabbed her and placed her on his lap facing him and caught her tightly. She again felt a sharp pain in her private part and also felt a sharp long object in her private part. The accused then started shaking. She managed to run away after some time. Again in the kitchen area of the said house, caught hold of her and put her on his lap when she felt sharp pain in both her vaginal area as well as her anal region.** She again managed to flee from the house and did not inform anyone about the incident.
……………………………………..” **[emphasis supplied]**

(ii) The evidence of PWs 6 and 7 is juxtaposed with the evidence of PW-1 the victim who has clearly stated therein as follows;

"……………………………………………….
3. It was in 2019, my mother and all the staff had gone to the hospital and I was all alone in the quarter. Adjacent to our quarter was another quarter of some Department. One Santosh uncle, his wife and 2 children lived in the said quarter and I always went there to play with his children. …………… On that day, the accused Lalit uncle was also present in the house. Lalit uncle used to frequent Santosh uncle's house. **Santosh uncle, his wife and their two children went out to play badminton and I was left alone with the accused in the sitting room. At that time, I was lying on the floor and playing. The accused then grabbed my legs and pulled me towards him and placed me on his lap with my face towards him. He then started rocking back and forth and I realized that his vagina**

> **(sic) was pushing against my vagina. I again felt a sharp pain in my vagina. The act of accused Lalit was very similar to accused Bed Prakash.** I asked the accused to stop and ran towards the kitchen. **The accused also followed me to the kitchen and grabbed me from the back and he again pushed his pelvic area in mine while rocking back and forth. I could feel the accused pushing his vagina (sic) in my anus.** In again felt a sharp pain in my anus. I then ran out and continued playing outside. ....**"** **[emphasis supplied]**

(iii) The deposition of all three witnesses corroborate each other with regard to the offence of sexual assault. There are no significant variations on the material facts which have been reiterated consistently by PW-1. There may be minor discrepancies with regard to the language employed, however the consistency of the statement of PW-1 with regard to the incident of sexual assault cannot be faulted. In such circumstances, it cannot be said that she was not a "*sterling witness*" as opined by the Learned Trial Court, who while stating so has curiously itself contrarily relied on the victim's statement to the hilt, to convict the Appellant. Undoubtedly, the offence of "aggravated penetrative sexual assault" has not been made out by the evidence of PW-1. Both the Appellant and PW-1 were fully clothed at the time of the offence as can be culled out from the evidence, but observing that she is not a "*sterling witness*" would then in fact have brought the Prosecution case crashing to its knees for want of evidence.

8. It is clear that in the first instance the victim was a mere child of six years. The Oaths Act, 1969, in the proviso to Section 4 lays down 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 the opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions of this Section 4 and

Section 5 of the said Act shall not apply to such witness. That, in any event, 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. A child below seven years of age is deemed to be *doli incapax*, i.e., incapable of committing a crime. Section 82 of the IPC provides *inter alia* that, "nothing is an offence which is done by a child under seven years of age" thereby providing absolute immunity from criminal prosecution for children below seven years of age. These two Sections (*supra*) are being cited herein to establish that, the law recognises the incapacity of children below seven years to be capable of criminal intent. In the same vein, PW-1 was below seven years when she was the victim of the wanton depravity of an adult, and was incapable of comprehending the nature of the offence perpetrated on her, let alone the import of a sexual assault. The innocence of PW-1 can be gauged from her statement that, after the Appellant subjected her to the acts of sexual assault, when she felt a sharp pain in her private region, all she did was run out and continue playing, without a thought to raising an alarm. There accrues no reason to doubt the veracity of the evidence of this witness which has been tested on the anvil of a prolix cross-examination where she detailed the crux of the offence committed on her consistently, to PWs 6 and 7, despite her tender years. There is obviously no eye-witness to the incident. PW-4 the mother had taken her child to the DCPU due to her child having told her of the sexual assault. Her statement does not waver with regard to what the victim narrated to her. PW-2 was also told of the incident by PW-1. Her evidence also with regard to the

narration made by the victim is unwavering. The failure of the victim to articulate in precise words the offence or the intention of the offender does not, in my considered view, render her an unreliable witness.

9. While addressing the argument of the Counsel for the Appellant about the delay in the lodging of the FIR, it requires no reiteration that the Supreme Court has repeatedly held that in offences of sexual assault there is always a reticence on the part of the victim and her family to bring it in the public domain. The reputation of the child, her family, the fear of her remaining a spinster, the taunts that the child had invited the offence upon herself, are all given elaborate deliberation before taking a step to lodge a complaint. In this context in ***State of Himachal Pradesh*** vs. ***Prem Singh***[2], the Hon'ble Supreme Court *inter alia* laid down as follows;

> **"6.** So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. ....**"**

(i) The argument advanced on the failure of the Learned Trial Court to detail the dates of the incident falls flat, as even though the specific dates were not mentioned the year of offence found place in the Charge. The Appellant was well aware of what charges he was to meet. The Appellant also took no steps under Section 30 of the POCSO Act to indicate that he did not have the requisite culpable mental state.

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[2] (2009) 1 SCC 420

10. In consideration of the entire evidence on record, I am of the considered opinion that there is no reason whatsoever to differ from the findings of the Learned Trial Court, that repeated sexual assault had been perpetrated on PW-1 by the Appellant.

11. Consequently, the Appeal stands dismissed.

12. Now, addressing the aspect of Sentence imposed on the Appellant, the Order on Sentence, dated 30-09-2023, *inter alia* reads as follows;

> "7. The concerned offences cannot be viewed lightly. Considering the serious nature of the offences involved, the convict is sentenced as follows;
>
> 1). The convict is also **sentenced to undergo rigorous imprisonment for a period of three years and a fine of ₹ 1000/- (Rupees one thousand only) for the offence defined under Section 9(l) and punishable under Section 10 of POCSO Act** committed against the survivor.
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> 2). The convict is **sentenced to undergo rigorous imprisonment for a period of three years and a fine of ₹ 1000/- (Rupees one thousand only) for the offence defined under Section 9(m) and punishable under Section 10 of POCSO Act** committed against the survivor."

(i) Despite the awareness that the offences could not be viewed lightly, the Learned Trial Court proceeded to mete out sentences of imprisonment of three years each on the Appellant, for the offence under Section 9(m) and Section 9(l) punishable under Section 10 of the POCSO Act which is totally erroneous, being alien to the legal provision and flies in the face of the mandate of law. The Learned Trial Court ought to have been mindful of the penal provision and handed out sentence as directed by law which must be adhered to. Where minimum sentence is prescribed by the law it has to be applied without exception. Section 10 of the POCSO Act *inter alia* provides that **"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." In light of the legal provision the Court is not clothed with powers to exercise discretion to impose sentence lesser than prescribed by law.

13. On this facet, in ***Mohd. Hasim*** vs. ***State of Uttar Pradesh and Others***[3], the Supreme Court in Paragraph 19 it was 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 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."
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> **[emphasis supplied]**

(i) In ***Harendra Nath Chakraborty*** vs. ***State of West Bengal***[4], 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**

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[3] (2017) 2 SCC 198

[4] (2009) 2 SCC 758

> **ordinarily be imposed save and except some exceptional cases which may justify invocation of the proviso appended thereto.**
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> **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***[5], 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***[6], 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.**"**

(iv) In ***State of Punjab*** vs. ***Prem Sagar and Others***[7], 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

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[5] (2023) 7 SCC 475
[6] 2022 SCC OnLine Sikk 135 : 2022 SCC OnLine Sikk 135
[7] (2008) 7 SCC 550

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.***[8] 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.

14. It is also imperative to point out 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 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—

[8] (1994) 2 SCC 220

(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 vested 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***[9], 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 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. It is relevant to remark that 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 also from exercising its powers of revision under Section 397 read with

[9] (2012) 1 SCC 10

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. The impugned Judgment is accordingly upheld, however in view of the above observations and considering that the Appellant was convicted under Sections 9(l) and 9(m) of the POCSO Act, punishable under Section 10 of the POCSO Act, but meted out sentence of imprisonment only of three years each, 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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