THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 31st July, 2024

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

Crl.A. No.34 of 2023

Appellant : Bindhyachal Baitha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Senior Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant was convicted under Section 9(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act"), for committing aggravated sexual assault on a child below twelve years, punishable under Section 10 of the same Act. He was sentenced to undergo simple imprisonment for a period of five years and fined ₹ 5,000/- (Rupees five thousand) only, with a default clause of imprisonment. The Learned Trial Court observed that since Section 9(m) of the POCSO Act covers the offences punishable under Sections 354 and 354B of the Indian Penal Code, 1860 (hereinafter, the "IPC"), the Appellant need not be penalised twice for the same offence under different legislations. He was acquitted of the offence under Section 5(m) of the POCSO Act for which penalty is provided under Section 6 of the same Act. Although charge was framed against the Appellant also under Section 376AB of the IPC, the Learned Trial Court failed to refer to or discuss this Section in the impugned Judgment.

(i) In the impugned Judgment, the Learned Trial Court in Paragraphs 15 and 17 concluded *inter alia* as follows;

> **"15.** It would be seen that the evidence of PW-5 and 7 and the allegation **against the accused of having inserted his finger into the victim's vagina is corroborated by the medical evidence (supra)**. ……
> …….
> **17.** In light of the discussions made above, the question whether on 30th September, 2018, **the accused touched and inserted his finger into the victim's vagina is answered in affirmative**.**"**
> [emphasis supplied]

Contrarily in the 'ORDER', at the conclusion of the impugned Judgment the Learned Trial Court proceeded to hold as follows;

> **"**In the result, I have arrived at a finding that the Prosecution have successfully brought home the charge **against the accused under Section 9(m) punishable under Section 10 of the POCSO Act, 2012**. Since this provision covers the offences punishable under Section 354 and Section 354B of the I.P.C, the accused need not be punished twice for the same offence under two different legislation. However, he stands acquitted from the charge under Section 5(m) punishable under Section 6 of the POCSO Act, 2012.
> ……**"** **[emphasis supplied]**

Thus, the Appellant was convicted for the offence of "aggravated sexual assault" simpliciter, despite the finding extracted above, that an offence of "aggravated penetrative sexual assault" had been perpetrated by him on the child.

(ii) Aggrieved by the Judgment and Order on Sentence of the Court of the Learned Special Judge (POCSO Act, 2012) Gangtok, Sikkim, dated 30-10-2023 and 31-10-2023 respectively, in S.T (POCSO) Case No.18 of 2019, this Appeal has arisen.

2. The victim is a girl child, aged about three years and two months at the time of the offence. The Prosecution case is that the Appellant had inserted his finger into her vagina and caused injuries therein. PW-5 the victim's mother, lodged Exhibit 2 the FIR, on 02-10-2018 complaining that the victim PW-1 had been indicating to her by pointing at her genital that uncle (accused) had

inserted his finger into it. That, PW-5 paid scant attention to what the child was communicating at the relevant time being overwhelmed by the circumstance of the hospitalisation of both her husband and father and she being the caregiver. However, on 01-10-2018 when the child had the urge to urinate frequently, she checked the genital of the child and found a cut therein, while the genital was found to be reddish in colour. On her enquiry, the child repeated the word "uncle" and pointed upwards. Later, when her sister-in-law was with the child and the Appellant was descending from the stairs, the child indicated that the Appellant, their neighbour, was the perpetrator.

(i) The concerned Police Station registered the FIR against unknown person under Section 376 of the IPC read with Section 10 the POCSO Act. On completion of investigation by the Investigating Officer PW-8, Charge-Sheet came to be filed against the Appellant under Section 10 of the POCSO Act.

(ii) The Learned Trial Court framed Charge against the Appellant under the POCSO Act, viz.; *(1)* Section 5(m) punishable under Section 6, *(2)* Section 9(m) punishable under Section 10 and under *(3)* Sections 376AB, *(4)* Section 354 and *(5)* Section 354B of the IPC. On his plea of "not guilty", to the aforementioned charges, trial commenced with the Prosecution examining eight witnesses. Thereafter, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), to enable him to explain the incriminating evidence against him and his responses were recorded. The final arguments were then heard.

(iii) The Learned Trial Court discussed the evidence of PW-1 the victim, PW-5 her mother, PW-7 the sister-in-law of PW-5, PW-6 the Gynaecologist and PW-4 the victim's father. It was concluded that the evidence of the Prosecution witnesses corroborated each other and that the accused had touched and inserted his finger into the victim's vagina. Thus, the Learned Trial Court opined that it was apparent that the victim comprehended that the act perpetrated on her by the Appellant was not right and therefore tried to tell her mother PW-5 and aunt PW-7 what "*mathi ko uncle*" (uncle from upstairs) had done to her. It was also found that the accused lived with his family on the terrace of the said building and was thereby referred to as "*mathi ko uncle*". Hence, the impugned Judgment of conviction and Order on Sentence were pronounced.

3. Learned Counsel for the Appellant contended that it was erroneous to hold the Appellant guilty as the circumstances could not even have permitted the offence to occur. The place where the Appellant resided was on the top floor of a four storied RCC building, while the victim lived on the immediate floor below with other families also in occupation of the same floor. The Appellant is employed in a private company, has a wife and two grown up children and these facts are not disputed. That, the injuries on the genital of the victim in all probability was on account of the diaper worn by the victim, besides, she was left in the constant care of PW-7 before the date of incident and she deposed that she did not leave the child alone, ruling out any opportunity for commission of such an offence. There was no eye-witness to the incident. PW-7 in her evidence before the Court has exacerbated her statement concerning the incident. That, the child

during her deposition was not able to identify the Appellant as the alleged perpetrator, apart from which the Learned Trial Court prompted her to depose against the Appellant by specifically enquiring of the child **"***if the uncle had done any bad things to her such as whether he had touched her private parts inappropriately***"**. It was only then, that the victim had stated that he had touched her vagina. The victim admitted to being tutored by her mother to state that the Appellant had inserted his finger into her vagina. Thus, the victim's statement cannot be relied on. The cross-examination of the IO was indicative of the fact that the male members of the victim's own family were shielded as they were not examined during the investigation. As the Learned Trial Court failed to appreciate the evidence in its correct perspective, the impugned Judgment deserves to be set aside and the Appellant acquitted of the offences.

4. *Per contra*, the Learned Additional Public Prosecutor submitted that the impugned Judgment and sentence suffers from no shortfalls and the Appellant being the perpetrator of the offence was correctly identified by PW-1 and rightly convicted and sentenced by the Learned Trial Court.

5. Due consideration has been afforded to the submissions put forth by Learned Counsel for the parties. The evidence on record has been carefully perused.

6. Whether the finding of the Learned Trial Court suffered from erroneous appreciation of the evidence is the question that falls for determination. To answer the question, it is essential to correctly examine the evidence on record.

7. The offence allegedly took place on 30-09-2018 and the perpetrator, the Appellant, was aged around 42 years. PW-1 the victim was allegedly three years and two months old as per PW-5, when she was subjected to the sexual assault. The victim's statement under Section 164 Cr.P.C. was recorded on 02-11-2018 when she was three years and some months. She was six years old when her evidence was recorded before the Learned Trial Court on 26-11-2021. The delay in the recording of the victim's evidence in contravention to the provision of Section 35 of the POCSO Act was on account of the COVID-19 pandemic raging at the relevant time. This circumstance, as required by law, was recorded in the Order of the Learned Trial Court dated 23-03-2020.

(i) That having been said, Learned Counsel for the Appellant did not contest the age of the victim. PW-4 the father, identified Exhibit P-4/PW-4 as his daughter's Birth Certificate obtained by him from Dehradun, Uttarakhand, his native place. PW-5 the mother also identified the same document and denied the suggestion put to her under cross-examination that her daughter was not born on 09-08-2015. As per the IO, she collected Exhibit P-4/PW-4 from PW-5 after preparing the handing and taking over memo marked Exhibit P-11/PW-8. She also identified the signatures on the seizure memo. The evidence *supra* not having been decimated by cross-examination established the date of birth of the victim.

(ii) On the day PW-1 deposed in Court, the Learned Trial Court recorded that the child did not understand the meaning of 'oath' and as such oath could not be administered to her. In immediate contradiction thereof, the Court has thereunder

recorded "OATH ADMINISTERED", thereby reflecting non-application of judicial mind by the concerned Judicial Officer.

(iii) Be that as it may, in the context of 'Oath' to minors, apposite reference may be made to Section 4 of the Oaths Act, 1969, which 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:—
>
> (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]

(iv) It is evident that the proviso (*supra*) dictates that it is not necessary to administer oath to a child under twelve years of age, if the Court is of the opinion that, although 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 shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth. As the Learned Trial Court has noted that the child understood the nature of activities around her, her evidence is considered admissible.

(v) The victim in her evidence unequivocally stated that the Appellant had inserted his finger inside her genital. This statement withstood her cross-examination. On a suggestion put to her that her mother had told her that the accused had put his finger inside her genital, she admitted it to be true, but immediately voluntarily asserted that the Appellant had actually done it.

(vi) The evidence of the victim is supported by the evidence of PW-2 the Medico-Legal Consultant, who examined the Appellant on 03-10-2018, on the day following the alleged incident. It may be recapitulated here that, Exhibit 2, the FIR, was lodged on 02-10-2018. PW-2 deposed as follows:

> **"**… On 03.10.2018, one B... B... **was produced before me at the SXXX hospital with an alleged history of having touched/sexually assaulted a minor victim on her private part. As a matter of fact, he himself disclosed before me that he had touched the genitals (sic) of the concerned victim.** Since the incident had taken place more than 24 hours back and since he had reportedly washed his hands several times after that I did not consider it necessary to obtain his finger swab. ……**."** **[emphasis supplied]**

His evidence regarding the voluntary statement made by the Appellant to him stood the test of cross-examination.

(vii) The evidence of the foregoing two witnesses is corroborated by the evidence of PW-6 the Doctor, who examined the victim on 02-10-2018 itself. The Doctor deposed as follows;

> **"** …….
>
> On 02.10.2018, when I was on duty in Labour Room of Gynae Department, …… Hospital, a POCSO survivor girl, 3 year old was brought for medical examination at around 10:15 pm by her aunty ….. accompanied by SI Chomu Lachungpa of …… PS. When I asked the survivor girl what happened she answered to me using her own lips saying ***mathi ko uncle le yaa chhuyo*** **and said it is paining and pointed towards her vulval area.**
>
> On examination, she was conscious, oriented and cooperative. Vitally she was found stable. There

> was no injury mark on her neck, back, chest, abdomen and limbs.
>
> On local examination there was no injury on the perineum mons, urethral area. **Her vaginal mucosa on the right side had a laceration of around 1 cm which was tender to touch. No bleeding, hymen was intact and inflamed.** There was vaginal discharge. Anal area had no injury, no tenderness. Her hygiene was good. Had taken bath twice. Changed her clothes twice before coming to the hospital.
>
> …….
>
> **My conclusion at the time of the examination was 3-year old girl with injury in her vagina.** ……**"**
>
> [emphasis supplied]

In her cross-examination PW-6 deposed that, the mucosal laceration and tenderness can be caused due to itching, use of a diaper by a child and urinary tract infection.

(viii) PW-5 was told of the incident by her daughter PW-1 with words and gestures upon which she lodged Exhibit 2. She categorically stated that the child was 3 years and 2 months at the time of the incident, could use the toilet herself and was not using diapers at the relevant time. She denied having told the Police that the abrasion was due to diapers. Her child, she stated, did not use diapers during that time nor did she suffer at that time from rash or itching in the genital. Her further evidence was that around 29/30-09-2018, her minor daughter showed her forefinger to her and stated that "*mathi ko uncle lay*" (the uncle from upstairs) and moved her forefinger around. When the victim kept repeating the statement to PW-5, she asked if the uncle had touched her and whether it was "good touch" or "bad touch", as she had taught her daughter about the difference between the two. She had also told her to report to PW-5 if anyone placed their hands under her dress. The victim told her that 'uncle' had put his finger in her private part and pointed to her groin and told her that he had done so when she was on the terrace. PW-5 accordingly checked the genital of

the victim and found it was bruised and had scratch marks. She then went with PW-7, her sister-in-law, to the concerned PS and reported the matter.

(ix) Her sister-in-law PW-7 corroborated the evidence of PW-5 and added that when she and the victim were standing outside their room, the Appellant descended the stairs. That, on seeing him, the victim appeared frightened. PW-7 asked her whether he was the one who had caused the injury on her genital and the child nodded in confirmation and pointed her finger at him. She also denied that the victim at the relevant time was using diaper. PW-7 came to the house of PW-5 on 28-09-2018 to assist her in the household chores as the husband of PW-5 was admitted in the hospital and the father of PW-5 was unwell. That, on 29-09-2018 PW-5 told her of the victim's complaint. That, when she along with PW-5 checked the private part of the victim they found some bruises and redness there. On enquiring from the victim, she kept repeating "*mathi mathi*" (upstairs) and that the uncle had put his finger in her private part.

(x) PW-4 the father of the victim who was hospitalised at the said time denied that the child was using diaper at the relevant time and that his child was instructed by his wife not to let any person touch her private part.

(xi) The Appellant after his examination under Section 313 Cr.P.C. sought to examine his wife as his witness but instead his daughter deposed as his witness and denied the allegations against the Appellant.

8. On careful consideration of the evidence on record it is evident that the fact of sexual assault has been made out by the

cogent and consistent testimony of the victim. Her evidence finds support from the testimony of PW-6 the Doctor *supra*.

(i) Pausing here momentarily, it is pertinent to examine what "vaginal mucosa", which PW-6 deposed had a laceration around 1 cm and was tender to touch, actually is. In an ***Article***[1] detailed below, "vaginal mucosa" has been explained as follows;

> Vaginal mucosa refers to the innermost layer of tissue lining the vagina, which is composed of an epithelium and covered with a layer of mucus. This layer serves multiple functions, including providing a protective barrier against pathogens, lubricating and enhancing wet ability, preventing desiccation, and retarding enzymatic degradation. The mucus lining of the vagina also acts as a physical barrier for drug permeation and provides a crucial first line of defense against various pathogens.
>
> *From : Drug Delivery and Development of Anti-HIV Microbicides [2019], Vaginal multipurpose prevention technologies: promising approaches for enhancing women's sexual and reproductive health [2020], Vulvar Disease [2019]*

(ii) In ***Butterworths Medical Dictionary – Second Edition – Editor-in-Chief Macdonald Critchley,*** at Page 1112, 'mucosa' has been defined as hereunder;

> **mucosa** (mew˙**ko**˙sah). Mucous membrane; the **moist membrane lining the alimentary canal, glandular ducts, the respiratory, urinary and genital passages**. It consists of a superficial layer of epithelium supported on a connective-tissue layer which contains nerves, blood vessels and lymphatics, and often plain muscle, glands and lymphoid tissue. The membrane may be smooth, corrugated, or provided with villous projections. **Cobblestone mucosa.** Red and swollen intestinal mucous membrane in Crohn's disease. [L Mucus.]
>
> **[emphasis supplied]**

(iii) From the above literature and explanation, it is evident that the vaginal mucosa is situated inside the vagina and not outside it. It thus concludes that the vaginal mucosa lines the vagina and a laceration was found therein by PW-6 on 02-10-2018 and also seen by PW-2 and PW-5.

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[1] From (i) a Book — "Drug Delivery and Development of Anti-HIV Microbicides" edited by José das Neves, Bruno Sarmento; (ii) an Article — "Vaginal multipurpose prevention technologies : promising approaches for enhancing women's sexual and reproductive health" by Trinette Fernandes, Krishna Baxi, Sujata Sawarkar, Bruno Sarmento & José das Neves; and (iii) a Book — "An Atlas of Vulval Diseases A Combined Dermatological, Gynaecological and Venereological Approach" by Michèle Leibowitch, Richard Staughton, Sallie Neill, Simon Barton, Roger Marwood.

(iv) As per PW-6 the hymen was intact, but inflamed. In this context, ***Modi A Textbook of Medical Jurisprudence and Toxicology – Twenty Seventh Edition – K Kannan — Lexis Nexis***, at Page 840, states that the hymen is situated more deeply in children and so it more often escapes injury in an attempted rape on children.

9. The evidence of PW-6 is supported by PW-2 who was told by the Appellant himself that, he had touched the genital of the victim. Indeed, it is settled law that an extra-judicial confession cannot form the basis of a conviction. This Court is also conscious and aware that the settled principle of law is that extra-judicial confession is a weak piece of evidence. It has further been observed in a catena of decisions that as a rule of caution the Court would generally look for independent reliable corroboration before placing reliance upon extra-judicial confession. However, on the flip side it is also a settled legal position that a conviction can be sustained on the basis of extra-judicial confession, provided that, the confession is proved to be voluntary, truthful and free of inducement. The cross-examination of PW-2 does not reveal that he had induced the accused or for that matter coerced him or put him under any kind of duress to make any self-incriminating statement. The witness appears to have voluntarily made the statement, disclosing to PW-2 that he had touched the genital of the victim. It is assumed that PW-2 being employed as a Doctor in the Government hospital would have reproduced the statement not only on Oath but in full faith and credit, commensurate to the dignity of his profession and office. That apart, the conviction in this matter is not based solely on the extra-judicial confession. The evidence gathered from the victim and witnesses is the crucial

aspect leading to the conviction. The extra-judicial confession referred to is merely an appendage to the other evidence on record.

10. The evidence of PWs 5 and 7 have also been consistent and cogent. Pertinently, even if, the evidence of the victim PW-1 before the Court is to be disregarded in totality, considering the lapse of time and the fragility of human memory to recall every singular detail of a past experience, more especially in view of the age of the victim, however the fact that immediately after the complaint was lodged the victim was medically examined, where she narrated to PW-6 the cause of her discomfort, duly recorded by PW-6, who found the injuries on the vagina of the victim cannot be ignored and undoubtedly confirms the child's complaints.

11. As seen from the conclusion in the impugned Judgment extracted at the commencement of this Judgment, the Learned Trial Court, despite the evidence on record indicating "aggravated penetrative sexual assault" as defined in Section 5 of the POCSO Act, however proceeded to convict the Appellant under Section 9(m) punishable under Section 10 of the POCSO Act for the offence of "aggravated sexual assault" only. This conclusion of the Learned Trial Court is perverse, being against the weight of evidence.

12. Relevantly, the provisions of Section 5(m) and Section 9(m) of the POCSO Act are being extracted hereinbelow to distinguish the offences as detailed therein, as also the penalty sought to be imposed;

SECTION 5 AND SECTION 6

> **"5. Aggravated penetrative sexual assault**.—….
>
> (m) whoever commits penetrative sexual assault on a child below twelve years; or
>
> ……

> **6. Punishment for aggravated penetrative sexual assault**.—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
>
> (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.**"** **[emphasis supplied]**

SECTION 9 AND SECTION 10

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

(i) In this context, it is essential to notice that Section 3 of the POCSO Act deals with ***penetrative sexual assault*** while Section 4 provides for its penalty reads as follows;

> **"3. Penetrative sexual assault**.—A person is said to commit "penetrative sexual assault" if—
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
>
> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
>
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
>
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
>
> **4. Punishment for penetrative sexual assault.—**(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

> (2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.
>
> (3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.**"**

Penetrative sexual assault on a victim is committed when penetration either by the genital of the accused or insertion of any object, part of body and other details as described in Section 3 *supra* occurs.

(ii) Section 7 of the POCSO Act deals with ***sexual assault*** and Section 8 which deals with the penalty thereof, reads as follows;

> **"7. Sexual Assault**.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
>
> **8. Punishment for sexual assault.—**Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.**"**

(iii) Thus, the parameters for an offence of *penetrative sexual assault* and that of *sexual assault* have been lucidly described and defined in the two Sections extracted *supra*. The measure of the gravity of the offence and the penalty prescribed for the offences vary in terms of its severity or acuteness. Sexual and penetrative sexual assault are described as 'aggravated' offences, as defined in Section 5 and Section 9 of the said Act, if the offences are committed in terms of the description provided in the Sub-Sections of the said two provisions.

13. Undoubtedly, the above observation of the Learned Trial Court of finding the commission of an offence of aggravated penetrative sexual assault but convicting the Appellant only for aggravated sexual assault has certainly put this Court in a predicament but nothing that cannot be rectified by application of the appropriate law. As a consequence, at this juncture, it would be apposite to consider the Judgment of the Hon'ble Supreme Court in ***Nadir Khan*** vs. ***The State (Delhi Administration)***[2]. The question raised by the Learned Counsel therein was that the High Court in revision under Section 401 Cr.P.C. has no jurisdiction or power to enhance the sentence in the absence of an appeal against the inadequacy of sentence under Section 377 Cr.P.C. The Supreme Court observed that;

> **"4.** It is well known and has been ever recognised that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. **The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law. The character of the offence and the nature of disposal of a particular case by the subordinate court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code.** …….. It is true the new Code has expressly given a right to the State under Section 377 Cr.P.C. to appeal against inadequacy of sentence which was not there under the old Code. That however does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court. ……...
>
> **5.** Section 401 expressly preserves the power of the High Court, by itself, to call for the records without the intervention of another agency and has kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court. The provisions under Section 401 read with Section 386(*c*)(iii) Cr.P.C. are clearly supplemental to those under Section 377 whereby

[2] (1975) 2 SCC 406

> appeals are provided for against inadequacy of sentence at the instance of the State Government or Central Government, as the case may be. There is therefore absolutely no merit in the contention of the learned Counsel that the High Court acted without jurisdiction in exercising the power of revision suo motu, for enhancement of the sentence in this case. The application stands rejected.**"** **[emphasis supplied]**

(i) In ***Eknath Shankarrao Mukkawar*** vs. ***State of Maharashtra***[3] the Supreme Court held that;

> **"6.** We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, suo motu. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under Section 397 read with Section 401, Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself" call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code.**"**

(ii) In ***Surendra Singh Rautela alias Surendra Singh Bengali*** vs. ***State of Bihar (Now State of Jharkhand)***[4], the argument advanced before the Supreme Court was that the High Court was not justified in enhancing the punishment awarded against the Appellant from imprisonment for life, to death sentence, as no appeal under Section 377 of the Cr.P.C. was filed by the State for enhancement of sentence. The Supreme Court held as follows;

> **"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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[3] (1977) 3 SCC 25

[4] (2002) 1 SCC 266

(iii) In ***Prithipal Singh and Others*** vs. ***State of Punjab and Another***[5] the Supreme Court observed as follows;

> **"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.
>
> **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.**"**

(iv) In ***Sadhu Saran Singh*** vs. ***State of Uttar Pradesh and Others***[6] the Supreme Court opined as follows;

> **"20.** ……. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. **However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than** from the conviction of an innocent. …….
>
> **21.** This Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative.**"** **[emphasis supplied]**

(v) In ***Harijan Bhala Teja*** vs. ***State of Gujarat***[7] the Supreme Court held as follows;

> **"12.** No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open for the appellate court to express the right conclusion

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[5] (2012) 1 SCC 10
[6] (2016) 4 SCC 357
[7] (2016) 12 SCC 665

> after reappreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused. ……**"**

(vi) As far back as in 1956 in ***Jayaram Vithoba and Another*** vs. ***The State of Bombay***[8] the Supreme Court was considering a matter in which the Presidency Magistrate who tried the case found the first Appellant guilty under Section 4(a) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) and sentenced him to three months' rigorous imprisonment. He was also found guilty under Section 5 of the Act, but awarded no separate sentence under that Section. The second Appellant was found guilty under Section 5 and sentenced to three months' rigorous imprisonment. The Appellants took the matter in revision to the High Court, which set aside the conviction of the first Appellant under Section 4(a) of the Act but confirmed that under Section 5, and awarded a sentence of three months' rigorous imprisonment under that section. As regards the second Appellant, both the conviction and sentence were confirmed. Against that order, the Appeal by Special Leave was preferred. The question before the Supreme Court was that as the High Court had set aside the conviction of the first Appellant under Section 4(a) of the Act, it should set aside the sentence passed on him under that Section and that it had no power under the Criminal Procedure Code to impose a sentence under Section 5 when none such order had been passed by the Magistrate. The contention was based on the terms of Section 423 of the Criminal Procedure Code, 1898 (Section 386 of the Code of Criminal Procedure, 1973). The Supreme Court after examining the legal point observed that;

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[8] AIR 1956 SC 146

> **"**(6) The question still remains whether apart from section 423(1)(b), the High Court has the power to impose the sentence which it has. When a person is tried for an offence and convicted, it is the duty of the court to impose on him such sentence, as is prescribed therefor. The law does not envisage a person being convicted for an offence without a sentence being imposed therefor. When the trial Magistrate convicted the first appellant under Section 5, it was plainly his duty to have imposed a sentence.
>
> **Having imposed a sentence under section 4(a), he obviously considered that there was no need to impose a like sentence under Section 5 and to direct that both the sentences should run concurrently. But, in strictness, such an order was the proper one to be passed. The appellants then took the matter in revision to the High Court, and contended that their conviction under section 5 was bad. The High Court went into the question on the merits, and found them guilty under that section. It was the duty of the High Court to impose a sentence under section 5, and that is precisely what it has done.**
>
> **The power to pass a sentence under those circumstances is derived from the law which enacts that on conviction a sentence shall be imposed on the accused, and that is a power which can and ought to be exercised by all the courts which, having jurisdiction to decide whether the accused is guilty or not, find that he is. We are of opinion that this power is preserved to the appellate court expressly by section 423(1)(d), which enacts that it can "make any amendment or any consequential or incidental order that may be just or proper".**
>
> .....**"** [emphasis supplied]

In the ultimate result, the order of the High Court was sustained with the observation that it could be maintained under Section 439 of the Criminal Procedure Code, 1898, even if it were to be regarded as an enhancement of the sentence and the Appeal was dismissed.

14. After careful perusal of the entire law as laid down in the various pronouncements of the Supreme Court extracted above, it would be apposite to peruse Section 386 of the Cr.P.C. which provides as follows;

> **"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]

(i) As held in ***Jayaram Vithoba*** (*supra*) the provision of Section 386(e) of the Cr.P.C. is relevant to the instant case which has been extracted hereinabove.

15. The long and short of it is that, the role of the High Court as an Appellate Court is to mete out even handed justice and in such circumstances it can intervene when perversity is found in the Judgment of the Learned Trial Court.

16. In ***State of Punjab*** vs. ***Prem Sagar and Others***[9], 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.

(i) In ***Dhananjoy Chatterjee alias Dhana*** vs. ***State of W.B.***[10] 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.

17. It thus follows that in the teeth of the incriminating evidence against the Appellant under Section 5(m) of the POCSO

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[9] (2008) 7 SCC 550

[10] (1994) 2 SCC 220

Act as also concluded unequivocally by the Learned Trial Court itself in Paragraphs 15 and 17 of the impugned Judgment, it would be a travesty of justice to uphold the conviction of the Appellant under Section 9(m) of the POCSO Act handed out by the Trial Court, when in fact the entire evidence on record points to the guilt of the Appellant for an offence which is far more serious and with higher penalty, i.e., Section 5(m) of the POCSO Act. The conviction of the Appellant under Section 9(m) of the POCSO Act is set aside.

18. Consequently, invoking the powers of this Court under Sections 397, 401 and 386(e) of the Cr.P.C. the Appellant is convicted of the offence under Section 5(m) punishable under Section 6 of the POCSO Act.

19. As already remarked hereinabove, the Learned Trial Court had failed to discuss Section 376AB of the IPC, presumably as the offence under Section 9(m) of the POCSO Act deals with sexual assault on a child below twelve years and had been convicted for it, therefore, the Learned Trial Court was remiss in not discussing this aspect. Mentioning such circumstances is the requirement of the law and the correct procedure and cannot be ignored by the Learned Trial Court.

20. In view of the conviction of the Appellant under Section 5(m) of the POCSO Act, there is no requirement to convict him under Section 376AB of the IPC. Apart from which it may be mentioned that the penalty provided in the above two Sections are identical.

21. In light of the above facts and circumstances, the Appeal is dismissed.

22. The Appellant is put to notice of his conviction under Section 5(m) of the POCSO Act punishable under Section 6 of the same Act.

23. List for hearing on sentence.

24. Issue Notice accordingly.

25. A copy of this Judgment be made over to the convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority for information and necessary steps.

26. Copy of this Judgment be forwarded to all the Special Judges (POCSO Act, 2012) in the Districts of Gangtok, Gyalshing, Mangan, Namchi, Soreng and Pakyong for perusal.

(Meenakshi Madan Rai)
Judge
31-07-2024

Approved for reporting : **Yes**

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