THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 12th June, 2024

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No.07 of 2022

Appellant : Karan Chettri

versus

Respondent : State of Sikkim

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

Appearance

Ms. Puja Lamichaney, Advocate (Legal Aid Counsel) for the Appellant.

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

---

and

Crl. A. No.08 of 2022

Appellant : Nima Sherpa @ Nani Ko Bau

versus

Respondent : State of Sikkim

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

Appearance

Mr. S. S. Hamal, Senior Advocate (Legal Aid Counsel) with Mr. Tashi Wongdi Bhutia, Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. Crl. A. No.07 of 2022 (*Karan Chettri* vs. *State of Sikkim*) and Crl. A. No.08 of 2022 (*Nima Sherpa @ Nani Ko Bau* vs. *State of Sikkim*) are being taken up together and disposed of by this common Judgment, the cases having arisen out of a common FIR, Exhibit 1.

2. The Appellant, Karan Chettri in Crl. A. No.07 of 2022 and the Appellant, Nima Sherpa in Crl. A. No.08 of 2022, shall hereinafter be referred to as "A2" and "A1" respectively.

3. The discontentment of the Appellants with the impugned Judgment of the Court of the Learned Judge, Fast Track, South and West Sikkim, at Gyalshing, dated 19-03-2022, in ST (Fast Track) Case No.02 of 2021, whereby they were convicted of the offences under Sections 450, 376D and 376(2)(l) read with Section 34 of the Indian Penal Code, 1860 (hereinafter, "IPC") and the consequent Order on Sentence, dated 26-03-2022, has led to the instant Appeals.

4. It is imperative to briefly walk through the Prosecution case before considering the merits of the Appeals.

(i) On 13-01-2021, Exhibit 1 was lodged before the Yangang Police Station by PW-1, the Complainant, alleging that on 10-01-2021, a Sunday, at around midnight, when only his mother PW-2 and sister-in-law PW-8 were in his house, A1 and A2 entered therein, physically assaulted both women and sexually assaulted his mother, hence the Complaint. Yangang PS Case No.01/2021, dated 13-01-2021, under Sections 376D and 34 IPC was registered against A1 and A2 and endorsed to PW-11 the Investigating Officer (IO) of the case. The medical examination of PW-2 supported the Prosecution case. On completion of investigation Charge-sheet was submitted against A1 and A2 under Sections 376D and 34 of the IPC.

(ii) The Learned Trial Court framed individual Charges against A1 and A2 under Sections 376D, 376(2)(l) read with Section 34 of the IPC and Section 450 read with Section 34 of the

IPC, to which they individually entered a plea of "not guilty" and claimed trial. To buttress the Prosecution case and prove it beyond a reasonable doubt, eleven witnesses were examined by the Prosecution, thereafter A1 and A2 made their statements under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."). Upon hearing the arguments and analysing the evidence on record, the impugned Judgment and Order on Sentence were pronounced. The Appellants were sentenced to undergo rigorous imprisonment for a term of twelve years and to pay a fine of ₹ 10,000/-(Rupees ten thousand) only, each, for commission of the offence under Section 376D of the IPC; to undergo rigorous imprisonment for a term of twelve years and to pay a fine of ₹ 10,000/-(Rupees ten thousand) only, each, for commission of the offence under Section 376(2)(l) of the IPC and to undergo rigorous imprisonment for a term of seven years and to pay a fine of ₹ 5,000/-(Rupees five thousand) only, each, for commission of offence under Section 450 of the IPC read with Section 34 of the IPC. The sentences of imprisonment were ordered to run concurrently and bore default stipulations.

5. Learned Senior Counsel for A1 urged that the Learned Trial Court found the victim to be somewhat mentally slow and thus put some questions to her to assess her mental aptitude and concluded that it was clearly somewhat under developed as compared to others. That, she suffers from mild retardation but at the same time found her competent to depose. That, the IO of the case deposed that the victim had mental illness. Thus, there were two views one of the Court *viz.,* of mental retardation and that of the IO (*supra*). Neither the Court nor the IO had the benefit of the

opinion of a mental health expert to buttress their observations and consider whether their conclusions fell within the ambit of Section 2(1)(s) of the Mental Healthcare Act, 2017 (hereinafter, the "Mental Healthcare Act"), despite which, they foisted their own opinions, which are therefore unreliable. That, the process prescribed by Section 105 of the Mental Healthcare Act was not complied, with instead of which, the Court expressed a unilateral opinion of mental illness which was prejudicial to the Appellant's case. That, the examination of PW-2 by PW-7, the Doctor, found her to be well-oriented and she did not deem it essential to refer PW-2 for psychiatric evaluation, which thereby established the non-existence of any mental deficiency nor did she find signs of physical struggle on PW-2. The doctor's evidence being expert opinion gains precedence over other opinions expressed.

(i) That, the evidence of PW-2 revealed that it was only A2 who had committed the offence and no proof emerged against A1 which the Learned Trial Court chose to ignore.

(ii) That, the time of offence is also anomalous. As per PW-2 the offence was committed when the "rooster crowed", indicating it was around dawn, contrarily as per Exhibit 1, it was in the midnight of 10-01-2021.

(iii) That, further anomalies in the Prosecution case are;

(a) as per PW-2, A1 caught hold of the hand of PW-8, but as per PW-8, A2 caught hold of her hand and enquired whether she was alright.

(b) as per PW-2, A2 raped her, but as per PW-8, A1 raped PW-2. That, A2 who was drunk just sat in the room.

(iv) That, the incident allegedly occurred on 10-01-2021, whereas the FIR was lodged on 13-01-2021, with no explanation for the delay. That, the Appellant must also be protected against the possibility of false implications as there is no basis for assuming that the statement of such a witness is always correct or devoid of embellishment. On this aspect reliance was placed on ***Santosh Prasad alias Santosh Kumar*** vs. ***State of Bihar***[1].

(v) That, PW-2 wrongly identified the villages that the Appellants belonged to and the Prosecution failed to examine Pushpa Lal Chettri who allegedly informed PW-1 of the incident, nor the wife of Pushpa Lall Chettri, who is said to have informed her husband. In contradiction to the above evidence PW-2 deposed that, they told PW-9, the daughter of PW-8 of the incident, who narrated it to PW-1. That, thereafter PW-2 and PW-8 themselves also informed PW-1 of the incident. Thus, there is no cogency as to who the informants were. That, PW-6 and PW-10 allegedly did not enter the victim's house, but PW-2 stated that four boys had come to her house that night. The Prosecution evidence is thus unreliable and therefore A1 deserves an acquittal.

6. Learned Counsel for A2, while endorsing the submissions put forth by Learned Senior Counsel with regard to the mix up in the identification of A1 and A2 *supra,* contended that, in the first instance A2 has been falsely implicated in the instant case as PW-8 was categorical in her assertion that A2 was drunk and just sat in the room. That, A1 raped PW-2.

(i) That, no test identification parade of A1 and A2 was conducted by the Prosecution and in view of the contradictory

[1] AIR 2020 SC 985

depositions (*supra*) of PW-2 and PW-8, it would be perilous to rely on their evidence.

(ii) That, the investigation was defective and although every defective investigation need not result in acquittal, extra caution is required to be exercised by the Courts while evaluating the evidence. On this aspect strength was drawn from ***Visveswaran*** vs. ***State Rep. by S.D.M.***[2]

(iii) That, the circumstances of the instant case are unbelievable as PW-2 has deposed that both she and PW-8 are physically able but strangely lacked the effort to defend themselves rendering an improbability in the Prosecution case.

7. *Per contra*, Learned Additional Public Prosecutor contended that the Learned Trial Court examined the evidence in detail and no error arises in the conviction and sentencing of both convicts, in terms of the impugned Judgment and Order on Sentence.

8. We have heard the arguments advanced by Learned Counsel *in extenso* and carefully perused the documents, evidence on record, impugned Judgment and citations made at the Bar.

9. The questions that fall for determination are;

(i) *Whether the Prosecution has established that PW-2 suffered from any mental illness or retardation?*

(ii) *Whether A1 or A2 or both committed the offence of rape on the victim?*

10. Dealing with the first question, although the Learned Trial Court observed that PW-2 was somewhat mentally slow and put some questions to assess her mental aptitude, the provisions

[2] (2003) 6 SCC 73

of Section 118 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act"), were not resorted to.

(i) Section 118 of the Evidence Act reads as follows;

> **"118. Who may testify**.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> *Explanation*.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.**"**

(ii) The Court did not record whether PW-2 was prevented from understanding the questions put to her, in terms of the legal provision or whether she was incapable of giving rational answers to those questions on account of any mental retardation. The questions put by the Court which have been extracted in Paragraph 37 of the impugned Judgment do not suffice to test the competence or otherwise of PW-2 to testify. Mental retardation is a condition of arrested or incomplete development of mind of a person especially characterised by sub-normality of intelligence as defined in Section 2(1)(s), of the Mental Healthcare Act. No evidence fortifies the observation made by the Court of mental retardation of PW-2 nor was expert opinion solicited. PW-7 is categorical in her evidence that she would have sought psychiatric evaluation if she had found mental deficiency in PW-2 but during the examination of PW-2 she found her well-oriented. The Learned Trial Court in Paragraph 2 of the impugned Judgment recorded as follows;

> **"**2. The facts of the case in brief is that on 13.01.2021 at 15:00 hours SI Chandra Kumar Subba (PW-11) of Yangang PS received a written FIR from S***B***C*** (PW-1), son of the victim M***M***C**** (PW-2) to report that

> his 52 years old mother who is **mentally childlike** was raped by the two accused persons on 10.01.2021 at around 00:00 hours in her house.**"** **(emphasis supplied)**

(iii) However, on perusal of Exhibit 1, the contents thereof makes no mention of PW-2 being "mentally childlike" nor has PW-1 made any mention of mental illness or retardation of PW-2. When we carefully peruse the evidence of PW-2, it is prolix evidence given by her, which includes her cross-examination, and appears to be made with a rational thought process. Indeed, we are conscious and aware that the Learned Trial Court had the advantage of observing the demeanour of PW-2, nonetheless the legal aspect of it as discussed above, cannot be thrown out by this Court as being irrelevant.

(iv) PW-11, the IO in his evidence has glibly stated that as per the guardian of PW-2 she had mental illness, the said guardian was not examined as a Prosecution witness. He had the option of seeking the assistance of Mental Health Experts to buttress this point but failed to do so during the entirety of the investigation.

(v) PW-1 during his evidence deposed that although his mother could speak and understand them, she was almost childlike and mentally a little slow. Cross-examination did not decimate this statement, but a reading of the statement would reveal its relativity as no yardstick was prescribed for such assessment. PW-8 a relative of PW-2 made no mention of the mental status of PW-2. PW-9 is the daughter of PW-8 she has also thrown no light on the mental condition of PW-2. In the teeth of such nebulous evidence for the point under discussion and considering the lucid testimony given by PW-2, there can be no finding that she was suffering from any mental condition, much less mental retardation.

(vi) Now, while addressing question no(ii) and the consequent identification of A1 and A2, we are aware that when identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction. This has also been observed by the Supreme Court in ***Mulla and Another*** vs. ***State of U.P.***[3]. The object of an identification parade is to enable the witnesses who claim to have seen the culprits at the time of occurrence to identify them, from an array of other persons, not known to the witnesses. The test identification parade is necessitated to establish the veracity of the witnesses and whether the identification of the accused persons were correctly made. In ***Shyamal Ghosh*** vs. ***State of West Bengal***[4], the Supreme Court opined that the main object of holding an identification parade during the investigation stage is to test the memory of the witnesses based upon first impression and also to enable the Prosecution to decide whether all or any of them could be cited as eye-witnesses to the crime. Pertinently, it must be recapitulated here that it was not the first time that PW-2 and PW-8 had seen A1 and A2. It is seen from the evidence that both the PW-2 and PW-8 that they had previous acquaintance with A1 and A2. PW-11, the IO deposed that A1 was well acquainted with the victim and this statement remained undecimated under cross-examination. Hence, test identification parade as provided under Section 9 of the Evidence Act, in our considered opinion was not a necessity, in the facts of the instant case.

(vii) The evidence of PW-2 and PW-8 being the only persons at the time of the offence are thereby of utmost importance.

---

[3] AIR 2010 SC 942
[4] AIR 2012 SC 3539

(viii) The evidence of PW-2, aged about fifty years at the time of the incident, commences *inter alia* as follows;

> "..... Witness is shown the two accused persons on the screen (Accused Nima in the red shirt and accused Karan in the white shirt)."

What can be gleaned about the unfolding of the incident from her evidence is that, when she and PW-8 were together in the house that night they heard knocking at the door. PW-2 opened it and found four drunken boys outside, of which A1 and A2 entered the house carrying bottles of Rum. They demanded to watch television and when PW-2 told them her son would be angry with her, they switched it off. That, the red shirt (A1) caught PW-8's hand, but she hit him with her *chappal*. Thereafter, A1 came to her and pulled down her pants while A2, raped her having removed his own trousers at that time. Thereafter, A1 came and slept on the bed next to her but she kicked him and he went away. PW-8 pleaded with them not to do such things to PW-2. The cross-examination of PW-2 could not decimate the fact that Nima (A1) disrobed her by pulling down her Pyjamas and Karan (A2) raped her. She has described the act of rape explicitly in her evidence.

(ix) During her deposition when she was required to identify A1 and A2, she identified A1 (Nima) as Karan, while Karan was addressed by her as Kamal. Regardless of her confusion with the names of A1 and A2, this Court finds that her consistent evidence is that when A1 and A2 entered her house, the offence of rape was perpetrated on her.

(x) The evidence of PW-2 is to be considered along with that of PW-8. On the day the evidence of PW-8 was recorded it appears that A1 was dressed in a black jacket. Her evidence recorded *inter alia* is as follows;

> **"**.....
> I have seen both the persons shown to me on the screen. The person is black jacket (witness points to accused Nima) lives at Namphok and although I do not know where the other one (witness points to accused Karan) lives, I have seen him. ……..."

(xi) This witness stated that the accused in the black jacket lifted PW-2 and put her on the other bed, opened his pants and pulled the quilt over himself and the victim and thereafter rubbed himself against her. He then also switched off the lights. A2 being drunk just sat in the room.

(xii) It is relevant at this juncture to notice that the evidence of PW-2 and PW-8 point to the rape of PW-2. Both have testified that both A1 and A2 together entered the house where PW-2 and PW-8 were living and PW-2 was raped. Apart from the evidence of PW-2 and PW-8, PW-6 on entering the house saw A2 on top of PW-2. According to PW-6 when he pulled A2 out of the house, A1 returned into the room and bolted it from inside and despite A2 banging the door A1 refused to open it. PW-10 also saw A2 sleeping with PW-2 covered with a blanket.

11. PW-7 the doctor who examined PW-2 has augmented the Prosecution case. On examination of PW-2 her findings *inter alia* were as follows;

> **"**.....
> On local examination: I found vaginal tear present with a mild laceration measuring 0.2 x 3, active bleed present, hymen broken as she is a mother of 3 children, perinneal tear present over posterior fourchette, no swelling and scratch mark upon the anal opening. ……
> She had sustained injury over her private area. Her two vaginal swabs collected and handed over to the Police for forensic examination. …… **"**

She identified both A1 and A2 on the screen and stated that they were the same persons who were brought before her for medical examination. The cross-examination of this witness revealed the fact that the active bleeding found on the victim was

not due to menstruation but was from the site of laceration found on her vagina, which could not be self inflicted. Her evidence thereby establishes that undoubtedly rape was perpetrated on PW-2.

12. Section 376D of the IPC provides as follows;

> **"376D. Gang rape**.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the victim.**"**

13. Thus, it is essential to notice that under the said provision of law, where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of these persons shall be deemed to have committed the offence of rape. In other words, even if one of them, in the instant case, did not commit the physical act of rape, it shall be deemed that he did so under the said law.

14. It thus emerges that both A1 and A2 having entered the house of PW-1 were complicit in the commission of the offence, consequently the shackles of Section 376D of the IPC bind both A1 and A2 for the offence of "gang rape". Notwithstanding the fact that PW-2 called A1 and A2 by different names and gave wrong addresses, or that PW-8 deposed that A1 was the offender and not A2, these circumstances are inconsequential to the Prosecution case, which pivots on the offence of "gang rape", perpetrated on PW-2 and has been proved by the cogent and consistent evidence

of PW-2 and PW-8 substantiated by that of PWs 6, 7 and 10. Circumstances which do not shake the foundation of the Prosecution case are of no consequence and we disregard the minor discrepancies accordingly. For the foregoing reasons we have no hesitation in holding A1 and A2 guilty of the offence of "gang rape" perpetrated on PW-2.

15. We cannot bring ourselves to agree with the conclusion of the Learned Trial Court as regards Section 376(2)(l) of the IPC, in the absence of evidence to indicate that PW-2 was suffering from any mental deficiency.

16. However, we see no reason to disagree with the finding of the Learned Trial Court on the aspect of house trespass as provided under Section 450 of the IPC and the consequent penalty imposed.

17. In the end result, we uphold the Order of conviction handed out individually to A1 (Nima Sherpa) and A2 (Karan Chettri) under Section 376D and Section 450 read with Section 34 of the IPC in ST (Fast Track) Case No.02 of 2021.

18. We acquit A1 and A2 of the offence under Section 376(2)(l) of the IPC.

19. Now, addressing the aspect of Sentence imposed on A1 and A2, the Order of Sentence, dated 26-03-2022, *inter alia* reads as follows;

> **"**7. Therefore, having regard to all of the facts and circumstances of the case, to meet the ends of justice as far as possible, both the convicts are hereby sentenced as under:-
>
> **a)** to undergo **rigorous imprisonment (RI) for a term of 12 years and to pay a fine of Rs.10,000/-(Rupees Ten Thousand) each, for commission of the offence under Section 376D. In default of payment of fine, both the convicts shall undergo simple imprisonment (SI) for two years.**
>
> **b)**.....

> **c)** for commission of offence of house tress-pass in order to commit rape, both the convicts are hereby sentenced under Section 450, IPC read with Section 34, IPC to undergo **RI for a term of 7 years and to pay a fine of Rs.5,000/-(Rupees Five Thousand) each. In default of payment of fine, both the convicts shall undergo SI for six months."**

(i) Section 376D of the IPC *inter alia* provides that the convicts "..... *shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life and with fine*. ....." Thus, the sentence of twelve years meted out by the Learned Trial Court on A1 and A2, for the offence under Section 376D of the IPC is erroneous being alien to the legal provision and flies in the face of the mandate of law.

(ii) In ***State of Punjab*** vs. ***Prem Sagar and Others***[5], 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. 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.

---

[5] (2008) 7 SCC 550

(iii) In ***Mohd. Hasim*** vs. ***State of Uttar Pradesh and Others***[6], 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.**"**
>
> **(emphasis supplied)**

(iv) In ***Harendra Nath Chakraborty*** vs. ***State of West Bengal***[7], 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*** vs. ***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

[6] (2017) 2 SCC 198
[7] (2009) 2 SCC 758

> 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)**

(v) In ***State of Uttar Pradesh*** vs. ***Sonu Kushwaha***[8], 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)**

(vi) In ***Suman Gurung*** vs. ***State of Sikkim***[9], 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.**"**

(vii) That, having been said, 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 exercise the prerogative granted by the legislature and to take advantage of the provisions of Section 377 of the Cr.P.C.

(viii) Notwithstanding such remissness of the State-Respondent, while considering Section 386 of the Cr.P.C. which deals with powers of the Appellate Court, it reads as follows;

---

[8] (2023) 7 SCC 475
[9] MANU/SI/0089/2022

"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 the 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 of 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)

(ix) It is thus clear from the first proviso 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.

(x) In ***Prithipal Singh and Others*** vs. ***State of Punjab and Others***[10], 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 : 2002 SCC (Cri) 165 : AIR 2002 SC 260] this Court reconsidered the issue and held : (SCC p. 271, para 8)
>
> > ***"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."***
>
> [See also *Nadir Khan* v. *State (Delhi Admn.)* [(1975) 2 SCC 406 : 1975 SCC (Cri) 622 : AIR 1976 SC 2205] , *Govind Ramji Jadhav* v. *State of Maharashtra* [(1990) 4 SCC 718 : 1991 SCC (Cri) 33] and *K. Pandurangan* v. *S.S.R. Velusamy* [(2003) 8 SCC 625 : 2004 SCC (Cri) 48 : AIR 2003 SC 3318].]**."**
>
> **37.** In *Jayaram Vithoba* v. *State of Bombay* [AIR 1956 SC 146 : 1956 Cri LJ 318] 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."** **(emphasis supplied)**

(xi) It is relevant to remark that the neglect and laxity of the State-Respondent in not preferring an Appeal against the erroneous sentence does not preclude 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

[10] (2012) 1 SCC 10

opportunity of being heard on the question of sentence, either in person or through his Advocate.

20. Resultant, Appeal is partly allowed.

21. Issue Notice to the convicts for hearing on enhancement of Sentence.

(Bhaskar Raj Pradhan)
Judge
12-06-2024

(Meenakshi Madan Rai)
Judge
12-06-2024

Approved for reporting : **Yes**

ds/sdl