



IN THE HIGH COURT OF MADHYA
PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

CRIMINAL APPEAL No. 5731 of 2018

VIRENDRA

Versus

THE STATE OF MADHYA PRADESH

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Appearance:

Shri Vivek Singh, learned senior counsel with Shri Rajesh Yadav
for the appellant.

Shri Kushagra Jain, learned counsel for the respondent/State.

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Reserved on 07.02.2025.

Delivered on 21.02.2025.

.....
J U D G M E N T

Per. Justice Gajendra Singh:

This criminal appeal under section 374(2) of the Cr.P.C is preferred challenging the conviction under sections 450, 354A(1)(i) read with (2), 376(2)(i) of the IPC and section 7 r/w 8 and section 3 r/w 4 of the POCSO, Act, 2012 and sentence under section 450 & 376(2)(i) of the IPC for a period of 5 years with fine of Rs.2000/-, 14 years with fine of Rs.8000/- along with default stipulation of six months & one year RI in special case no.SC/34/2017 by Ist Addl. Sessions Judge,



Mandleshwar (WN) vide judgment dated 16.07.2018. The sentence of imprisonment were ordered to run concurrently.

2. The case of the prosecution before the trial court was that on 10.02.2017 at 11.a.m victim (PW/1), aged below 16 years was alone in the house because her parents were not present in the house and prosecution was shutting door of the house after washing clothes then appellant/accused entered the house and closed the door and held right hand of the prosecutrix with bad intention and gauged her mouth and pressed the chest of victim. Appellant/accused threatened the victim from raising alarm and committed penetrative sexual assault with the victim (PW/1). On hearing the alarm raised by the prosecutrix PW/5 came and knocked the door then appellant/accused pushed the victim and ran away from the house. She intimated the police chowki Khaltanka but did not narrate the fact of penetrative sexual assault due to shame and fear of being defamed. Thereafter she filed a written complaint narrating the whole incident. She was medically examined on 11.02.2017. Appellant/accused was taken into custody vide Ex.P/22 on 14.02.2017. Completing the investigation in crime no.27/17, police station Balakwada submitted a report to the special court. Appellant/accused abjured guilt and claimed for trial. To bring home the guilt, prosecution examined as may as 12 witnesses including the victim as PW/1, her father as PW/2, principal of the concerned school as PW/3, resident of the village Munim Patel as PW/4, neighbour of the victim



who reached the place of incident as PW/5, Medical Officer Dr.Amitabh Pandey as PW/6, Head Constable Amar Singh Pal No.669 as PW/7, Head Constable Balu Patil No.113 as PW/8, Medical Officer Dr.Bhupendra Singh Chouhan as PW/9, Sub Inspector Dineshsingh Kushwah as PW/10, ASI Mangilal as PW/11 and Head Constable Balkrishna no.257 as PW/12.

3. In cross examination under section 313 of the Cr.P.C appellant/accused either denied or expressed ignorance regarding the facts and circumstances brought by the prosecution against him. Appellant/accused advanced defence that PW/5 and father of the victim PW/2 have ill-will towards him due to a quarrel and due to this he has been falsely implicated. Appellant/accused did not examine any witness in his defence. Appreciating the evidence trial court found proved that date of birth of the victim (PW/1) is 21.7.2003 and on the date of incident i.e. 10.02.2017 the victim was below the age of 16 years i.e. 13 years six months and 20 days and found the victim (PW/1), his father (PW/2) and neighbour (PW/5) as reliable and found the assurance of the testimony of victim from the FSL report Ex.P/25 that reported the presence of sperm on underwear and slide collected from the victim and convicted the appellant/accused and sentenced as mentioned in para-1 of the judgment.

4. Challenging the conviction and sentence this appeal has been preferred on the ground that trial court committed error in relying



prosecution witnesses and discarding defence version. The conviction is based on dragging unwarranted inferences. Trial court was wrong in not considering the material contradictions and omissions in the statement of prosecution witnesses.

5. Heard.

6. Counsel for the State has supported the conviction and sentence inflicted on the appellant/accused and prayed for dismissal of the appeal.

7. Perused the record.

8. Firstly this court is examining the challenge towards age of the victim (PW/1) recorded by the trial court.

9. PW/3 is the principal of the school in which PW/1 was studying at the time of incident and this witness has proved the date of birth of the PW/1 as 21.07.2003 through application form for admission Ex.P/8C, birth certificate issued by Janpad Panchayat Kasrawad as Ex.P/9C and scholar register Ex.P/11C and the certificate Ex.P/7. This witness has categorically stated that victim PW/1 was admitted in school on 28.6.2006 and her date of birth was recorded as 21.7.2003 on the basis of birth certificate Ex.P/9C. The extract of scholar register Ex.P/11C mentions that victim was admitted on 30.04.2007 as new admission in LKG and thereafter she continuously studied in the same school up to class-8 regularly. The cross examination of this witness comprises of para-3 & 4 and no effective challenge has been given to



the sanctity of entry regarding date of birth on the basis of birth certificate Ex.P/19. Accordingly, findings of the trial court regarding date of birth of the victim (PW/1) as 21.7.2003 does not call for interference.

10. Victim as categorically stated incident of penetrative sexual assault by appellant/accused. She also explained the reason why she did not disclose the fact of penetrative sexual assault at first instance on 11.2.2017 at 2.45 a.m at PS Khaltaka and afterwards preferred Ex.P/2 narrating whole incident on 11.2.2017. The reason assigned by the victim for not disclosing the act of penetrative sexual assault at first instance does not demolish case of prosecution considering the age of the victim and stigma and fear extended by appellant/accused. The observation of the apex court in **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat - (1983) 3 SCC 217** is being reproduced as below:

2:3. Rarely will a girl or a woman in India make such false allegations of sexual assault, whether she belongs to the urban or rural society, or, sophisticated, or, not-so sophisticated, or, unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because:- (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred; (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the society including by her



own family members, relatives, friends, and neighbours; (3) She would have to brave the whole world; (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered; (5) If she is unmarried, she would apprehend that it would be, difficult to secure an alliance with a suitable match from a respectable or an acceptable family; (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself; (7) The fear of being taunted by others will always haunt her; (8) She would feel extremely embarrassed in relating the incident to others being overpowered by feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo; (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy; (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour; (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence; (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built in assurance that the charge is genuine rather than fabricated.



11. Explanation of the victim (PW/1) is acceptable as PW/5 has supported PW/1 and Medical Officer Dr.Amita Pandey, who examined victim on 11.2.2017, has reported in Ex.P/5 that she found pain at the right wrist and there was redishness at her place. Face was redish and there was pain and swelling on the left side of breast. This witness prepared the vaginal slide and also collected underwear of the victim and handed over to the concerned police official. This material collected from the victim was handed over to police chowki Khaltaka and were seized through Ex.P/19 by Head Constable Balu Patil no.113 (PW/8) and were forwarded to Regional State Forensic Laboratory, Rau Indore through Ex.P/23 and deposited in the FSL vide Ex.P/24 and a report Ex.P/25 was submitted according to which semen and sperm were found on the vaginal slide and underwear of the victim and this report assures the truthfulness of the victim (PW/1) and is sufficient to prove the foundational facts for raising presumption under section 29 of the POCSO Act, 2012 and the trial court rightly invoked the presumption under section 29 of the POCSO Act, 2012 in para-27 of the judgment and shifted the burden to rebut presumption on the appellant/accused.

12. The burden to rebut presumption is heavy and does not discharge only through suggestions to PW/2 and PW/5 that witnesses were not in good relation with the appellant/accused and they have falsely implicated appellant/accused. The admission through PW/4 that Rajput and Yadav community have tense relations in the village is not



sufficient to discharge the burden because to settle community scores no one would put on stake the prestige of her unmarried child daughter on stakes. Accordingly, trial court was justified in discarding the defence version and convicting the appellant/accused under sections 450, 354A(1)(i) read with (2), 376(2)(i) of the IPC and section 7 r/w 8 and section 3 r/w 4 of the POCSO, Act, 2012, hence the said conviction is affirmed.

13. Now the question arises regarding quantum of sentence. On the date of offence i.e. 10.2.2017 the punishment as prescribed in section 376(2)(i) was RI for a term which shall not be less than 10 years, but which may extend to imprisonment for life, which shall mean imprisonment for remainder of that person's natural life and shall also be liable to fine.

14. The punishment under section 4 of the POCSO Act, 2012 was imprisonment of either description for a term which shall not be less than 7 years but which shall extend to imprisonment for life and shall also be liable to fine and it is argued on behalf of the appellant/accused that it was not a fit case to award sentence of imprisonment more than ten years and trial court has not recorded any reason for inflicting sentence of imprisonment of 14 years.

15. Trial court has recorded in para-31 of the judgment that appellant/accused is 20 years old and he has no criminal antecedents but trial court did not consider those facts as mitigating circumstances and



referring to the nature of offence, age of the accused, duration of trial and age of the victim the sentence of 14 years RI was inflicted.

16. Principle of proportionality in prescribing liability according to culpability of each kind of criminal conduct has been very aptly elaborated by the apex court in the case of **Lehna vs. State of Haryana - (2002) 3 SCC 76**. It will be expedient to refer to the observations made by the apex court on this subject as under:

"The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal expected in principle, and in spite of errant notions it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies; but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought than to be a measure of toleration that is unwarranted and unwise. But, in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime uniformly disproportionate punishment has some very undesirable practical consequences."



17. Proper sentence was explained in **Deo Narain Mandal vs. State of U.P - (2004) 7 SCC 257** by observing that in criminal cases awarding of sentence is not a mere formality. Where the statute has given the court a choice of sentence with maximum and minimum limit presented then an element of discretion is vested with the court. This discretion can not be exercised arbitrarily or whimsically. It will have to be exercised taking into consideration the gravity of offence, the manner in which it is committed, the age, the sex of the accused, in other words the sentence to be awarded will have to be considered in the background of the fact of each case and the court while doing so should bear in mind the principle of proportionality. The sentence awarded should be neither excessively harsh nor ridiculously low.

18. We have carefully examined the submission in this regard and find that the rehabilitation of the victim has not been properly taken into consideration. In **Bhaggi @ Bhagirath @ Naran vs. State of M.P - (2024) 2 SCR 111** apex court has addressed the requirement of imposing sentence of fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Section 65 of the IPC, 1860 prescribe the limit to imprisonment for non payment of fine, when imprisonment and fine is awardable and limit is that imprisonment shall not exceed 1/4th of the term of imprisonment which is the maximum fixed for the offence, if the offence is punishable with imprisonment as well as fine.



19. Keeping in view the criminal jurisprudence which encompasses reformatory and corrective theory as also the doctrine of proportionality, the sentence of ten years with fine of Rs.2,00,000/- (Two Lacs) would serve the purpose.

20. Accordingly, this appeal is partly allowed to the extent that the sentence under section 376(2)(i) of the IPC is reduced from fourteen years to ten years RI and fine is enhanced from Rs.8000 to Rs.2,00,000/- (rupees Two Lacs). In default of payment of fine, the appellant shall undergo four years RI. Total fine amount shall be paid to the victim (PW/1). No interference in the sentence under section 450 IPC is required. Supersession warrant be prepared accordingly.

21. Copy of the judgment shall be supplied to the appellant/accused through concerned Superintendent of Jail. Copy of the judgment shall be supplied to the victim (PW/1) in the light of **Aparna Bhat vs. State of M.P -AIR 2021 SC 1492.**

(VIVEK RUSIA)
JUDGE

(GAJENDRA SINGH)
JUDGE

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