

Reserved on 04.04.2022
Delivered on 31.05.2022

A.F.R.

Court No. - 49

Case :- JAIL APPEAL No. - 153 of 2021

Appellant :- Sonu

Respondent :- State of U.P.

Counsel for Appellant :- From Jail, Rahul Jain

Counsel for Respondent :- A.G.A.

Hon'ble Suneet Kumar, J.

Hon'ble Umesh Chandra Sharma, J.

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

- 1.** The appeal has been preferred against the conviction and sentence of the appellant Sonu S/o Late Phool Chand, under Section 363, 366, 376D I.P.C. & Section 5/6 of POCSO Act in Session Trial No. 8/2018 in Case Crime No. 111/2017, P.S. Kotwali, District Vindhyachal, U.P. By Special Judge POCSO Act / Additional Sessions Judge, Mirzapur on 14.10.2020.
- 2.** The grounds of appeal are that there was no evidence on record to prove the alleged incident. No one had seen Sonu along with the victim on the date and time of incident. Though, it is stated that the victim was kidnapped at about 10:00 A.M from the nearby market place, no eye-witness saw the occurrence in day light makes the allegation improbable. No witness, neither father nor mother of the victim were aware about the date-of-birth of the victim as to whether at the time of occurrence she was minor or not. There was dispute between the father of the victim and the uncle of the appellant. The victim had relations with Dinesh and Sonu. Sonu has helped the victim to get married with Dinesh.

Sonu has been made scapegoat in the matter. There are glaring contradiction between the statement and cross-examination of

the witnesses P.W.-1, P.W.-2 & P.W.-3. The Trial Judge has not relied upon the medical age already framing mind to convict the appellant. In cross-examination, witness has stated that Sonu had done nothing and had not gone with the victim though at some places, victim has deposed against the appellant. There is no explanation of delay in lodging the F.I.R. after three months from the incident. The victim has stated to the I.O. that she was living in Bahraich with her husband Dinesh. There is no independent eye-witness. P.W.-1 and P.W.-2 have given heresay evidence. The charge is not proved from the evidence of sole witness, victim P.W.-3. Appellant has no previous criminal antecedent, therefore, the appeal be allowed and the conviction and sentence awarded by the learned Trial Court be quashed.

- 3.** In brief, the case of the prosecution is this that informant/plaintiff PW1- Ram Ashrey father of the victim, moved an application for lodging the F.I.R. with the averment that on 27.10.2016, daughter of the informant P.W.- 1 aged about 17 years old left the house at about 10 A.M. for school, appellant-Sonu with two unknown youngsters kidnapped and abducted her daughter. Even after prolong search, he could not find her daughter. He used to talk with his daughter from an unknown mobile no. 9565005779 provided by Sonu. Sonu informed P.W.-1 that on mobile no. 946763015, he will know about his daughter. Through that given mobile number, he contacted his daughter who informed that she was in Jammu & Kashmir.
- 4.** On the basis of written FIR Ex. Ka-1, a case was registered under Section 363 IPC on 12.03.2017, S.I. Bhuval Singh, Virendra Yadav, Krishna Nand Rai, Jai Lal and lastly, S.H.O. Ashok Kumar Singh investigated the matter. The charge-sheet was submitted

by the last I.O.. The victim was found in injured condition in a field near pitch road in P.S. Hardi, District Bahraich, U.P., for which another crime no. 0338/2017, under Section 307 IPC was registered on 05.03.2017. That case was transferred to District Mirzapur where investigation was completed against the appellant Sonu and charge-sheet was submitted under Sections 363, 366, 376, 307 IPC and 3/4 POCSO Act. Investigation about rest accused persons remain pending.

5. The accused was charged under the above sections which he denied and sought trial. Prosecution submitted following documentary evidences:-

1. Tehrir FIR, Ex. Ka.-1.

2. Statement of victim under Section 164 Cr.P.C., Ex. Ka.-2

3. Medical Report Ex. Ka.-3.

4. G.D. regarding institution of case, Ex. Ka.-4.

6. Map of Case Crime No. 338/17, under Section 307 IPC, P.S. Hardi, District Bahraich. Ex-K-5 (Map of this Case Crime No. 3K/10 and chik FIR 3K/2 and also chik 3k/4 and 5 relating Section 307 IPC, P.S. Hardi, District Bahraich, have not been exhibited.)

7. Charge-sheet Ex-K-6

8. Following witnesses were examined to prove the prosecution case.

1.PW1 Ram Ashrey, informant, father of the victim.

2.PW2 Pankali, mother of the victim.

3. PW3 Victim herself.

4. PW4 Dr. Anuradha Mishra.

5. PW5 Ram Lallan Bajpai.

6. PW6 Haldhar @ Rakesh Yadav.

7. PW7 Head Constable Writer, Umakant Rai.

8. PW8 S.I. Suresh Kumar Singh, I.O.

9. PW9 S.I. Ashok Kumar Singh, I.O.

9. After completion of prosecution evidence, the statement of the accused-appellant was recorded under Section 313 Cr.P.C., wherein he said that due to enmity between his maternal uncle and the informant, he has falsely been implicated in this case. The appellant did not produce any oral or documentary evidence in his defence in the lower court. The Lower Court heard the argument of both the parties and came to the conclusion that the victim was aged about 17 years, at the time of occurrence. In this regard, Lower Court has referred to section 94 of Juvenile Justice Act 2015 and also relied on the case of ***Mahadeo vs. State of Maharashtra and another (2013), 2014 SCC 637***, in which principles have been laid down by the Hon'ble Apex Court about Rule 12 (3) of Juvenile Justice Rules 2007 and Rule 12 (3) B and also Rule 12 (3) (A) (i) to (iii), and the same has been reiterated by the Hon'ble Supreme Court in the case of ***Jernail Singh Vs. State of Haryana (2013) 7SCC 263***. In this regard the Lower Court has also examined educational certificates of the victim in which, her date of birth is mentioned as 20.10.2001. At the time of occurrence, the victim was studying in class 10 in Maharaja Pratap Inter College, Bihasara.

10. Victim's father and mother PW1 and PW2 and Victim herself as PW3 have supported the prosecution version. In their statement

given on oath before the Court, informant PW1 has proved that aforementioned mobile numbers were provided by the accused Sonu, by which he could contact the victim. He also found mobile number of the accused in the book of victim. Accused also abused him and used unparliamentary language on asking about the victim.

11. The Lower Court has accepted the explanation given by the informant PW1 regarding non lodging of FIR promptly and accepted the explanation that to prevent propaganda, he did not lodge the FIR just after the incident. It is a common practice in the Indian society that when any offence is committed against female member of the family, firstly, family members try to solve the problem at their own end and upon failure, they take recourse of law. In this regard, following citations are relevant in which Hon'ble Supreme Court and High Courts have held that if delay is properly explained then lodging the delayed F.I.R. is not fatal to the prosecution case. In case of abduction, kidnapping and rape of female member of the family, people think over repeated times and try to solve the problem at their own end fearing social admonition and when they became helpless then they lodge the F.I.R.

About delayed FIR and delayed recording of statement of PWs by I.O. u/s 161 CrPC, Hon'ble Supreme Court has held that if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by reliable evidence: Hon'ble Supreme Court has in catena of cases held the above discussed law:-

- 1a. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)**
- 1. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)**
- 2. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC)**
- 3. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505**
- 4. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153**
- 5. Munshi Prasad Vs. State of Bihar, 2002(1) JIC 186 (SC)**
- 6. Ravindra Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC)**
- 7. Sheo Ram Vs. State of U.P., (1998) 1 SCC 149**
- 8. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041**

Hon'ble Supreme Court has held that the normal rule is that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases, vide.

(I) State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

(ii) Santosh Moolya Vs. State of Karnataka, (2010), 5 SCC 445"

12. PW2, mother of the victim has also deposed that at times accused Sonu and his friends used to come at her house. She

further deposed that on 27.10.2016 when victim left the house for school, Sonu had come with two other friends who, took away her daughter. When PW1 and PW2, father and mother of the victim, came to know about the victim, they went to Bahraich and K.G.M.U. Lucknow, where, police had admitted the victim.

- 13.** PW3, victim had narrated the whole story that on 27.10.2016, when she was going school, Sonu along with another person met her at Chauraha (crossing) and on their direction, she sat on their Motorcycle, where from she was taken to a mountain at Mirzapur, there she was raped by the accused-appellant Sonu. At the same place, she was made unconscious by Guddu and was taken away to Bahraich, where she was given to Dinesh, Guddu returned from there. Dinesh kept her for two-three months in his house, where he used to beat her. Dinesh at several occasions forcefully raped her and torn her clothes. Sonu wanted to marry her. According to her, she was married another person, Lalla Prasad, aged about 25 years, by Dinesh.
- 14.** As per the evidence of P.W.-5 & P.W. 6, the Victim was found in naked and unconscious condition without clothes in the area of P.S. - Hardi, District-Bahraich. There was tube for passing urine on the body of the victim, her hymen was old torned. She was also subjected to physical and sexual assault when she was found in District Bahraich, there were marks of injuries at her body. The victim has proved her statement recorded under Section 164 Cr.P.C.
- 15.** P.W.-5 Ram Lalla Bajpai and PW6 Haldhar @ Rakesh have deposed that victim was found in unconscious state. There were injuries on her body.
- 16.** Thus, it is proved that the victim was kidnapped from Mirzapur and was transferred to several persons and was beaten and

subjected to physical, mental and sexual assault and later on was thrown in the area of P.S. Hardi District Bahraich.

- 17.** According to PW6 Haldhar @ Rakesh Yadav there were injuries upon both the eyes and nose of the victim. There was swelling on her face. There was dried blood at her nose face and cheeks.
- 18.** P.W.-7 Constable Uma Kant Rai proved chik FIR and G.D. regarding institution of case. P.W.-7 S.I. Investigator Suresh Kumar Singh had started investigation of Case Crime No. 3311/17, under Section 307 IPC, P.S. Hardi, District Bahraich, which was transferred to P.S. Mirzapur after knowing that main offence had been committed under the jurisdiction of P.S. Vindhyachal, Mirzapur.
- 19.** PW-8 Suresh Kumar Singh, S.I was appointed Investigating Officer of Case Crime No. 338/17 Section 307 IPC, PS Hardi, District-Bahraich, collected the articles received from the spot recording the statements, visited the spot, recorded the medical report in C.D. Parcha and transferred the case P.S.- Vindhyachal, Mirzapur, for further investigation.
- 20.** P.W.-9, S.I. Investigator, Ashok Kumar Singh had finally investigated the case and submitted the charge sheet in the afore-mentioned sections and proved the same. He has also proved the papers regarding acts done during the course of investigation.
- 21.** On the basis of oral and documentary evidences, the Lower Court convicted the accused appellant under Sections 363, 366, 376D IPC and Section 6 POSCO Act and discharged the accused appellant under Section 307 IPC. After conviction Lower Trial Court sentenced the accused-appellant under Section 363 IPC for rigorous Imprisonment of five years and 10 thousand Rs. fine and

in default of payment of fine three months additional imprisonment. The Lower Trial Court has also sentenced the appellant for seven years rigorous imprisonment and 10 thousand Rs. fine and in case of non-payment of fine he would undergo three months additional imprisonment under Section 366 IPC. The accused has been sentenced for life imprisonment and Rs. 50 thousand fine under Section 376D IPC equivalent Section 6 of POCSO Act and in case of non-payment of fine simple imprisonment of 1 year has been awarded.

22. As already noted that the appellant has not produced any evidence in his defence and there is not even an iota of the evidence in support of his false implication at the behest of plaintiff due to enmity with his maternal uncle. Even alleged enmity is not established.

23. Section 359 defines kidnapping which is as under:-

Kidnapping is of two kinds; kidnapping from India and kidnapping from lawful guardianship.

In this case the matter relates to kidnapping from the lawful guardianship.

24. Section 361 relates to kidnapping from lawful guardianship- whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

25. Section 363 relates to punishment for kidnapping whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either

description for a term which may extend to seven years, and shall also be liable to fine.

26. In this case, the victim has been found minor by the Lower Court, which is not rebutted by the accused-appellant. The Lower Court has given a categorical finding by referring to the concerned Section and Rules of Juvenile Justice Act, 2015. The Trial Court concluded that the date of birth 20.10.2001 of the victim as written in the progress report of year 2015-2016 in Jayanti Singh Lal Man Singh Uchatar Madhyamik Vidhyalya, Jignapur is correct. The occurrence has taken place on 27.10.2016, thus, the victim was aged about 15 years 7 days old at the time of occurrence, which is below 16 years. The victim's mother PW2 has deposed that her daughter was about 17 years old at the time of occurrence. Thus, at the time of occurrence. Thus victim was a minor and was under the lawful guardianship of her parents where from she was kidnapped for which the accused-appellant has been rightly punished on the basis of evidence of P.W.-1, P.W.-2 and P.W.-3. The accused-appellant has also been punished and sentenced under Section 363/366 IPC for kidnapping, abduction, inducing a woman to compel her from marriage, it is as under:-

Section 366 relates to kidnapping, abducting or inducing woman to compel her marriage, etc.-

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and

shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

Section 375 relates to rape:-

A man is said to commit "rape" if he-

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other persons; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other persons; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Under the circumstances falling under any of the following seven descriptions:

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of

death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Sevently. - When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only to that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2. - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of

age, is not rape.]

Section 376 relates to Punishment for rape:-

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which¹[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,—

(a) being a police officer, commits rape—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

- (h) commits rape on a woman knowing her to be pregnant; or
- (j) commits rape, on a woman incapable of giving consent; or
- (k) being in a position of control or dominance over a woman, commits rape on such woman; or
- (l) commits rape on a woman suffering from mental or physical disability; or
- (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- (n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

- (a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
- (b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;
- (c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);
- (d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

1[(3) Whoever, commits rape on a woman under sixteen years of age 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 that person's natural life, and shall also be

liable to 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 sub-section shall be paid to the victim.]

27.In the case of **Mohan Das Survanshi Vs State of Madhya Pradesh, 1999 Cr LJ 3451 (MP)**, the Court held that consent of a minor prosecutrix does not matter if she was taken to separate places for making sexual intercourse away from her lawful guardians, her name different in FIR does not matter as it was her pet name, under such circumstances accused is guilty of kidnapping and raping a minor for days.

28.In this regard P.W.-1 and P.W.-2 have deposed that accused -appellant Sonu used to come at their house with one or two persons, and PW3 has deposed that she was on the way to school, when she was taken away by Sonu and another unknown person. On their direction, she sat on their Motorcycle but they did not leave her at her school and carried her to Mirzapur Mountain where, Sonu raped her and Guddu thereafter had taken her to Bahraich. Thus, when the victim was on the way to school even then she was under the lawful guardianship of her parents being minor girl. Later on, she has deposed that Guddu had given her in the custody of Dinesh who got her married to Lalla Prashad, who makes bricks in Delhi. The accused-appellant had knowledge about the consequences of kidnapping and abduction of a minor girl. Medical evidence of PW4 also corroborates the oral evidence of P.W.-1, P.W.-2 and P.W.-3. Doctor PW4 found the victim's hymen old torned. She opined that it might be due to injury or due to inter course. Thus, the Lower Trial Court has rightly convicted the appellant under Sections 363 and 366 IPC.

29. From the above discussed evidences, it is also proved that she was raped by Sonu and one Dinesh but Dinesh was not present in Mirzapur when she was raped on the Mountain at Mirzapur by Sonu. There is no evidence that Sonu was also present when Dinesh had raped her. It is also not established that who was another person and whether one Guddu named by the victim was also present when she was being raped by Sonu at the Mountain of Mirzapur. Therefore, it is clearly established from the evidence of the victim PW3 that at the time of rape she was alone raped by the accused-appellant Sonu. Therefore, Section 376D is not attracted as it is not established by any evidence that it is a case of gang rape. Though, it is established and proved beyond reasonable doubt that she was raped by two or three persons at different locations and at different time. Therefore, this Court is of the opinion that Section 376D is not made out and the accused is not liable to be punished and sentenced under Section 376D IPC and the Lower Court has erred in coming to the above conclusion. Thus, the accused-appellant is proved to have committed the offence of rape with the minor prosecutrix of this case.

30. The Lower Trial Court has convicted and sentenced the accused-appellant under Section 6 of the POSCO Act. Section 6 POSCO Act was amended on 16.08.2019 and minimum sentence of 20 years imprisonment was added along with imposition of fine. Since, it is proved that it is not a case of gang rape as the victim was raped by more than one person at different time intervals and the trial is going on only for the accused -appellant Sonu, who kidnapped and abducted the victim from Mirzapur and committed penetrative sexual assault on her. Therefore, this case is covered under Section 4 of the POSCO Act. The offence was committed on 27.10.2016 and Section 4 was amended on

16.08.2019 and minimum sentence 07 years was amended and enhanced to minimum 10 years. By the same amendment, section 4 clause (2) of the POSCO Act was added and it was provided that if penetrative sexual assault has been committed upon a child below 16 years of age, the accused shall be punished with imprisonment for a term not less than 20 years which may extend to imprisonment for life. Before the date of occurrence i.e. 16.08.2019, sub-Section 2 of Section 4 was not part of the statute.

31. So far as Section 376 IPC is concerned, this Section was amended on 03.02.2013, earlier this Section was substituted by Act 43 of 1983 w.e.f. 25.12.1983. On 21.04.2018 the sentence clause was amended thereby incorporating, "shall not be less than 10 years but, which may extend to imprisonment of life and shall also be liable to fine". Before the aforesaid date minimum seven years sentence was provided. Earlier, it has been concluded by this Court that it is not a case of gang rape by the accused-appellant but the victim was subjected to rape by Sonu alone for which Sonu was tried by the lower trial Court and this appeal too.

32. In view of the above discussion, it is proved beyond reasonable doubt that accused-appellant Sonu has committed the offence under Section 363 and 366 IPC and also committed the offence under Section 376 IPC read with Section 4 of the POCSO Act. In this context the law laid down by the Hon'ble Supreme Court in **Manoj Mishra @ Chhotkau Vs State of Uttar Pradesh 2021**, is relevant wherein after rape of a minor girl, the Session Trial under Sections 363, 366, 376D and $\frac{3}{4}$ POCSO Act was conducted and the accused was convicted and sentenced and duly affirmed by the High Court, Lucknow Bench, as follows:-

(I) The Trial Court awarded 3 years RI and Rs. 3,000/- fine for

the offence u/s 363 I.P.C.

(ii) The Trial Court awarded RI and Rs. 5,000/- fine for the offence u/s 366 I.P.C.

(iii) The Trial Court awarded RI and Rs. 25,000/- fine for the offence u/s 376 I.P.C.

(iv) The Trial Court awarded RI and Rs. 2,000/- fine for the offence u/s 506 I.P.C.

(v) The Trial Court awarded RI and Rs. 7,000/- fine for the offence u/s 4 POCSO Act.

The Supreme Court found that it was not a case of gang rape, therefore, confirmed the conviction and sentence awarded by the trial Court and confirmed by the High Court under Section 363 & 366 I.P.C. but converted the Section 376 D into Section 376 I.P.C and held that prior to the amendment w.e.f. 21.04.2018 the minimum sentence was 07 years which became 10 years minimum w.e.f. 21.04.2018 and since the accused has undergone sentence for more than 8 years, the appellant shall be released on payment of fine.

33. The Supreme Court held that appellant was father of five children and there was not apprehension that appellant would indulge in similar acts in future. He had no criminal antecedent. Section 376D was not made out therefore, the Hon'ble Supreme Court released the appellant for undergone sentence for more than 8 years and ordered to release him after payment of fine. The facts of the above cited case is similar to the case in hand.

34. In **Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926**, explaining rehabilitary & reformatory aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology is in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

34. The term, 'Proper Sentence', was explained in **Deo Narain Mandal Vs. State of UP, (2004) 7 SCC 257** by observing that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

35. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, Supreme Court referred its earlier judgments rendered in **Jameel vs State of UP [(2010) 12 SCC 532]**,

Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463], and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice

system.

36. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that no accused person is incapable of being reformed, therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

37. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Supreme Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

38. In this case, the accused-appellant has no criminal antecedent. It is not a case of gang rape. He belongs to a poor family. He is about 24 years old, therefore, a lenient view regarding sentence may be adopted. Consideration may be given to the young age, future & financial condition of the accused. The appellant is not even financially able to arrange a private Advocate due to which, an *amicus curiae* has been provided to him. Considering the overall circumstances, this Court is of the opinion the punishment and sentence under Section 363 & 366 IPC is liable to be maintained and that the accused has not been found guilty of Section 376D and Section 6 of the POCSO Act instead he has been found guilty of Section 376 IPC and Section

4 POCSO Act. Therefore, adopting a reformatory approach, the accused is liable to be punished for seven years rigorous imprisonment and Rs. 25,000/- fine under Section 376 I.P.C and Section 4 POCSO Act.

Order in Appeal.

1. The appeal is accordingly **partly allowed** and **partly rejected**. The punishment and sentence awarded by the Lower Court under Section 363, 366 IPC is maintained.

2. The conviction under Section 376D IPC and Section 6 POCSO Act is modified under Section 376 IPC and Section 4 of the POCSO Act and is awarded seven years rigorous imprisonment and fine of Rs. 50,000/-. In case of non-payment of fine under Section 376 and Section 4 of the POCSO Act, the accused-appellant shall undergo one year additional rigorous imprisonment. The fine imposed as above shall be given to the victim as amount of compensation. As the accused-appellant is already in jail the period of his incarceration in jail shall be adjusted as per rules. All the sentences shall run concurrently.

3. The Registry to return the lower court record along with the copy of this order.

Order Date :-2022

Sachin

(Umesh Chandra Sharma,J.) (Suneet Kumar,J.)