REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 719 OF 2019
(Arising out of SLP (Criminal) No.1948 of 2017)

KUMAR GHIMIREY … APPELLANT(S)

VERSUS

THE STATE OF SIKKIM … RESPONDENT(S)

J U D G M E N T

ASHOK BHUSHAN, J.

Leave granted.

2. This appeal has been filed by the appellant against the judgment of Sikkim High Court dated 20.09.2016 dismissing Criminal Appeal No.19 of 2015 filed by the appellant questioning the order of conviction and sentence dated 31.01.2014 passed by the Special Judge(POCSO Act, 2012)convicting the appellant under Section 9/10 of the Protection of Children from Sexual Offences Act, 2012(POCSO Act, 2012), Section 341 of

IPC. The appellant was to undergo simple imprisonment for a period of seven years and to pay fine of Rs.50,000/- under Section 9/10 of POCSO Act, 2012 and under Section 341 of IPC he was sentenced to undergo simple imprisonment for a period of one month.

3. The appellant aggrieved by the judgment of the Special Judge filed an appeal which though has been dismissed by the High Court but while dismissing the appeal sentence under Section 9/10 of POCSO Act, 2012 has been converted into sentence under Section 5(m) of the POCSO Act read with Section 6 of the POCSO Act and sentence has been enhanced from seven years to ten years with fine of Rs.5,000/-.

4. As per the prosecution case, on 20.02.2014 at 1700 hours, Mangal Das Rai, PW.2 (father of Anjali Rai) resident of Lower Namphing, South Sikkim gave a written complaint to Temi Police Station that the accused-appellant, Kumar Ghimirey had attempted to sexually assault his seven year old daughter, Anjali Rai, PW.1, at around 1330 hours in a jungle. The FIR No.05(02) 14

under Section 376/511 of IPC was registered on the same day against the accused-appellant and the matter was taken up for investigation by the Officer-in-Charge of the PS i.e., Sub-Inspector(SI).

5. A chargesheet was submitted under Section 376/511/341/342 of IPC read with Section 4 of POCSO Act, 2012. Learned Special Judge framed charges under Section 341 of IPC and under Section 5 of POCSO Act, 2012, punishment under Section 6 of POCSO Act, 2012 and also under Section 376(2) of IPC. Statement of PW.1, (Child) Anjali Rai was recorded. The mother of victim, PW.3 was examined. Father of the victim appeared as PW.2. PW.5 and PW.6 were the girls who before attending the school with the victim were returning at the same time. They also appeared in the witness box corroborating the incident. PW.9, Gynecologist, who examined the victim has also appeared in the witness box.

6. Learned Special Judge after considering the entire evidence convicted the appellant under Section 9/10 of

POCSO Act, 2012 as well as Section 341 of IPC. In paragraph 25, the Special Judge while recording conviction held under Section 9/10 of POCSO Act, 2012 imposed simple imprisonment for a period of seven years and fine of Rs.50,000/-. Under Section 341 of IPC sentence imposed was simple imprisonment for a period of one month. The appeal was filed by the appellant in the High Court which appeal though has been dismissed by the High Court vide its judgment dated 20.09.2016 but while dismissing the appeal the High Court altered the conviction imposed by the Special Judge under Section 9/10 of POCSO Act, 2012 to Section 5(m) read with Section 6 and enhanced the punishment to rigorous imprisonment of ten years and a fine or Rs.5,000/-. Paragraph 25 of the judgment of the High Court is as follows:

> "25. Having regard to the entirety of the facts and circumstances, the evidence on record and the discussions supra, I cannot bring myself to agree with the finding of the Learned Trial Court that the offence was one under Section 9 punishable under Section 10 of the POCSO Act. IT is undoubtedly commission of an offence under Section 5(m) of the POCSO Act punishable under Section 6 of the POCSO Act. The appellant is

> convicted accordingly, duly altering the conviction imposed by the learned Trial Court under Sections 9/10 of the POCSO Act. Accordingly, he is sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-(Rupees five thousand) only, under Section 5(m) punishable under Section 6 of the POCSO Act, in default of fine to undergo simple imprisonment of six months. For the offence under Section 341 of IPC the sentence of the Learned Trial Court is upheld. The Sentences of imprisonment shall run concurrently."

7. The victim was also directed to be paid compensation of Rs.1,00,000/-(Rupees one lakh) by the High Court under Sikkim Compensation to Victim Scheme. The appellant aggrieved by the judgment of the High Court has come up in the appeal.

8. Learned counsel for the appellant challenging the judgment of the High Court contends that the High Court erred in enhancing the punishment whereas no appeal was filed for enhancement of the punishment. In his submission, the High Court ought not to have enhanced the sentence. It is further submitted that the punishment awarded by the trial court was the maximum punishment under Section 9/10 of POCSO Act, 2012

whereas in the facts and circumstances of the case, the appellant could have been at best awarded punishment of five years only under Section 10.

9. Learned counsel appearing for the State supported the order of the High Court. It is contended that under Section 386 sub-clause (b)of Cr.P.C. the High Court has right to alter the finding and the High Court having found that offence was covered under Section 5(m) of POCSO Act, 2012, the punishment of ten years rigorous imprisonment was rightly imposed. It is submitted that the offences under Section 5(m) of POCSO Act have been fully proved. It is submitted that the High Court after analysing the evidence has rightly concluded that the offence was aggravated penetrative sexual assault minimum punishment for which was ten years RI. Hence, this Court may not interfere with punishment awarded.

10. We have considered the submissions of the learned counsel for the parties and perused the records.

10. The first submission of the learned counsel for the appellant is that the High Court ought not to have

enhanced the punishment from seven years to ten years. The enhancement has been made by the High Court in appeal filed by the appellant under Section 386 of Cr.P.C. challenging his conviction order. Powers of the Appellate Court under Section 386 are to the following effect:

> "**Section 386.** 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
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> (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;
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> (b) in an appeal from a conviction-
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> (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."

11. As per Section 386 clause (b) of Cr.P.C. in an appeal from a conviction although the Appellate Court can alter the finding, maintaining the sentence, or with or without altering the finding, alter the nature or the extent, of the sentence, but not so as to enhance the same. Under Section 386(b)(iii), in an appeal from a conviction, for enhancement of sentence, the Appellate Court can exercise the power of enhancement. The Appellate Court in an appeal for enhancement, can enhance the sentence also. The proviso to Section 386, further, provids that the sentence shall not be enhanced unless the accused had an opportunity of showing cause against such enhancement.

12. Present is a case where the High Court has enhanced

the sentence in appeal filed by the accused challenging his conviction. The submission of the learned counsel for the appellant that the procedure prescribed under Section 386 proviso has not been followed by the High Court since no notice for enhancement was issued to the appellant has not been refuted by the learned counsel for the State. There can be no doubt with regard to the power of the High Court to enhance the sentence in an appropriate case. The High Court can also exercise its power under Section 401 of Cr.P.C. in an appropriate case. Section 401 of Cr.P.C. provides for the power of revision to the High Court. The High Court under Section 401 of Cr.P.C. can exercise any of the powers conferred on a Court of Appeal by Sections 386, 390 and 391 or on a Court of Session by Section 307 of Cr.P.C. The High Court could have very well exercised power under Section 401 of Cr.P.C. read with Section 386(b)(iii), could have enhanced the sentence but the said course is permissible only after giving notice of enhancement. The power of the High Court has been accepted and reiterated by this Court in a large number

of cases. Reference is made to the case in **Surjit Singh and others vs. State of Punjab, 1984 (Supp)SCC 518.** In the above case the appellants were convicted under Section 302 of IPC. They preferred a criminal appeal before the High Court of Punjab and Haryana. The High Court while dismissing the appeal has passed order which amounted to enhancement of sentence. This Court held that the High Court could not have enhanced the sentence before following the prescribed procedure. In paragraph 3 following has been held:

> "3. While dismissing the appeal of the appellants a division Bench of the High Court observed 'that Surjit Singh and Harjinder Singh who had been proved to have committed the murder of Bachan Singh in quite a ruthless manner as is apparent from the number of injuries found on the person of the deceased'. The High Court further observed that it is a fit case in which over and above the sentence of imprisonment for life imposed by the trial court a fine of Rs. 5,000/- in default to suffer further rigorous imprisonment for two years must be imposed on the appellants. This additional sentence imposed by the High Court unquestionably constitutes an enhancement of sentence. The High Court did not issue notice calling upon the appellants to show cause why the sentence imposed upon them be not enhanced before doing so. Rules of natural justice as also the prescribed procedure require

> that the sentence imposed on the accused cannot be enhanced without giving notice to the appellants and the opportunity to be heard on the proposed action. The record does not show that such a notice and opportunity were given to the appellants and in the absence of notice the appellants had no opportunity to contest the proposed action. Therefore, we allow this appeal limited to the question that the sentence of fine of Rs. 5,000/- and the default sentence imposed on each appellant by the High Court is quashed and set aside confirming the sentence of imprisonment for life imposed by the trial court. The appeal is allowed to the extent herein indicated."

13. In the case of **Sahab Singh and others vs. State of Haryana, (1990) 2 SCC 385,** also after considering the procedure prescribed by Cr.P.C. including Sections 386 and 401 High Court held that the High Court even if no appeal is filed by the State for enhancement of sentence can exercise suo motu power of revision under Section 397 read with Section 401 of Cr.P.C. but before the High Court can exercise its revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice. In paragraph 4 this Court laid down following:

"4.Section 374 of the Code of Criminal Procedure ('the Code' hereinafter) provides for appeals from conviction by a Sessions Judge or an Additional Sessions Judge to the High Court. Section 377 entitles the State Government to direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy. Sub- section 3 of Section 377 says that when an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause the accused may plead for his acquittal or for the reduction of the sentence. Admittedly no appeal was preferred by the State Government against the sentence imposed by the High Court on the conviction of the appellants under Section 302/149, I.P.C. Section 378 provides for an appeal against an order of acquittal. Section 386 enumerates the powers of the appellate court. The first proviso to that section states that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement. Section 397 confers revisional powers on the High Court as well as the Sessions Court. It, inter alia, provides that the High Court may call for and examine the record of any proceeding before any inferior criminal court situate within its jurisdiction for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any inferior court. Section 401 further provides that in the case of any proceedings, the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred

on a Court of appeal by Sections 386,389, 390 and 391 of the Code. Sub-section 2 of Section 401 provides that no order under this Section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by Pleader in his own defence. Sub-section 4 next provides that where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at theinstance of the party who could have appealed. It is clear from a conjoint reading of Section 377, 386, 397 and 401 that if the State Government is aggrieved about the inade quacy of the sentence it can prefer an appeal under Section 377(1) of the Code. The failure on the part of the State Government to prefer an appeal does not, however, preclude the High Court from exercising suo motu power of revision under Section 397 read with Section 401 of the Code since the High Court itself is empowered to call for the record of the proceeding of any court subordinate to it. Sub-section 4 of Section 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that sub-section cannot stand in the way of the High Court exercising revisional jurisdiction suo motu. But before the High Court exercises its suo motu revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice and is given an opportunity of being heard on the question of sentence either in person or through his advocate. The revisional jurisdiction cannot be exercised to the prejudice of the convict without putting him on guard that it is proposed to enhance the sentence imposed by the Trial Court."

14. The same proposition has been laid down in **Govind**

Ramji Jadhav vs. State of Maharashtra, (1990) 4 SCC 718 and **Surendra Singh Rautela @ Surendra Singh Bengali vs. State of Bihar (Now State of Jharkhand), (2002) 1 SCC 266.**

15. We, thus, are of the view that the judgment of the High Court in sofaras it enhanced the sentence from seven years to ten years is not in accordance with the procedure prescribed. The judgment of the High Court to the extent it has enhanced the sentence from seven years to ten years is set aside.

16. Now, we come to the submission of the appellant that the sentence imposed on the appellant is excessive. He submits that under Section 10 minimum sentence is five years, hence, in the facts of the present case, the sentence ought to have been imposed of five years only to the appellant. Hence, the sentence be reduced by this Court to five years which submission has been refuted by the counsel for the State.

17. The learned Special Judge has marshalled the

evidence. The victim herself appeared as PW.1. She was thoroughly cross-examined by the accused, the evidence of victim has proved, the charge levelled against the accused which evidence was corroborated by evidence of PW.6 and PW.7 who were also students studying in the same school and returning from the school at the time when victim was returning from the school. The medical evidence also fully corroborated the charge on the appellant. The High Court has rightly affirmed the finding of the conviction of the appellant. We do not find any ground to interfere with the finding of conviction and in fact learned counsel for the appellant has not very seriously challenged the conviction of the appellant. His submission was that he could have been awarded only sentence of five years under Section 10. The Special Judge after considering the factors imposed the sentence of seven years. The Special Judge has noted that the offence committed against the minor girl child (7 years) cannot be viewed lightly, we fully endorse the view of the learned Special Judge and considering the serious nature of the

offence the conviction of seven years RI need no interference in this appeal. We, thus, reject the submission of the learned counsel for the appellant that the sentence awarded ought to be reduced to five years.

18. In the result, the appeal is partly allowed. The direction of the High Court in paragraph 25 of the judgment in sofaras it has enhanced sentence from seven years to 10 years RI is set aside. The sentence awarded by the Special Judge i.e. seven years under POCSO Act, 2012 and one month under Section 341 of IPC is maintained. The rest of judgment of the High Court is affirmed.

.....J.
(ASHOK BHUSHAN)

.....J.
(K.M. JOSEPH)

New Delhi,
April 22, 2019.