IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 567 OF 2024

Santosh Maroti Bhandare
Age : 25 Years, Occu : Driver,
R/o. Bahadar Pura, Tq. Kandhar,
Dist. Nanded ...APPELLANT

VERSUS

1. The State of Maharashtra,
Through Police Station Bhagyanagar
Tq. Kandhar, Dist. Nanded.

2. XYZ ...RESPONDENTS

WITH
CRIMINAL APPEAL NO. 740 OF 2024

XYZ ...APPELLANT

VERSUS

1. Santosh Maroti Bhandare
Age : 25 Years, Occu : Driver,
R/o. Bahadar Pura, Tq. Kandhar,
Dist. Nanded

2. The State of Maharashtra,
Through Police Station
Bhagya Nagar, Nanded.
Tq. & Dist. Nanded. ...RESPONDENTS

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- Mr. G. G. Suryawanshi, Advocate for the Appellant in Criminal Appeal No.740 of 2024 and Respondent No.2 in Criminal Appeal No.567 of 2024

- Mr. Rupesh A. Jaiswal, Advocate the Appellant in Criminal Appeal No.567 of 2024 and Respondent No.1 in Criminal Appeal No.740 of 2024
- Ms. M. N. Ghanekar, APP for Respondent – State in both matters.

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CORAM : RAJNISH R. VYAS, J.
DATE : FEBRUARY 06, 2026

JUDGMENT :

1. Heard the respective counsels for the parties.

2. The questions that fall for consideration in the present appeals are:-

> "A) Whether the accused was rightly convicted and sentenced by the Trial Court?
>
> B) Whether imposition of a statutory minimum sentence by the Appellate Court, by taking recourse to Section 386 of the Code of Criminal Procedure, 1973 which the Trial Court did not award, would amount to enhancement of sentence ?"

3. Criminal Appeal No. 567 of 2024 is against the conviction filed by the sole accused who was convicted by the Extra District Judge & Additional Sessions Judge, Nanded in Special Case No.26 of 2012 dated 20th June 2024 challenging his conviction for commission of offence punishable under Sections 376 (2)(n) of the Indian Penal

Code, 1860 (hereinafter would be referred as “IPC” for the sake of brevity) and under section 5(l) punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter would be referred as “the Act of 2012” for the sake of brevity). The accused was sentenced to suffer rigorous imprisonment for a period of 7 years and to pay a fine of ₹ 5000/- for the offence under Section 5(l), punishable under Section 6 of the Act of 2012. The accused is acquitted of the commission of offences punishable under Sections 363 and 366-A of IPC. No separate sentence was awarded for the commission of an offence punishable under Section 376(2)(n) of IPC.

4. It is necessary to mention here that Criminal Appeal No.740 of 2024 is also preferred by the victim to award a statutory minimum sentence.

5. Since both appeals involved appreciation of the same evidence, they are heard together.

6. Heard Mr Rupesh Jaiswal, learned counsel for the accused, in both appeals. Ms. Ghanekar, learned APP for the respondent – State and Mr. Suryawanshi, learned counsel appearing for the victim.

7. In short, it is the case of the prosecution that on the day of

the incident, i.e., 20th January 2022 at about 06.00 pm, when the victim had been to eat *panipuri* at Swiss Bakery, the accused came in a car and asked her to sit in the car. By further saying that they would flee away and perform the marriage. Accordingly, the victim sat in the car, and the accused then took her to Aurangabad on a motorcycle to his maternal Aunt's daughter's place. From where they went to Ahmadabad by travel bus and hired a room. On 23rd January 2022 and on 24th January 2022, the accused committed forcible sexual intercourse under the pretext of performing the marriage.

8. On 25th January 2022, the Police Officials from Nanded visited the Ahmadabad i.e. the place of occurrence and brought the victim and the accused to Bhagyanagar Police Station.

9. It is in this background that the First Information Report No.25 of 2022, dated 21st July 2022, came to be registered against the appellant, at the instance of the mother of the victim.

10. During the course of the investigation, the accused was arrested on 26th January 2022 and was subjected to the medical examination, as was the victim. The clothes of the accused as well as the victim were seized and forwarded for forensic examination.

11. The vehicle, which was used by the accused, was also seized. During the course of the investigation, statements of various witnesses were also recorded, and upon completion of investigation, a final report No.27 of 2022, dated 10th March 2022, was filed.

12. On 28th December 2022, the Extra Joint Additional Sessions Judge, Nanded, framed the charges below Exhibit 42 for commission of offences punishable under Sections 376(2)(n) and 376(3) of IPC, as also section 6 of the Act of 2012. The accused did not plead guilty, and to bring home the charge, the prosecution examined in all 10 witnesses.

13. Further, several documents were relied upon, including the CA report, which was Exhibited 51 and 52.

14. The accused was thereafter questioned under section 313 of Cr.P.C., and in which he stated that since the accused was working as a Driver on the car owned by the Uncle of the victim, and since he left the job as his salary was not paid, a false case was filed against him. He further stated in the 313 statement that, due to frequent quarrels between the victim's mother and the father, the victim became annoyed and frustrated; therefore, she would says that they would run

away. Thereafter, the accused was not aware of the victim's whereabouts. The accused neither entered into the witness box nor examined any witness. After considering the evidence on record, the accused was convicted of the offence stated above.

15. It is necessary to mention here that the Trial Court has acquitted the accused for the commission of offences punishable under Sections 363 and 366-A of IPC.

16. At the outset, it is necessary to look into the provision of Section 376(2)(n) of IPC, which prescribes the punishment for the commission of an offence, for a person who commits rape repeatedly on the same woman.

17. The provision under Section 375 of IPC is briefly discussed to appreciate the controversy involved in the present case. Rape is defined under Section 375 of IPC. According to which, whoever penetrates his penis to any extent into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person, is said to commit an offence of rape. The essential element of rape is the insertion of the penis to any extent into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person. It must be against the victim's will and without consent.

18. So far as the conviction under Section 6 of the Act of 2012, is concerned, suffice it to say that it prescribes the punishment for aggravated penetrative sexual assault. The penetrative sexual assault is defined under Section 3 of the Act of 2012, which means that penetration of the penis to any extent into the vagina, mouth, urethra or anus of a child or makes the child do so with him or any other person. Thus, the definition of rape under Section 375 of IPC is somewhat similar.

19. The accused is also convicted for the commission of offence under Section 5(l), punishable under Section 6 of the Act of 2012, which deals with aggravated penetrative sexual assault, and it means committing sexual assault repeatedly, more than once, on a child.

20. Coming to the facts of the case, it will have to be seen whether the victim of the crime was a child, as defined under Section 2(d) of the Act of 2012, which provides that "child" means any person below the age of eighteen years. In this regard, the testimony of the mother of the victim (PW-1), Investigation Officer (PW-9), and the Medical Health Officer (PW-10) would be of assistance.

21. PW-1 is the mother of the victim, who deposed that the victim at the time of the incident was 14 years and 2 months. She stated that the victim was born in Aayurvedik Hospital, Nanded, on 09th November 2007. She produced the birth certificate of the victim, which was exhibited as Exhibit 57, subject to the accused's objection. If the birth certificate Exhibit 57 is perused, revealing that the victim was born on 09th November 2007 and that the certificate was issued on 26th December 2007. The Registration number is 16170 dated 14th December 2007. Thus, the birth certificate was issued much before the registration of the first information report. It further reveals the child's name, place of birth, and the names of the father and mother.

22. PW-10 is a Doctor who has been working as a Medical Officer in Nanded since 1997. He stated that in 2016, he was working as a Medical Health Officer, and the Municipal Corporation had maintained birth/death records online since 2012. He submitted that before 2012, the hospital used to inform of the birth of a child by submitting the prescribed form, and based on that, the Municipal Corporation's office used to take entry in its records. He submitted that the said information is referred to as the birth report, and on the day of the deposition, he brought the entire birth record for 2007. He

further filed the online birth record of the victim at Exhibit 94. A copy of the original was filed, and his certificate was to be proved, which was Exhibit 97. He had also brought the original report of the victim, which was manually prepared. A copy of which was filed below Exhibit P-98. He stated that, as per the said report, the victim was born at the Aayurvedik Government Hospital, Nanded, and that the date of birth was 09th November 2007. In the deposition, he also mentioned his father's and mother's names, as well as his registration number, 16170. The birth certificate below Exhibit 57 was shown to him, and he stated that its contents were as per the original record maintained by the Municipal Corporation, which was with him on that day. He agreed that he stated that Dr S. B. More issued the certificate. He identified his Signature.

23. In the cross-examination, he admitted that he cannot say whether the information given in the said form at Exhibit P-98 is correct or not.

24. Exhibit P-98, which is the birth report, reveals the name of the victim, gender, name of father as well as mother, place of birth and her date of birth as 09th November 2007.

25. In this background, the learned Advocate for the accused submitted that the age of the child was not proved beyond a reasonable doubt, and according to him, the mother has not deposed the date of birth but only stated that the victim was 14 years and 2 months old at the time of the incident. He further submitted that if Exhibit P-98 is perused, and it would reveal that the child's name is in a different handwriting. According to him, the victim was not a child under the Act of 2012. He submitted that the testimony of PW-10 is of no importance, since PW-10, in his cross-examination, categorically stated that he cannot say whether the information given in the form at Exhibit P-98 is correct or not. He therefore stated that just because a document is produced and exhibited, it does not mean that its contents are proved. He submitted that the admissibility of the document is one thing, and the explanation is another.

26. Per contra Ms. Ghanekar, learned APP, submitted that there is absolutely no dispute regarding the date of birth since not only the mother but also PW-10 Medical Officer has proved the same. The prosecution has proved the birth certificate which was duly exhibited. In contrast, the PW-10 has categorically stated that he has produced the birth certificate on record, which was supported by the original

document.

27. Since the mother has deposed that the victim was 14 years and 2 months at the time of the incident, and she has produced the birth certificate, which is further corroborated by the testimony of PW-10, I conclude that the prosecution has rightly proved that the victim was a child under the Act of 2012.

28. This takes me to the point as to whether the accused has committed forcible sexual penetrative intercourse upon the victim. In this regard, the testimony of PW-2 is required to be taken into consideration.

29. PW-2 is the victim of a crime who has stated that at the time of the incident, she was studying in 8th std. and was 15 years old, and previously she was residing at Kandhar. According to PW-2, on 20th January 2022 at about 06.00 pm, she went to eat panipuri, when the accused arrived in a car, asked her to sit, and stated that both would flee and perform the marriage. The victim sat in the car, which was taken to a particular village and then to the city of Aurangabad. The distance between the village and Aurangabad was covered by a motorcycle owned by the accused's maternal aunt's daughter. She

stated that from Aurangabad, they went to Ahmadabad by travel bus, where the accused hired a room, and on 23th January 2022 at night, he had physical relations with her by force.

30. PW-2, the victim, has also stated that the accused had told her that he would marry her soon. On 24th January 2022 at about 10.00 pm, again, the accused had a physical relationship with the victim by force, saying that he would marry her. According to her, on 25th January 2022, the police came there and took them to Bhagyanagar Police Station. She deposed that her statement was recorded under Section 164 of Cr.P.C., which was marked as Exhibit 62, and her clothes were also seized. She was subjected to a medical examination. This witness has admitted that the accused was residing in the same area where the father of the victim used to teach in a school. She further admitted that there were several houses of the relatives of the victim in the area where the accused was residing. She also admitted that the accused was working as a driver with her Maternal aunt. She stated that she was aware that the accused was married and had one daughter.

31. She further admitted that the area where she went to eat the Panipuri was busy and in the centre of the city.

32. She admitted that she has not disclosed to anybody, right from leaving the city, and again on her return, about anything. She volunteered that the accused had blackmailed her and told her that he would kill the parents of the victim. It is necessary to mention that the version regarding blackmailing and threats is an omission that was put to the said witness and proved by the Investigating Officer. She also admitted that police had asked her to depose in court, as she had deposed before the police, and accordingly, she deposed.

33. The mother of the victim, who was examined as PW-1, had stated in her testimony that the victim left the house, saying that she was going to eat panipuri. Since she did not return home, she started searching for her, but she was not found. Hence, she went to the police station and lodged a missing report, as shown below Exhibit 55., based on which the offence under Section 363 of IPC was initially registered. She submitted that, after visiting her house, the police conducted the panchanama. She stated that the brother of the accused informed her sister's son on the phone that the accused had kidnapped the victim and taken her to Ahmedabad to perform the marriage. The said information was supplied to the police. Her brother and cousin brother, went to the police in Ahmadabad. On 26th January 2022, they brought

the victim and the accused to the Bhagyanagar Police Station. When PW-1 enquired with the victim, the victim disclosed that the accused took her, saying that he would marry her and thereafter performed sexual intercourse with her.

34. PW-3 is Dr Gajanan, who in the year 2020 was serving at the Government Medical College, Nanded. He stated that the victim was referred for medical examination on 27th January 2022. He then obtained the consent of the mother of the victim, noted the identification marks of the victim, recorded the history and medically examined the victim. During the medical examination, he could not notice any external injury. On internal examination, he found old hymen tears in positions 3, 4, 10, and 11. He collected the samples of vaginal swab, blood, nail clipping and pubic hairs of the victim and handed them over to the LPC. According to the said witness, all the examination findings were consistent with the sexual intercourse. However, the final opinion was kept pending until the FSL report was received. He proved the medical report, which was below Exhibit 64. He admitted that a hymen tear heals within 12 hours of its tearing. During cross-examination, he admitted that he did not conduct any tests to ascertain the victim's age. He further admitted that there was

no evidence of the use of force.

35. It is in this background that the prosecutrix has submitted that the prosecution has proved the offence of rape and penetrative sexual assault. In contrast, the counsel for the appellant has argued that the victim's testimony is not at all reliable, as there were several opportunities for her to raise a hue and cry when she was travelling from the village to Aurangabad and then from Aurangabad to Ahmadabad, where they stayed. He further stated that if the testimony is reviewed holistically, it would reveal that the victim was a consenting party. In fact, they were residing as husband and wife in Ahmadabad.

36. He submitted that, considering the aforesaid aspect, he is already acquitted by the Trial Court for the commission of offences punishable under Sections 363 and 366-A of IPC. According to him, since he is already acquitted of the said offences and the prosecution does not challenge the acquittal, the same evidence would be of no help to the prosecution. He submitted that, admittedly, the Nanded police had visited Ahmadabad on 24th January 2022. At that time, the victim had narrated that she was subjected to forcible penetrative sexual assault, but surprisingly, her medical examination was

conducted on 27th January 2022. He thus submitted that the delay in medically examining the victim was deliberate. He submitted that, in fact, the medical evidence would reveal that there was no physical relationship, as no external marks were found on the body. as cross-examination, the medical officer has categorically admitted that a hymen tear can heal within 12 hours of its occurrence. Learned Counsel for the appellant thus submitted that the evidence of the victim tendered by the prosecution is not clinching or reliable. According to him, his appeal is liable to be allowed on the ground of non-examination of the material evidence. He submitted that none of the persons from the place from which the victim had accompanied were examined. Further, the landlord of the room in which the victim and the accused were residing at Ahmadabad was also not examined, which clearly shows the genesis of the crime is suppressed by the prosecution. He accordingly prayed for acquittal.

37. Per contra Ms. Ghanekar, learned APP for the respondent – State submitted that the version of the victim, who was just 14 years and 02 months old, inspires confidence, and her evidence is cogent and reliable. There was absolutely no reason for the false implication and version advanced in the statement recorded under section 313 of

Cr.P.C., that it was due to her uncle's nonpayment of the appellant's salary; he left the job, and that was the reason for the false implication is, in fact, a fragile defence. Learned APP submitted that the reasons advanced by the accused, that there was a quarrel between the parents of the victim, and that the victim requested the accused to flee, are also not convincing. She submitted that, the foundational facts were proved by prosecution, therefor presumption under Sections 29 and 30 of the Act of 2012, would attract, which was not rebutted by the accused either by way of cross-examination or by putting on a stand while recording his statement under Section 313 of Cr.P.C. or by the production of any witness.

38. Mr. Surayawanshi, learned Advocate for the victim, not only supported the contention of the prosecution but also stated that this is a classic case wherein the provision of the Act 2012, more particularly section 5(l), which is ignored. According to him, as the prosecution has proved that the victim's date of birth was 09th November 2007 and, as such, the victim was 14 years 02 months old on the date of the incident, the Trial Court should have awarded the punishment of 20 years. In contrast, the Trial Court has just imposed seven year sentence of imprisonment. He submitted that the

punishment awarded is contrary to the provisions of the Act of 2012. He, thus, submitted that his appeal for imposing statutory minimum sentence be allowed.

39. I have given my thoughtful consideration to the arguments advanced by the respective counsels and also gone through the record of the case.

40. Discussion made (supra) would reveal that at the time of commission of the offence, the victim was a child and was 14 years and 02 months old only. The witnesses' testimony is particular, she stated that the accused took her on a motorcycle from the village to Aurangabad, and from Aurangabad to Ahmadabad by bus. Victim stated that on 23rd and 24th of January, 2022, she was subjected to forcible penetrative sexual assault under the pretext of marriage.

41. It is necessary to mention here that the defence case is that the accused was married and had one daughter. The accused was 24 years of age at the time of the incident. Thus, it is crystal clear from the evidence that the accused had committed forcible sexual intercourse. There is no closeness of age of accused and victim. Even if the argument advanced by the defence is assumed to be correct that the victim was a consenting party, it is a well-settled principle of law

that the consent of the minor victim is, in fact, no consent in the eyes of the law.

42. The medical evidence also supports the case of the prosecution. Though no external injuries were found, an old hymen tear was present. Even the slightest of penetration would constitute the offence under Section 375 of IPC and under the provisions of the Act of 2012. The medical report also corroborates the testimony of the victim.

43. At this stage, it is necessary to mention here that Sections 29 and 30 of the Act of 2012 speak about raising a presumption. Section 29 of the Act of 2012 provides that when a person is prosecuted for the commission of an offence under Sections 3, 5, 7 of the Act of 2012, the Court shall presume that such a person has committed the offence unless the contrary is proved. Section 30 of the Act of 2012 provides that for any offence under the Act that requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such a mental state. Still, it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. 'Culpable mental state' includes intention, motive, knowledge of a fact

and the belief, in, or reason to believe, a fact.

44. If the record of the case is perused, it would reveal that the applicant was charged and convicted for the commission of offences punishable under Section 6 of the Act of 2012. The prosecution has proved the foundational facts and thus presumption under Sections 29 and 30 of the Act of 2012 had triggered. It was then for the accused to rebut the presumption, either by cross-examination, by answering the question under 313 of Cr.P.C., or by entering the witness box. Admittedly, same has not been done in the present case. In the aforesaid background, it can be said that the accused has not discharged the burden on him. However, the prosecution has discharged the initial burden by proving the foundational facts. Thus, I conclude that the prosecution has proved the case beyond the reasonable doubt that the accused has committed the offence of aggravated penetrative sexual assault since the victim was subjected to forcible penetrative sexual assault repeatedly. The conviction was rightly awarded under Section 376 (2)(n) of IPC and Section 5(l) punishable under Section 6 of the Act of 2012. The question regarding imposition of statutory minimum sentence is discussed in further part of the judgment, more particularly while dealing in an appeal against

a acquittal, but same shall not be taken to mean that the statutory sentence is imposed while entertaining an appeal under Section 372 of code of criminal procedure.

45. The victim has preferred Criminal Appeal No.740 of 2024 challenging the said judgment with the following prayers. The appeal is preferred under Section 372 of Cr.P.C., and the prayers made are as follows :

A) The Criminal Appeal may kindly be allowed.

B) The record and proceedings kindly be called for.

C) This Hon'ble Court may be pleased to quash and set aside the impugned judgment and order passed by the learned Special Judge POCSO Nanded in Special Case No.26 of 2022, dated 20th June 2024 to the extent of acquittal of the accused under Sections 363 and 366-A of the Indian Penal Code, 1860 and also awarded the sentence to the accused as per the provisions of Section 6 of the Protection of Children from Sexual Offences Act 2012 as well as Section 376(2)(n) of the Indian Penal Code.

46. At this stage, it is necessary to deal with question of acquittal of the accused under provisions of section 363 and 366A of Indian penal code. The law regarding interference in the judgment of acquittal is crystal clear. The Hon'ble Apex Court has stated that when there are two views possible, the view which leans in a favour of the accused is required to be taken. It has further observed that the presumption of innocence gets strengthen when the accused is acquitted by the Trial Court. The Hon'ble Apex Court has further stated that there are no restrictions in appeal against acquittal for interference, if ultimately it comes to notice that the appreciation of evidence was perverse or illegal. In the aforesaid background, if the testimony of the victim/PW2 is taken into consideration, it would reveal that that on the day of incident, she had been to eat Panipuri at a particular place by informing to her mother, at which time the accused came there with a car and asked her to sit in a car. Thereafter, accused stated to her that they would flee away and perform the marriage. The victim then sat in a car and went away with the accused. The Trial Court, in its judgment, more particularly in para 20 has dealt with the aspect of applicability of Sections 363 and 366-A at length. Suffice it to say that the said finding are based on proper appreciation of evidence and law, and therefore requires no

interference.

47. Now comes the question of awarding punishment under Section 376(2)(n) of IPC and Section 5(l), punishable under Section 6 of the Act of 2012. Section 376(2)(n) of IPC punishes the accused, who committed rape repeatedly on the same woman and further state that the said offence 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.

48. So far as Section 5(l) punishable under Section 6 of the Act of 2012 is concerned, Section 6 prescribes punishment for aggravated penetrative sexual assault. It says that whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the natural life of that person, and shall also be liable to fine, or with death.

49. Section 6 of the Act of 2012 was amended, which came into force with effect from 16th August 2019. Before it, the punishment prescribed was rigorous imprisonment of not less than ten years, which

may extend to imprisonment for life, and also made the offender liable to a fine.

50. In the present case, the offence was committed on 20th January 2022, and therefore, the old provision of Section 6 of the Act of 2012 would not be applicable. The sentence imposed in the present case is seven years for the commission of the offence, under section 6 of the Act of 2012 and Section 376 of IPC, which is less than the statutory minimum prescribed.

51. The learned counsel for the accused contended that in an appeal, under the provisions of Section 372 of Cr.P.C., at the instance of the victim, an appeal against the conviction preferred by the accused, the sentence cannot be enhanced. He submitted that the Court has awarded a sentence of seven years for the commission of an offence punishable under Section 6 of the Act of 2012 as well as Section 376(2)(n) of IPC. Though there is statutory punishment which is more than what is awarded, still the powers under Sections 372 and 386 of Cr.P.C. cannot be exercised to enhance the sentence.

52. He submitted that this Court, acting as a Single Bench, will not have jurisdiction, and under section 372 of the Code of Criminal Procedure, it would lie before the Honble Division Bench.

53. According to the roster, Criminal Appeal against conviction as well as connected appeal against acquittal are assigned to this Court, but, since there was a doubt in the mind of the counsel for the accused, this Court vide its order dated 05th February 2026, has called upon the Registrar (Judicial) to verify whether this appeal would lie before the Single Bench or Division Bench.

54. The Registrar (Judicial) has submitted his report dated 05th February 2026 and has stated that the sentence passed in the present appeal against conviction is of seven years and in his opinion, the appeal would lie before the Single Bench. Even the learned APP has stated that the appeal would not be maintainable but a revision, which can be filed to enhance the sentence. The contention of both the counsels for the appellant and the learned APP is that since awarding the statutory minimum sentence would be an "enhancement", the power under Sections 372 and 386 of Cr.P.C. cannot be exercised by this Court. To buttress her contention, Learned APP has relied upon the judgment of this Court in the case of ***Anand Singh Vs. The State of Maharashtra***[1]**.** She accordingly submits that it would be a revision that can be preferred for the enhancement of the sentence and not an

1 Criminal Appeal No.467 of 2012 dated 10th June 2022.

appeal.

55. Mr Jaiswal, learned counsel for the accused, has relied upon the law laid down by the Hon'ble Apex Court in the case of ***Sachin Vs. The State of Maharashtra***[2], to buttress his contention that, Section 372 of Cr.P.C. prescribes only three contingencies under which the appeal can be preferred; the first is the accused's acquittal; the second, conviction for a lesser offence; and the third, inadequate compensation. He thus contends that there is absolutely nothing in Section 372 of Cr.P.C. that permits the victim to prefer an appeal praying for "enhancement."

56. I have pondered over the issue and have given thoughtful consideration to the arguments advanced. To deal with the aforesaid contention, it is required to see the difference between "enhancement of sentence" and "imposition of minimum statutory punishment."

> *"Enhancement" is a statutorily mandated increase to an offender's sentence range because of a specific factor in the commission of the crime.*
>
> *"Enhancement" is an additional term of imprisonment added to the base term for a particular offence.*
>
> *"Enhancements" are not offences; they are*

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punishments.

For imposing an enhanced sentence, the court has discretion, which can be called "enhancement choice". Enhancement choice, then, will require stating the reasons for imposing the enhanced sentence, but the Court cannot award less than the mandated punishment. Then comes discretion to impose the sentence which can be called as "imposition choice", which means that though court has a choice to award the sentence, but not less than what the legislature has prescribed.

"Minimum statutory sentence", means the base limit is fixed by the statute, below which the sentence cannot be awarded.

"Minimum statutory sentence" would be automatic, once the guilt is proved.

"Minimum statutory sentence", fails to give any discretion to the Court to award lesser sentence.

It will also have to be considered that the object behind imposition of minimum statutory sentence is providing uniformity and consistency while awarding punishment. The said sentence is mandatory in nature and sometimes act as a strong deterrent for serious offences. Thus the judicial discretion is removed for imposing a sentence less than mandated by the law.

In fact, if the statutory minimum sentence is not

imposed by the trial court and lesser sentence than statutory minimum is imposed, then corrective steps will have to be taken in an appeal and therefore it cannot be called as an enhancement of the sentence."

57. It is not disputed by the respective counsels at all that not only Section 376(2)(n) of IPC, but also Section 6 prescribed the minimum statutory sentence. Section 376(2)(n) of IPC mandates that the sentence shall not be less than ten years, whereas Section 6 of the Act of 2012 doesn't permit the Court to award a sentence of less than twenty years, if the offence under Section 5 of the Act of 2012 is proved.

58. Both the Sections, i.e. Section 376(2)(n) of IPC and Section 6 of the Act of 2012, though prescribe the statutory minimum punishment, also give discretion to the Court to award a higher sentence, which may extend to life imprisonment or with death.

59. It is in this background that the intention of the legislature will have to be seen. Keeping in mind the mandate of Section 6 of the Act of 2012 and Section 376(2)(n) of IPC enhancement would mean extending the length of sentence from twenty years to life imprisonment or with death when conviction is under Section 6 of the

Act of 2012 and from ten years to life imprisonment when conviction is under Section 376(2)(n) of IPC.

60. Imposing a statutory minimum sentence , if not imposed by the Trial Court would in no manner thus amount to enhancement of sentence in the true sense. The accused may draw an inference that due to the imposition of a statutory minimum punishment, he would be required to undergo a longer period of sentence, but that cannot be called an "enhancement of the sentence" in the true sense.

61. There is one more reason for it. Section 386 of Cr.P.C., if looked into, would reveal that it speaks about the power of the Appellate Court. So far as powers which are required to be exercised in an appeal from conviction, the Appellate Court can exercise its power in the following manner:-

> *"a) 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*
>
> *b) Alter the finding, maintaining the sentence, or*
>
> *c) With or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not to enhance the same."*

62. Thus, what the Appellate Court can also do while entertaining an appeal from the conviction is alter the nature or the extent, or the nature and the extent, of the sentence. To put it simply, the Appellate Court can convert rigorous imprisonment into simple imprisonment and vice versa, and award the just punishment. The enhancement stated in Section 386 of Cr.P.C. would only mean that the length of the sentence is increased from a minimum sentence to maximum sentence, if not imposed by the Trial Court.

63. Now, coming to what factors are required to be taken into consideration while imposing the sentence upon the convict by the court, it is necessary to mention that while dealing with the question of enhancing the sentence, the Appellant Court will have to test the reasoning adopted and factors which are taken into consideration by the Trial Court while awarding the sentence. The Trial Court can impose the sentence upon the accused as per its discretion only when it is permissible by the mandate of law. If the legislature has fixed the boundaries of the Trial Court's discretion, neither the Trial Court nor the Appellant Court can exceed the boundaries.

64. Section 28 of Cr.P.C. is also one of the provisions which can

be looked into. Section 28 speaks about the sentences which High Courts and Sessions Judges may pass. The same is reproduced as under :

> ***"28. Sentences which High Courts and Sessions Judges may pass. -***
>
> *(1) A High Court may pass any sentence authorised by law.*
>
> *(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.*
>
> *(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years."*

65. The opening words of the said sentence are the Court may pass any sentence authorised by law. It further says that the Sessions Judge or the Additional Sessions Judge may pass any sentence authorised by law. An Assistant Sessions Judge may pass any sentence authorised by law. Thus, the Code, though it gives the Court power to award the sentence, imposes a rider that the sentence must be awarded which is authorised by law.

66. The provision of Section 354 of Cr.P.C. is also required to be looked into. Section 354 speaks about the language and contents of the judgment. The said provision is reproduced hereinbelow.:

"354. Language and contents of judgment.—

(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—

(a) shall be written in the language of the Court;

(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;

(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted, and the punishment to which he is sentenced;

(d) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(2) When the conviction is under the Indian Penal Code (45 of 1860), and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the

alternative.

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of a sentence of death, the special reasons for such sentence.

(4) When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code.

(5) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(6) Every order under section 117 or sub-section (2) of section 138 and every final order made under section 125, section 145 or section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

67. Sub-section 3 of Section 354 of Cr.P.C. says that when the conviction is for an offence punishable with death or, in the

alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of a sentence of death, the special reasons for such sentence.

68. Sub-section 4 of Section 354 of Cr.P.C. says that when the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such a sentence.

69. Thus, before awarding the sentence, not in a case when the statutory minimum limit is fixed, the Court is required to hear the accused and record the reason.

70. This takes me to one more Section, so that the controversy involved can be decided in the proper perspective, and the said Section is Section 235 of Cr.P.C. Section 235 of Cr.P.C. reads as under :

"235. Judgment of acquittal or conviction.—

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he

proceeds in accordance with the provisions of section 360, hear the accused on the questions of sentence, and then pass sentence on him according to law."

71. Sub-section 2 of Section 235 of Cr.P.C. provides that the Court before imposing the sentence, is required to hear the accused and then pass sentence on him according to law.

72. In this background, it can be said that what the Code mandates is giving the reasons while imposing the punishment, and passing the sentence in accordance with the law.

73. Therefore, what the law prescribes, so far as the present case is concerned, is awarding of minimum statutory punishment of twenty years for conviction under Section 6 of the Act of 2012 and the minimum statutory punishment of ten years when the offence is under Section 376(2)(n) of IPC. Thus, it cannot be said that if the Appellant Court awards the statutory minimum sentence, it would amount to an enhancement of the sentence. What the Appellant Court would be doing is only awarding the base sentence prescribed by law.

74. The aspect can be seen from one more angle. The Protection of Children from Sexual Offences Act, 2012 was enacted

with a particular aim and object to protect children from offences of sexual assault, sexual harassment and pornography and provide for the establishment of Special Courts for the trial of such offences and for matters connected therewith or incidental thereto. Section 6 of the act of 2012, specifically states that whoever commits aggravated penetrative sexual intercourse shall be punished with rigourous imprisonment for a term which shall not be less than 20 years, but which may extent to imprisonment for life……". Thus the negative wording in the section clearly shows that awarding of sentence of 20 years is mandatory and less than it would be against the provision of law.

75. Further Section 42 of the Act of 2012 speaks about alternate punishment, which reads as follows:

> *"**42. Alternate punishment.**—Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, Section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such*

offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

76. If the aforesaid provision is perused, it would reveal that whenever the accused is convicted for more than one offence, the punishment which is greater in degree is required to be awarded. Thus, Section 42 of the Act of 2012 was enacted with the particular object that, when the crime is against a child, a higher degree of punishment is required to be awarded.

77. In the present case, though the higher degree of punishment, more particularly, minimum statutory punishment is of twenty years under Section 6 of the Act of 2012 and ten years under Section 376(2)(n) of IPC, the Trial Court has awarded the sentence of seven years. If the said part of the judgment is allowed to stand, it would defeat the mandate of the Act of 2012.

78. Even provision of Section 42-A of the Act of 2012 would be helpful. Section 42A of the Act of 2012 is reproduced hereinbelow :

"42A. Act not in derogation of any other law.—*The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the*

time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

79. The aforesaid section shows that in case of derogation between two provisions, the provisions in the Act of 2012 will have overriding effect. Further provisions are required to be read in addition to and not in derogation of the provisions of any other law. Thus, a holistic reading of Sections 42, 42A of the Act of 2012 and Sections 386 and 28, as also Section 354 of Cr.P.C., would clearly suggest that the punishment is required to be awarded, which is "in accordance with law."

80. There is one more reason for disturbing the length of the sentence awarded by the Trial Court. In the case of ***Mohd Hashim Vs. The State of U.P. and Others***[3], the following observations made would be relevant.

"15. The three-Judge bench, while adverting to the concept of "minimum sentence", relied on the observations made in Bahubali (supra), which were reproduced hereinabove, and opined that :

"9. The above observation also clearly shows that

3 (2017) 2 SCC 198

> *where there is a statute that bars the exercise of judicial discretion in the matter of the award of sentence, the Probation of Offenders Act will have no application or relevance. As Rule 126-P(2)(ii) of the DI Rules manifestly bars the exercise of judicial discretion in awarding punishment or in releasing an offender on probation in lieu of sentencing him by lying down the minimum sentence of imprisonment, it has prevail over the aforesaid provision of the Probation of Offenders Act, 1958, in view of Section 43 of the Defence of India Act 1962, which is later than Probation of Offenders Act and as an overriding effect."*

81. Thus, it can be seen that awarding a lesser sentence than the statutory minimum prescribed was absolutely illegal.

82. Hon'ble Apex Court in the case of State of ***Madhya Pradesh Vs. Vikram*** **Das**[4] has dealt with the aforesaid aspect, particularly paragraphs No. 8. Paragraph No.8 is reproduced as under :

> *"8. In view of the aforesaid judgments that where a minimum sentence is provided for, the Court cannot impose less than the minimum sentence. It is also held that provisions of Article 142 of the*

4 (2019) 4 SCC 125

Constitution cannot be restored to impose a sentence less than the minimum sentence."

83. Thus, even while exercising powers under Article 142 of the Constitution of India,less than minimum statutory sentence cannot be imposed.

84. The judgment in the case of ***State through S.P., New Delhi, vs. Ratan Lal Arora***[5] is also on a similar line. Paragraph No.12, which reads as follows:

"12. That apart, Sections 7 and 13 of the Act provide for minimum sentences of six months and one year, respectively, in addition to the maximum sentence, as well as the imposition of a fine. Section 28 further stipulates that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force. In the case of Supdet., Central Excise V. Bahubali, while dealing with Rule 126-P(2)(ii) of the Defence of India Rules which prescribed a minimum sentence and Section 43 of the Defence of India Act, 1962 almost similar to the purport enshrined in Section 28 of the Act in the context of a claim for granting relief under the Probation Act, this Court observed that in cases where a specific enactment enacted after the Probation Act prescribes a minimum sentence of

5 (20041) 4 SCC 590

imprisonment, the provisions of the Probation Act cannot be invoked if the special Act contains any provision to enforce the same without reference to any other Act containing a provision, in derogation of the special enactment, there is no scope for extending the benefit of the Probation Act to the accused. Unlike the provisions contained in Section 5(2) proviso of the old Act providing for imposition of a sentence lesser than the minimum sentence of one year therein for any "special reasons" to be recorded in writing, the Act did not carry any such power to enable the Court concerned to show any leniency below the minimum sentence stipulated. Consequently, the learned Single Judge in the High Court committed a grave error of law in extending the benefit of probation even under the Code. At the same time we may observe that though the reasons assigned by the High Court to extend the benefits of probation may not be relevant, proper or special reasons for going below the minimum sentence prescribed – which in any event in wholly impermissible, as held supra, we take them into account to confine the sentence of imprisonment to the minimum of six months under Section 7 and minimum of one year under Section 13(2) of the Act, both the sentences to run concurrently. So far as the levy of fine in addition made by the learned trial

Judge with a default clause on two separate counts is concerned, they shall remain unaffected and are hereby confirmed."

85. The sum and substance of the aforesaid judgment is that awarding a sentence less than the minimum statutory sentence is not permissible.

86. Thus, in the aforesaid background, I am of the view that what has been sought is the awarding minimum statutory sentence under Sections 6 of the Act of 2012 and 376(2)(n) of IPC and not the enhancement of the sentence. The increase in the length of sentence may be a consequence of awarding the statutory minimum sentence, but it cannot be called an enhancement of the sentence. Thus exercising of powers under section 386 of code of criminal procedure, in the facts and circumstances of the case, would in fact be in the interest of justice.

87. It is necessary to mention here that, as per the provision of Section 6 of the Act of 2012 and Section 376(2)(n) of IPC, the Court is legally bound to award the minimum punishment of twenty years and ten years respectively, and no discretion is given to the Court to award less than that.

88. In the aforesaid background it would be crystal clear that a omission to award a statutory minimum sentence would not be permissible in law.

89. It is further necessary to mention here that when the appeal is preferred for the enhancement of the sentence, what is challenged is the discretion of the Trial Court and the manner in which it is exercised. In this case, as already stated, there is no discretion given to the Court for awarding a sentence less than twenty years in the case of commission of an offence under Section 6 of the Act of 2012 and a sentence not less than ten years under Section 376(2)(n) of IPC.

90. In that view of the matter and considering the provisions of the Protection of Children from Sexual Offences Act, 2012, this Court has no other option but to award the minimum statutory sentence. Since the accused was well aware about pendency of the appeal under section 372 of code of criminal procedure, in which he has argued through Advocate Jaiswal, and which is heard along with his appeal for conviction, he cannot even say that he was not heard before imposing minimum statutory sentence. Even otherwise, once minimum

statutory sentence is prescribed and accused is held guilty, hearing on the point of sentence for awarding minimum sentence prescribed for that particular offence, maybe an empty formality.

91. Accordingly, the questions are answered as under;

A) Trial Court has rightly convicted but has not imposed statutory minimum sentence on the accused.

B) While exercising power under section 386 of the Code of Criminal Procedure in an appeal against conviction, the minimum statutory sentence can be imposed, and such imposition will not amount to an enhancement of sentence.

92. Thus, the following order is passed.

O R D E R

A) Criminal Appeal No.567 of 2024 is dismissed. Consequently, the conviction awarded to the appellant is maintained and while exercising power under Section 386 of Cr.P.C. statutory minimum sentence is imposed for commission of offence is

awarded to the accused i.e., of twenty years for commission of offence punishable under Section 6 of the Act of 2012 and punishment of sentence of ten years (minimum statutory sentence) for commission of offence punishable under Section 376(2)(n) of IPC.

B) Appeal against acquittal bearing Criminal Appeal No.740 of 2024 is dismissed so far as challenging acquittal under Sections 363 and 366-A of IPC. As regards prayer regarding imposition of statutory minimum sentence is concerned, same does not survive in view of the clause (A) of the order.

C) In view of Section 42 of the Act of 2012, the accused shall undergo the imprisonment which is greater in degree i.e. twenty years for rigorous imprisonment.

D) Consequently, the judgment delivered by Special Judge POCSO Nanded in Special Case No.26 of 2022, dated 20th June 2024, to the extent of the acquittal of the accused under Sections 363 and 366-A of IPC is hereby maintained.

93. At this stage, it is necessary to state that Mr. Rupesh Jaiswal, learned counsel, who was appointed by the Court to represent the accused, argued the case and has relied upon the judgments. He has tried his best to convince this Court that the accused has not committed the crime, and also, even on the point of sentencing. His fees be quantified at ₹ 12,000/-.

94. Mr. Rupesh Jaiswal, learned counsel further submits that the said amount be directed to be paid to the Advocates' Association Bar Library, High Court, Aurangabad; hence, no further orders are required.

95. Order accordingly.

(RAJNISH R. VYAS, J.)