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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 395 of 2014

Suresh Ram Vishvakarma

---Appellant

Versus

State of Chhattisgarh through Police Station Tapkara, District Jashpur, Chhattisgarh.

---Respondent

For Appellant	:-	Mr. Arvind Sinha, Advocate
For State	:-	Mr. Avinash Singh, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Sachin Singh Rajput
Judgment on Board
28/02/2023

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374(2) of CrPC has been preferred by the appellant herein against the impugned judgment dated 06/02/2014 passed by learned Special Judge, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Jashpur in Special Case No. 33/2013 whereby he has been convicted for offences punishable under Section 376(2)(i) of IPC (omitted by Amendment Act 22 of 2018 w.e.f. 21/04/2018), Section 6 read with Section 5(i/k/m) of Protection of Children from Sexual Offences Act, 2012 (in

short, 'Act of 2012'), and Section 3(i)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short, 'Act of 1989') and sentenced to undergo R.I. for 14 years with fine of Rs. 50000/- in default of payment of fine additional R.I. for 2 years and R.I. for 5 years with fine of Rs. 5000/- in default of payment of fine additional R.I. for 1 year, respectively, directing both the sentences to run concurrently.

2. Case of the prosecution, in brief, is that on 22/04/2013 at about 3 PM at Village Ghumra, Bhursapara within the ambit of Tapkara Police Station, the appellant herein committed sexual intercourse with the minor victim without her consent, knowing fully well that she is a member of Scheduled Tribes community and thereby, committed the aforesaid offences.

3. Further case of the prosecution is that on 28/04/2013 at about 1 PM, Smt. Savitri Painkra (P.W.-2) lodged a report at Police Station that on the date of the incident, she had gone towards the forest to collect wood and when she returned home at about 5 PM, her daughter informed her about the incident. On that basis, first information report was lodged vide Ex. P/1 and victim (P.W.-1) was subjected to medical examination which was conducted by Dr. Mamta Sai (P.W.-8) and in the MLC report (P.W.-9), the Doctor had opined that the victim had undergone sexual assault. After due investigation, the appellant was charge-sheeted for offences punishable under Sections 376(2)(i) and 506(II) of IPC, Section 5(i/k/m) of the Act of 2012 and Sections 3(2)(v) and 3(1)(12) of the Act of 1989 which was committed to the Court of Special

Judge for trial in accordance with law. The appellant abjured his guilt and entered into defence.

4. In order to bring home the offence, prosecution examined as many as 9 witnesses and brought on record 11 documents. Statement of the appellant was taken under Section 313 of CrPC wherein he denied guilt, however, he examined none in his defence.

5. Learned trial Court, after appreciation of oral and documentary evidence on record, convicted the appellant for offences punishable under Section 376(2)(i) of IPC (unamended), Section 6 read with Section 5(i/k/m) of the Act of 2012 and Section 3(1)(xii) of the Act of 1989, finding him guilty of the said offences and sentenced him as aforesaid.

6. Mr. Arvind Sinha, learned counsel for the appellant, would submit that the trial Court is absolutely unjustified in convicting the appellant for the aforesaid offences as there is no evidence on record upon which his conviction could have been based. In alternative, he would submit that appellant is in jail since 30/04/2013 and he has already completed sentence for more than 9 years, as such, in light of the decision rendered by the Supreme Court in the matter of **Vipul Rasikbhai Koli Jhankher v. State of Gujarat**[1], his sentence be reduced and he be sentenced to the period already undergone.

7. Per contra, Mr. Avinash Singh, learned State counsel, would submit that prosecution has been able to prove the offence

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beyond reasonable doubt, as such, the trial Court has rightly convicted the appellant for the offences in question. He would further submit that apparently the victim was a minor on the date of offence and she also belonged to Scheduled Tribes community, in that view of the matter, the sentence awarded by the trial Court is absolutely justified and it be maintained by dismissing the instant appeal.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

9. The question for consideration is whether the trial Court is justified in convicting the appellant for the offences in question ?

10. Victim (P.W.-1), who was a minor on the date of the offence, has been examined before the Court and she has clearly supported the case of the prosecution. Moreover, victim's mother Smt. Savitri Painkra (P.W.-2) has also been examined and she has clearly stated that at the time of the incident, she had gone to the forest to collect woods and when she returned to her home in the evening, her daughter narrated the incident to her and then she lodged a report at the Police Station. Pursuant to the report, victim was also subjected to medical examination and the MLC report (Ex. P/9) has been proved by Dr. Mamta Sai (P.W.-8), who has clearly opined that there was signs of sexaul assault on the private parts of the victim. As such, considering the entire evidence available on

record, we are of the considered opinion that the trial Court has rightly convicted the appellant for offences punishable under Sections 376(2)(i) of IPC (unamended) and Section 6 read with Section (i/k/m) of the Act of 2012. We do not find any infirmity warranting interference in conviction of the appellant for these two offences.

11. So far as sentence awarded to the appellant with regard to these two offences is concerned, the trial Court has sentenced him to undergo R.I. for 14 years with fine of Rs. 50000/-.

12. The Supreme Court, in the matter of **Vipul Rasikbhai** (supra), has relied upon its earlier decisions rendered in the matters of **Dharambir v. State of Uttar Pradesh**[2] and **Maru Ram v. Union of India**[3] and held in paragraphs 7 and 8 as under :-

> "7. In determining the quantum of sentence, the Court must bear in mind the circumstances pertaining to the offence and all other relevant circumstances including the age of the offender. The appellant has undergone actual imprisonment for a period of 11 years as on date. In **Dharambir v. State of Uttar Pradesh** (supra) a two-Judge Bench of this Corut specifically noted the impact of longer prison sentences on convicts who are young. Justice V R Krishna Iyer, speaking on behalf of the Court had noted the impact of prolonged incarceration:
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> > "2. We, however, notice that the petitioners in this case are in their early twenties. We must naturally give thought to the impact on these two young lives of a life sentence which means languishing in prison for years and years. Such induration of the soul induced by indefinite incarceration hardens the inmates, not softens their responses. Things as they are, long prison terms do not humanise or habilitate but debase and promote recidivism. A host of other vices, which are unmentionable in a judgment, haunt the long careers of incarceration, especially when young persons are forced into cells in the company of callous convicts who live in sex-starved

2 (1979) 3 SCC 645
3 (1981) 1 SCC 107

circumstances. Therefore, the conscience of the court constrains it to issue appropriate directions which are policy-oriented, as part of the sentencing process, designed to make the purpose of punitive deprivation of liberty, constitutionally sanctioned, is decriminalisation of the criminal and restoration of his dignity, self-esteem and good citizenship, so that when the man emerges from the forbidding gates he becomes a socially useful individual. From this angle our prisons have to travel long distances to meet the ends of social justice."

8. In our view, the ends of justice would be met by directing that instead and in place of the sentence of life imprisonmnet which has been imposed for the conviction under Section 376, the appellant shall stand sentenced to a term of 15 years' imprisonment. We are not inclined to uphold the argument of the respondent-state that only the sentence of life imprisonment would meet the ends of justice. The principles of restorative justice finds place within the Indian Constitution and severity of sentence is not the only determinant for doing justice to the victims. In **Maru Ram v. Union of India** (supra), Justice V R Krishna Iyer had poignantly highlighted the linkages between victimology and restorative justice :

"74. ..... Some argument was made that a minimum sentence of 14 years' imprisonment was merited because the victim of the murder must be remembered and all soft justice scuttled to such heinous offenders. We are afraid there is a confusion about fundamentals in mixing up victimology with penology to warrant retributive severity by the back-door. If crime claims a victim criminology must include victimology as a major component of its concerns. Indeed, when a murder or other grievous offence is committed the dependants of other aggrieved persons must restore the loss of heal the injury is part of the punitive exercise. But the length of the prison term is no reparation to the crippled or bereaved and is futility compounded with cruelty. "Can storied urn or animated bust call to its mansion the fleeting breath ?" Equally emphatically, given perspicacity and freedom from sadism, can flogging the killer or burning his limbs or torturing his psychic being bring balm to the soul of the dead by any process of thanatology or make good the terrible loss caused by the homicide ? Victimology, a burgeoning branch of humane criminal justice, must find fulfillment, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted, not by giving more pain to the offender but by lessening the loss of the forlorn. The State itself

> may have its strategy of alleviating hardships of victims as part of Article 41. So we do not think that the mandatory minimum in Section 433-A can be linked up with the distress of the dependents.

13. Following the decision of the Supreme Court in **<u>Vipul Rasikbhai</u>** (supra) and considering the fact that the age of the appellant was 26 years on the date of the offence and further considering that minimum sentence for offence punishable under Section 376(2)(i) of IPC (prior to the amendment) was 10 years, we hereby award the sentence of 10 years to the appellant for offence punishable under Sections 376(2)(i) of IPC and Section 6 read with Section 5(i/k/m) of POCSO Act, in place of the sentence as awarded by the trial Court. However, the fine sentence is hereby maintained directing the trial Court to pay the fine amount to the victim as compensation, on being deposited.

14. The appellant has also been convicted for offence punishable under Section 3(1)(xii) of the Act of 1989 (prior to its amendment w.e.f. 26/01/2016), which stood as under :-

> "**Section 3(i)(xii) –** being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;"

15. A careful perusal of the aforesaid provision would show that as per Section 3(1)(xii) of the Act of 1989, it must be proevd that the accused was in a position to dominate the will of a woman belonging to a Scheduled caste or Scheduled Tribe community and uses that position to exploit her sexually to which she would not have otherwise agreed. The position to dominate means commanding and controlling position. The

expression “sexual exploitation” includes sexual intercourse without consent. (See : **Madanlal v. State of Chhattisgarh**[4])

16. The ingredients of the offence under Section 3(1)(xii) of the Act of 1989 are that :-

(i) the offender must be a person who is not a member of Scheduled Caste or Scheduled Tribe.

(ii) he must be in a position to dominate the will of a woman belonging to a Scheduled Cate or a Scheduled Tribe.

(iii) the said position was used to exploit the woman sexually to which, she would not have otherwise agreed.

The 'position to dominate' means 'commanding and controlling position'. The position of the accused coupled with the use of such position to exploit the victim women sexually are important criteria apart from the Caste/Tribe factor of the victim/accused.

17. In light of the ingredients of Section 3(1)(xii) of the Act of 1989, it is quite vivid that the Special Judge has only recorded a finding that the offence of rape has been committed by the appellant upon the victim under Section 376 of IPC and thereafter, held that the offence under Section 3(1)(xii) of the Act of 1989 has been committed because the victim was a member of Scheduled Tribes.

18. In our considered opinion, merely because the victim was a member of Scheduled Tribe community, it cannot be assumed that the appellant was able to dominate her will to exploit her

4 2007 (1) CGLJ 435

sexually. Even otherwise, the charges framed against the appellant are very vague and the prosecution has not led any evidence to show that the appellant was in commanding and controlling position and in absence of any separate evidence in this regard, the conviction of the appellant under Section 3(1)(xii) of the Act of 1989 deserves to be and is hereby set aside.

19. In conclusion, the conviction of the appellant for offences punishable under Sections 376(2)(i) of IPC and Section 6 read with Section 5(i/k/m) of the Act of 2012 is maintained, however, his jail sentence is reduced to 10 years and the fine is maintained directing the trial Court to pay it to the victim. The conviction of the appellant for offence punishable under Section 3(1)(xii) of the Act of 1989 is hereby set aside.

20. Accordingly, this criminal appeal is allowed to the extend indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sachin Singh Rajput)
Judge

Harneet