

Court No. - 46

Case :- CRIMINAL APPEAL No. - 4472 of 2018

Appellant :- Bhura

Respondent :- State of U.P.

Counsel for Appellant :- Anil Kumar Shukla,A.Z.Khan

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Syed Aftab Husain Rizvi,J.

1. This appeal is directed against judgment and order of conviction and sentence dated 05.07.2018, passed by the Special Judge, POCSO Act/Additional Sessions Judge, Court No.8, Muzaffarnagar in Special Sessions Trial No. 346/- of 2016 (State of U.P. vs. Bhura), whereby the accused appellant Bhura has been convicted and sentenced under Section 377 IPC for rigorous life imprisonment with fine of Rs.10,000/- and in default of payment of fine further undergo for one year additional simple imprisonment; under Section 5/6 of Protection of Children from Sexual Offences Act, 2015 for rigorous life imprisonment with fine of Rs.10,000/- and in default of payment of fine further undergo for one year additional simple imprisonment.

2. A written report has been made by informant Saleem (PW-2) son of Mahsood on 28.07.2016 stating that his 6 year old son was playing outside the house on 28.07.2016. The accused appellant, who is selling tobacco product in a kiosk, at about 04.30 in the evening on the pretext of offering toffee has taken the victim to the sugarcane field and has committed unnatural offence upon him. On hearing screams of the child the informant and his wife rushed to the field and found the victim weeping. On seeing the informant

the accused ran away. On such written report First Information Report came to be registered in Case Crime No.417 of 2016 under Section 377, 506 IPC and 3/4 POCSO Act at Police Station Purkaji, District Muzaffarnagar.

3. Investigation proceeded in the matter and statement of victim was recorded on 06.08.2016 by the Magistrate where he has fully supported the prosecution case. As per the victim the accused appellant took him in the agricultural field behind his house and committed act of unnatural offence. On raising alarm his sister saw them and his mother also arrived whereafter the accused fled.

4. The victim was medically examined at District Hospital, Muzaffarnagar and following injury has been noticed:-

"Injury - Red abrasion 01cm x.4cm on route of anus at 12'o' clock "

Two slides were also prepared on the victim for pathological examination of spermatozoa.

5. Upon conclusion of investigation charge sheet was ultimately submitted against the accused under Sections 377, 506 IPC and 3/4 POCSO Act on 22.08.2016. The case was ultimately committed to the court of sessions where it got registered as Special Sessions Trial No.346/9 of 2016. Charges were framed against the accused appellant under Sections 377, 506 IPC and 5/6 POCSO Act, who denied the same and demanded trial.

6. During the course of trial, the victim has appeared as PW-1, who has fully supported the prosecution case. The victim has specifically stated that the accused appellant performed unnatural offence and he experienced pain and after hearing screams family

members arrived.

7. Informant Saleem has also appeared as PW-2 and has supported the prosecution case. Similarly, mother of the victim, namely Imrana, has also appeared as PW-3 and has supported the prosecution case with regard to unnatural offence committed by the accused appellant upon the victim.

8. The incriminating material placed on record during trial was confronted to the accused appellant for recording his statement under Section 313 Cr.P.C. The accused appellant has stated that he has been falsely implicated and that he is innocent.

9. Before proceeding further, it would be worth noticing that the medical report and other documents placed on record by the prosecution were admitted by the defence and in such view of the matter the court below dispensed the requirement of its formal proof by virtue of section 294(3) Cr.P.C. The court below on the basis of evidence led in the matter found the accused appellant guilty of committing unnatural offence beyond reasonable doubt and, therefore, convicted and sentenced him vide impugned judgment and order. Thus aggrieved, the accused appellant is before this Court.

10. Learned counsel for the accused appellant initially attempted to submit that implication of the accused is false as there had been a fight between brother of the victim with the accused on account of which he has been falsely implicated. Such argument was soon given up in the absence of any specific evidence led in that regard. Learned counsel also admits that the documentary evidence placed on record by the prosecution have since been admitted as such

there was no necessity of its formal proof in view of section 294(3) Cr.P.C.

11. Learned A.G.A. for the State, on the other hand, submits that the court below has rightly convicted the accused appellant on the basis of evidence led before it and, therefore, no interference in the matter is called for.

12. We have heard learned counsel for the parties and have examined the materials brought on record, including the records of court below.

13. Upon examination of evidence on record, we find that the FIR has been promptly lodged wherein the accused appellant is specifically named as an accused. The incident itself has occurred at about 04.30 in the evening whereas the FIR has been lodged on the same day at 08.15 pm. Accused appellant otherwise had his kiosk nearby the house of the victim and, therefore, identity of accused appellant is not in issue. The oral testimony of PW-1 with regard to unnatural offence having been committed by the accused appellant upon him is also corroborated by the medical report on record, which has been duly exhibited. The injuries on the anus of the victim coupled with his specific implication of accused made it abundantly clear that the prosecution has succeeded in proving the guilt of the accused appellant beyond reasonable doubt. The conviction of accused appellant under section 377 IPC is, therefore, affirmed.

14. Learned counsel for the accused appellant states that the accused appellant was 24 years of age at the time of committing offence with no criminal background and this is the first offence

reported against him. The accused appellant is the only son of his parents and is required to support not only his aged parents but also his three sisters. The accused appellant otherwise comes from a poor background and he has limited means available to support himself. It is, therefore, urged that the life imprisonment awarded to the accused appellant is excessive and that lesser sentence would clearly subserve the purpose in the facts of the present case.

15. On behalf of the accused appellant reliance has been placed upon a judgment of the Supreme Court in the case of Thongam Tarun Singh vs. State of Manipur, (2019) 18 SCC 77 wherein the life sentence of the accused had been reduced to 8 years in respect of offence under section 376 read with 120B IPC. Reliance is also placed upon a Division Bench judgment of this Court in Mahesh Rathur vs. State of U.P. being Criminal Appeal No.2867 of 2013 wherein the life sentence in respect of offence under section 377/511 IPC was reduced to 10 years imprisonment.

16. Argument of the learned A.G.A. is that the victim herein was 6 years old boy at the time of incident and, therefore, no leniency ought to be allowed in the matter of sentence.

17. Law with regard to sentencing of accused has been examined in a series of judgments by the Supreme Court. In State of Rajasthan vs. Vinod Kumar, (2012) 6 SCC 770, the Supreme Court in a case arising out of the offence under Section 376 IPC observed as under in para 23 of the judgment:-

"23. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the sexually assaulted victim and the gravity of the criminal

act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case."

18. We have considered the facts of the present case and in our opinion there are circumstances which persuade us to modify the sentence awarded to the accused appellant. It is not in dispute that the accused appellant was 24 years of age at the time of committing of offence and has no criminal history and that he is only son of his parents and has to support his three sisters. The provision of Section 377 IPC as well as Section 5/6 of the POCSO Act prescribes the minimum punishment of ten years in such offences.

19. Upon overall evaluation of circumstances of the present case, we deem it appropriate to modify the sentence of life imprisonment awarded to the accused appellant to the sentence of ten years rigorous imprisonment.

20. The appeal is, accordingly, allowed in part. Impugned judgment and order of conviction and sentence dated 05.07.2018 is modified by substituting the sentence of life imprisonment awarded to the accused appellant to the sentence of ten years rigorous imprisonment. The fine imposed upon the appellant vide impugned judgment is sustained. The accused appellant is in jail and shall serve the remaining sentence.

Order Date :- 12.10.2023

Ashok Kr.