

Court No. - 10

Case :- CRIMINAL APPEAL U/S 372 CR.P.C. No. - 115 of 2023

Appellant :- Ram Kishor

Respondent :- State Of U.P. Thru. Secy. Home, Lucknow And Another

Counsel for Appellant :- Sunil Dixit

Counsel for Respondent :- G.A.

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(1) Heard Shri Sunil Dixit, learned counsel for the appellant and Shri Umesh Verma, learned A.G.A.-1 for the State.

(2) This appeal has been filed by the appellant-complainant who is the father of the victim to assail the impugned judgment and order dated 18.09.2023 passed by the learned Special Judge P.O.C.S.O. Act/ Additional Sessions Judge, Court No.11, Unnao, in Special Session Trial No.214 of 2018 {**State of U.P. Vs. Vinod Sharma**} arising out of Case Crime No.277 of 2018, under Section 376 of the I.P.C. (hereinafter referred to as I.P.C.) and Section 3/4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to P.O.C.S.O. Act, whereby the sole accused/ Respondent no.2- Vinod Sharma, has been held guilty under Section 376 of the I.P.C. and Section 3/4 of the P.O.C.S.O. Act and has been sentenced to 10 years rigorous imprisonment with fine of Rs.50,000/- and in default of payment of fine, he has further been directed to undergo one year's additional rigorous imprisonment.

(3) The appellant/ Complainant who is the father of the victim has filed this Appeal under Section 372 of the Cr.P.C. (hereinafter referred to as Cr.P.C.).

(4) A preliminary objection has been raised by Shri Umesh Verma, learned A.G.A.-1 with regard to the maintainability of this Appeal, in the manner in which it has been filed. He has pointed out Section 228-A I.P.C. and also the language of Section 372 of the Cr.P.C.

(5) Section 372 Cr.P.C. being relevant is quoted

hereinbelow:-

"372. No appeal to lie unless otherwise provided--No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

[Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]".

(6) Before we proceed further to hear the learned counsel for the appellant on the issue of admission of this appeal, we make it clear that the accused/ Respondent no.2 has also assailed the impugned judgment and order dated 18.09.2023 passed by the learned Special Judge P.O.C.S.O. Act/ Additional Sessions Judge, Court No.11, Unnao, in Special Session Trial No.214 of 2018 {**State of U.P. Vs. Vinod Sharma**} arising out of Case Crime No.277 of 2018, whereby he has challenged his conviction.

(7) Criminal Appeal No.2795 of 2023 {**Vinod Sharma Vs. State of U.P. and another**} is connected with the instant appeal and has also been listed today.

(8) The accused is being represented by his counsel Shri O.P. Tewari.

(9) Counsel for the appellant has submitted that from a bare perusal of the impugned judgment and order dated 18.09.2023 it would be evident that the victim was aged about 9 year at the time of the incident.

(10) Having regard to the fact of age of the victim on the date of incident, the submission of the counsel for the appellant is that the accused / Respondent no.2 ought to have been convicted for the offence under Section 6 of the P.O.C.S.O. Act.

(11) Section 5 (m) of the P.O.C.S.O. Act is relevant and therefore, being quoted hereinbelow:-

"(m) whoever commits penetrative sexual assault on a child below twelve years; or".

(12) The punishment provided for penetrative sexual assault as defined under Section 5 of the P.O.C.S.O. Act is provided under Section 6 of the P.O.C.S.O. Act which is being quoted hereinbelow:-

"6. Punishment for aggravated penetrative sexual assault-- (1) 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 natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under Sub-Section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim".

(13) Counsel for the appellant has vehemently submitted that having regard to the undisputed facts the victim on the date of incident was only 9 years old, Trial court ought to have tried and convicted the accused /Respondent no.2 Vinod Sharma for the offence under Section 5 (m) of the P.O.C.S.O. Act and sentenced him under Section 6 of the P.O.C.S.O. Act which provides a minimum sentence for 20 years imprisonment.

(14) He has also drawn attention of this Court to the fact that despite having come to know that undisputedly the victim's age was 9 years on the date of incident, having regard to the object and purpose for enacting the P.O.C.S.O. Act, the learned Trial Court ought to have amended the charge, and as the evidence was already led in, should have proceeded to dispose of the trial accordingly.

(15) Per contra, Sri O.P. Tiwari, learned counsel for the accused / Respondent no.2 has opposed the aforesaid contentions by saying that no charge under Section 5/6 of P.O.C.S.O. Act was ever framed against the accused / Respondent no.2, therefore, he could not have been held guilty and sentenced under Section 5 (m)/6 of the P.O.C.S.O. Act.

(16) Having regard to the entire facts and circumstances of the case in hand, we find that no charge for offence under Section 5 (m)/6 of the P.O.C.S.O. Act read with Section 376 I.P.C. was framed against the accused/ Respondent no.2. He was charged for the offence under

Section 3/4 of the P.O.C.S.O. Act read with Section 376 I.P.C.

(17) The accused / Respondent no.2 was tried for the said offence only. Therefore, technically speaking this appeal at the behest of appellant/ complainant who is father of the victim, is not maintainable under proviso 372 Cr.P.C. as it cannot be said that the accused / Respondent no.2 was convicted for lesser offence as provided under proviso to Section 372 Cr.P.C., which is quoted hereinabove. Thus, we are not inclined to admit this Appeal as the same does not fall in any category enumerated in proviso to Section 372 Cr.P.C.

(18) However, we are also conscious of the fact that the appellant/ complainant has only suffered the injury even though the Respondent no.2/ accused has been convicted and technically he cannot prefer an Appeal for enhancement, looking into the language of the Section 372 Cr.P.C.

(19) At this stage, learned counsel for the appellant/ Respondent no.2 submits that the complainant is represented as Respondent no.2 in connected Criminal Appeal No.2795 of 2023 and being a party, the complainant has a right to address the Court on various issues including the issue of enhancing sentence in this Appeal even in absence of an appeal by the State for enhancement of sentence in view of the law laid down by Hon'ble the Supreme Court in the case of **Surendra Singh Rautela alias Surendra Singh Bengali**, reported in (2002) 1 SCC 266.

(20) Counsel for the appellant having pointed out the judgment in Surendra Singh Rautela (Supra) has submitted that he does not wish to press this appeal and prays that the same may be dismissed as withdrawn with liberty to the complainant/ victim in Criminal Appeal No.2795 of 2023 to argue on the merits of the charge framed and sentenced given by the learned Trial Court.

(21) Accordingly, we **dispose of this appeal as withdrawn with liberty as aforesaid.**

Order Date :- 21.3.2024
N.PAL