MANOJ MISHRA @ CHHOTKAU

v.

THE STATE OF UTTAR PRADESH

(Criminal Appeal No. 1167 of 2021)

OCTOBER 08, 2021

[M. R. SHAH AND A. S. BOPANNA, JJ.]

Penal Code, 1860 – ss.363, 366, 376-D, 506 – Appellant alongwith other accused persons convicted and sentenced u/ss.363, 366, 376-D, 506 and s.4, POCSO Act – Held: Evidence of the prosecutrix and the medical evidence establish the charge of rape – However, charge of gang rape is not established with convincing evidence – Thus, conviction by the trial court, confirmed by High Court u/s.376-D is modified – Appellant is convicted u/s.376 and sentenced for the period undergone – Fine and default sentence imposed by the trial court, unaltered – Conviction u/s.506 is set aside – Although, conviction and sentence u/ss.363, 366, IPC and s .4, POCSO Act is confirmed – Protection of Children from Sexual Offences Act – s.4 – Criminal Law (Amendment) Act, 2018.

Partly allowing the appeal, the Court

Held: 1.1 In so far as the incident based on which the charge was framed against the accused, more particularly against the appellant, the parents of the prosecutrix and the prosecutrix herself were examined as PW1 to PW3 who have spoken with regard to the same. Though reference was made to the complaint and the statement of PW1 and at the first instance the complainant having named Ramasre *alias* Siri, it was in the circumstance when he had noticed that the prosecutrix, i.e. his daughter was not in the house and had accordingly lodged the complaint on suspicion. It is pursuant to the complaint when the police took action, the prosecutrix and the said Ramasre *alias* Siri were retrieved by the police when they were travelling to Mumbai as per the very statement recorded by the prosecutrix under Section 164 Cr.PC. In that circumstance what would be relevant is the statement

and the evidence tendered by the prosecutrix as PW3 before the trial court which described the events prior thereto and the circumstance which forced her to be with Ramasre *alias* Siri at that point. Though certain discrepancies were referred to by the counsel for the appellant in the manner the prosecutrix had described the incident to contend that as per her own statement the thatched hut was open from all sides and the act was alleged to be committed during the day time which cannot be probable, it is noticed that the sum and substance of the evidence tendered by the prosecutrix as PW3 is essentially with regard to the physical relationship she had with the appellant due to which she had become pregnant and this was disclosed to her family members only when they had noticed her to be pregnant. She has further stated that in that situation when she had insisted on the appellant marrying her, he had refused, threatened and he had taken the help of the co-accused and got her married to Ramasre alias Siri, by enticing and taking her away. In that background, the fact that the appellant had physical relationship with the prosecutrix on more than one occasion and the prosecutrix had not disclosed the same to her parents when it had happened for the first time about four months earlier but was brought to their notice when her pregnancy was noticed will have to be viewed from the stand point as to whether the charges as framed would stand established. It is no doubt true that the prosecutrix in her deposition has stated that on the day of the incident the appellant, Ramasre *alias* Siri, Nangodiya etc. had caught hold of her. However, there is no specific indication as to whether the other accused and the appellant had indulged in sexual act along with the appellant herein or the reference is with regard to that they having assisted the appellant in enticing and taking her away on the date of the complaint so as to marry her of to Ramasre *alias* Siri. What is also to be taken note of, is that the said Ramasre *alias* Siri and Nangodiya are siblings being the sons of Raksharam who was acquitted by the trial court. To establish common intention on their part in furthering the sexual assault committed by the appellant, there is convincing evidence to that effect. [Paras 9, 10][714-B-H; 715-A-D]

1.2 Though there is marginal variation with regard to the number of weeks mentioned, the pregnancy was not less than 20 weeks and if the same is kept in the backdrop, the statement of the prosecutrix that the appellant had intercourse with her for the first time, four months earlier, which is an approximate indication and that she became pregnant would coincide with the period. Though there are minor discrepancies with regard to the statement made under Section 164 Cr.PC and the evidence tendered by the prosecutrix as PW3, the thrust of the allegation has been that the appellant had committed physical contact with her against her will. In such circumstance, the evidence of the prosecutrix and the medical evidence would establish the charge of rape. Insofar as the incident of rape attributed to the appellant it does not disclose that all the accused had committed rape on her or had the common intention and aided the commission. In fact, the very conclusion reached by the High Court itself would indicate that the allegation of rape as established by the prosecution is against the appellant and the other accused are not involved in such act. Further, when the prosecutrix was traced based on the complaint lodged by her father all of them were not with her but she was found only with Ramasre @ Siri. That apart, as noted the other three accused apart from the appellant are the siblings and their father Raksharam has been acquitted by the trial court. In that circumstance, the charge of gang rape has not been established with convincing evidence. However, having already noted that the incident of rape alleged had been established, it would be a case to convict the appellant under Section 376 of IPC. However, the conviction handed down by the trial court and confirmed by the High Court under Sections 363, 366 and under Section 4 of POCSO Act and the sentence as ordered thereunder would not call for interference. [Paras 11-14][715-F-H; 716-A, D-F; 717-C-E]

1.3 In respect of the charge against the appellant under Section 506, IPC this Court does not find that there is any supporting evidence except the vague statement of the prosecutrix in her evidence as PW3 that whenever she shouted when he had attempted to have sexual acts with her, the appellant

had threatened her not to say anything to anyone as otherwise he would kill her. The conviction and sentence under Section 506 imposed by the trial court and affirmed by the High Court is not sustainable and is liable to be set aside. [Para 15][717-F-H]

2. The incident in question is based on the complaint dated 09.08.2013. In this circumstance, though it is noted that Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence of 10 years, the case on hand is of 2013 and the conviction of the appellant was on 20.05.2015. The incident having occurred prior to amendment, the pre-amended provision will have to be taken note. The same provides that a person committing rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that he is also a father of five children and the eldest son is more than 18 years, it appears that there is no reason to apprehend that the appellant would indulgence similar acts in future. The sentence of 7 years would have been sufficient deterrent to serve the ends of justice. The appellant has been in custody from 20.09.2013. If that be the position, he has been in custody and served the sentence for more than 8 years which shall be his period of sentence. As such he has served the sentence imposed except payment of fine. The fine and default sentence as imposed by the trial court is maintained. [Para 16][718-A-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1167 of 2021

From the Judgment and Order dated 14.03.2018 of the High Court of Judicature at Allahabad, Lucknow Bench in Criminal Appeal No.1102 of 2017.

Anoop Prakash Awasthi, Adv. for the Appellant.

Parmanand Pandey, Ms. Priyanka Singh, Utkarsh Pandey, Advs. for the Respondent.

The Judgment of the Court was delivered by A

A. S. BOPANNA, J.

1. The appellant is before this Court assailing the judgment dated 14.03.2018 passed by the High Court of Judicature at Allahabad, Lucknow Bench in Criminal Appeal No.1102/2017. Through the said judgment, the High Court has dismissed the appeal and confirmed the conviction and sentence ordered to the appellant by the Additional Sessions Court and Special Judge POCSO Act,Bahraich in C.C. No.18/2014. The appellant herein was arrayed as Accused No.4 in the said case. B

2. The brief facts leading to the conviction and sentence of the appellant is that the father of the prosecutrix filed a written report dated 09.08.2013 at 22:35 hours before the police alleging therein that one Ramasre alias Siri had enticed his daughter aged about 14 years on 02.08.2013 and had taken her away. In the said complaint, it was further alleged that Raksharam, Nangodiya and Manoj Kumar alias Chhotkaui.e. the appellant herein had cooperated with him in the alleged incident. An FIR was lodged in Crime No.625/2013 under Sections 363 and 366 IPC. The prosecutrix was found by the police along with Ramasrealias Siri.She was brought back and subjected to medical examination. The case was investigated and a charge sheet was filed under Sections 363, 366, 376 and 506 Indian Penal Code (for short 'IPC') as also sections 3 and 4 of Protection of Children from Sexual Offences Act (for short 'POCSO Act'). The Court had thereafter framed the charges against the accused. On the accused denying the charge, trial was conducted. The father and mother of the prosecutrix were examined as PW-1 and PW-2 respectively, while the prosecutrix herself was examined as PW-3. Dr. Rabia Sultan who had conducted the medical examination on the prosecutrix was examined as PW-4. The Constable Pramod Kumar Shah who had carried the FIR was examined as PW-5 and the Sub-Inspector Tara Prasad Pandey who had investigated the case was examined as PW-6. C D E F

3. The trial court having analysed the said evidence which was tendered before it, also taking into consideration the denial put forth by the accused while recording the statement under Section 313 of Criminal Procedure Code (for short 'Cr.PC') had arrived at the conclusion that the charge alleged against the accused was proved. Accordingly the accused were sentenced to (i) 3 years rigorous imprisonment with fine of Rs.3000/- for the offence under Section 363 IPC; (ii)5 years rigorous G H

A imprisonment with fine of Rs.5,000/- for the offence under Section 366 IPC;(iii) 20 years rigorous imprisonment with fine of Rs.25,000/- for the offence under Section 376-D IPC; (iv) 2 years rigorous imprisonment with fine of Rs.2,000/- under Section 506 IPC and (v) 7 years rigorous imprisonment with fine of Rs.7,000/- for the offence under Section 4 of
B POCSO Act. The default sentence for non-payment of the fine was also imposed and the sentence for the offence under the said provisions were ordered to run concurrently through the judgment dated 20.05.2015. Through the said judgment one of the accused Raksharam was acquitted on holding that the charges against him were not proved.

C 4. The appellant had assailed the said judgment before the High Court in Criminal Appeal No.1102/2017. The learned Judge while adverting to the evidence tendered before the trial court had reappraised the same in the background of the contentions that were urged and, in that light, had arrived at the conclusion that the appellant had raped the prosecutrix number of times after being enticed away by him. In that
D view of the matter the learned Judge was of the opinion that the trial court had rightly arrived at the conclusion on the basis of the prosecution evidence that the appellant was involved in the commission of the crime. The judgment of conviction and sentence was accordingly confirmed. The appellant therefore claiming to be aggrieved by the judgment passed by the learned Judge of the High Court is before this Court in this appeal.

E

5. We have heard Mr. Anoop Prakash Awasthi learned counsel appearing for the appellant, Mr. Parmanand Pandey learned standing counsel for the State of Uttar Pradesh and perused the appeal papers.

6. The learned counsel for the appellant while seeking to contend
F that the trial court as also the High Court had committed an error in convicting and upholding the conviction would seek to refer to the contradictions in the very manner in which the complaint was initiated and the various statements made by the prosecutrix herself. It is contended that the criminal proceedings was set in motion by the complaint dated 09.08.2013 wherein it has been stated that his daughter
G has been tricked and enticed, therefore eloped somewhere. When a statement was recorded on 10.08.2013, he has alleged that Ramasre alias Siri had enticed his minor daughter and his statements had been varying from time to time. It is his case that even the prosecutrix has made contradicting statements with regard to the nature of the incident
H as also her age.In that light, it is contended that the entire theory of the

prosecutrix being kidnapped, enticed or being raped in the manner as has been put forth is not reliable. It is contended that even with regard to the manner in which the prosecutrix had stated of having gone with Ramasre alias Siri,it only indicates that it was consensual and in any event the appellant has been named only thereafter when a statement was recorded under Section 164 Cr.PC. Though in her evidence as PW-3 she has stated, with regard to the incident; in her cross-examination she has stated, with regard to the physical relation she had for the first time which had been told by her to the family but has again stated that she disclosed the same when she was four months' pregnant and the family members enquired her about the same.

7. The learned counsel therefore contends that neither the evidence of the parents who were examined as PW-1 and PW-2 nor the evidence tendered by the prosecutrix as PW-3 was reliable and the trial court as well as the High Court ought not tohave passed the conviction and sentence on such evidence. Though PW-4 in her evidence and with reference to the medical examination report has stated about the prosecutrix being pregnant and the foetus being of 20-23 weeks, that by itself cannot establish the charge made against the appellant is his contention. Alternatively, it is contended that even if the statement of the prosecutrix about the physical relations of the appellant with her and that she has filed the complaint when the appellant had refused to marry her despite she becoming pregnant is accepted, it only indicates that it was consensual and when she herself has stated that she was 20 years and also when PW-4 the doctor in her cross-examination has indicated that due to the development of her body even if she is stated to be 16-17 years there could be variation and it can be 17-18 years as per general variations.In such event, the charge would not be sustainable. Even otherwise, in the facts and circumstance, the conviction under Section 376-D IPC is not justified and said provision ought not to have been invoked as it does not qualify to be a gang rape. For all the said reasons, he contends that the judgment is liable to be set aside.

8. The learned standing counsel for the State of Uttar Pradesh contends that the trial court as also the High Court has referred to the evidence available on record. Though there may be certain discrepancies in the various statements the same cannot qualify as contradictions and in that circumstance when PW-1, PW-2 and PW-3 have all stated with regard to the incident in support of the prosecution and when there is categorical medical examination to indicate that the prosecutrix was

A pregnant, the charge would stand established. It is contended that in such circumstance when the father of the prosecutrix has indicated the age as 14 years and the doctor also has indicated the age to be around 16 years,the contention of the consensual sex will not be acceptable. In that view he contends that the judgment passed by the trial court as also the High Court does not call for interference.

B

9. In the light of the above, we have taken note of the nature of consideration made by the trial court as also the High Court. In so far as the incident based on which the charge was framed against the accused, more particularly against the appellant, the parents of the prosecutrix and the prosecutrix herself were examined as PW-1 to PW-3 who have

C spoken with regard to the same. Though reference was made to the complaint and the statement of PW-1 and at the first instance the complainant having named Ramasre alias Siri, it was in the circumstance when he had noticed that the prosecutrix,i.e. his daughter was not in the house and had accordingly lodged the complaint on suspicion. It is

D pursuant to the complaint when the police took action, the prosecutrix and the said Ramasre alias Siri were retrieved by the police when they were travelling to Mumbai as per the very statement recorded by the prosecutrix under Section 164 Cr.PC. In that circumstance what would be relevant is the statement and the evidence tendered by the prosecutrix as PW-3 before the trial court which described the events prior thereto

E and the circumstance which forced her to be with Ramasre alias Siri at that point. Though certain discrepancies were referred to by the learned counsel for the appellant in the manner the prosecutrix had described the incident to contend that as per her own statement the thatched hut was open from all sides and the act was alleged to be committed during

F the day time which cannot be probable, it is noticed that the sum and substance of the evidence tendered by the prosecutrix as PW-3 is essentially with regard to the physical relationship she had with the appellant due to which she had become pregnant and this was disclosed to her family members only when they had noticed her to be pregnant. She has further stated that in that situation when she had insisted on the

G appellant marrying her,he had refused, threatened and he had taken the help of the co-accused and got her married to Ramasre alias Siri, by enticing and taking her away.

10. In that background, the fact that the appellant had physical relationship with the prosecutrix on more than one occasion and the

H prosecutrix had not disclosed the same to her parents when it had happened

for the first time about four months earlier but was brought to their notice when her pregnancy was noticed will have to be viewed from the stand point as to whether the charges as framed would stand established. It is no doubt true that the prosecutrix in her deposition has stated that on the day of the incident the appellant, Ramasre alias Siri, Nangodiya etc. had caught hold of her. However, there is no specific indication as to whether the other accused and the appellant had indulged in sexual act along with the appellant herein or the reference is with regard tothat they having assisted the appellant in enticing and taking her away on the date of the complaint so as to marry her of to Ramasre alias Siri. What is also to be taken note of, is that the said Ramasre alias Siri and Nangodiya are siblings being the sons of Raksharamwho was acquitted by the trial court. To establish common intention on their part in furthering the sexual assault committed by the appellant, there is convincing evidence to that effect.

11. From the evidence tendered by PW-2 to PW-3, more particularly the evidence of PW-4 i.e., the doctor who examined the prosecutrix it would disclose that she had examined the prosecutrix at 7 pm on 19.08.2013. She has stated that the victim who was unmarried was fully grown up and on conducting the necessary tests it was seen that the rupture of the hymen was old and she was found to be 24 weeks into her pregnancy. The medical report was exhibited as K-2. The complementary report dated 24.08.2013 was marked as exhibit K-4. In the cross-examination she has referred to the age of prosecutrix as 16 to 17 years.Though she has stated that it could be 17 to18 years as per general variations, no definite opinion to that effect has been given by her. In the cross-examination she has however stated that the pregnancy was of 23 weeks. The report of the doctor indicates it to be 23 weeks while the pathology report gives the status of the single alive foetus of 20 weeks 2 days as on 20.08.2013. Though there is marginal variation with regard to the number of weeks mentioned,the pregnancy was not less than 20 weeks and if the same is kept in the backdrop,the statement of the prosecutrix that the appellant had intercourse with her for the first time, four months earlier, which is an approximate indication and that she became pregnant would coincide with the period. Though thereare minor discrepancies with regard to the statement made under Section 164 Cr.PC and the evidence tendered by the prosecutrix as PW-3,the thrust of theallegation has been thatthe appellanthad committed physical contact with her against her will. In such circumstance, the evidence of

A the prosecutrix and the medical evidence would establish the charge of rape.

12. The question which would however arise for our consideration is as to whether the charge framed against the accused under Section 376 D IPC would be justified and as to whether the case would qualify B to be one of gang rape. On this aspect, the evidence of PW-1 and PW-2 does not establish the same. The evidence of PW-3 i.e., the prosecutrix is not categorical inasmuch as the prosecutrix has alleged that when she was sitting in her thatched hut, the appellant came after parking his vehicle (tractor) besides the road and asked for water. At that time, he asked where her father was and after she told that he had gone out, the C appellant had forced himself upon her. She has further alleged that he kept doing the wrong act with her for four months and she became pregnant. When she disclosed the pregnancy and asked the appellant to marry her, he did notyield. Therefore, insofar as the incident of rape attributed to the appellant it does not disclose that all the accused had D committed rape on her or had the common intention and aided the commission. It is no doubt true that she refers to the incident on the day she was said to have been taken away by all the accused.In that regard except stating that she was carried to the home of a lady who they were calling as Aunty, and at her place committed sexual act there is no other evidence available on record to indicate that the spot was visited in the E course of the investigation and the lady who is alleged to have aided has either been apprehended or examined. It is also not established that all of them were seen together or aided with common intention.

13. In fact, the very conclusion reached by the High Court itself would indicate that the allegation of rape as established by the prosecution F is against the appellant and the other accused are notinvolved in such act. The relevant conclusions read as hereunder:

> "23. It has also been placed before the court that the other co-accused were real brothers and their father, as such the truthfulness of the incident is highly improbable. The main co-G operation of other co-accused appears to be in enticing the prosecutrix away but the allegation of specific rape has been levelled against the present accused-appellant only and that too four months prior to the incident on one threat or the other. This also gives a reason for enticing her away and getting her married H to Ram Asrey alias Sirri.

26. To conclude, the prosecutrix was raped by the accused-appellant number of times after being enticed away by him and also before the incident the truthfulness or reliability of her statement is undoubtful and there is nothing which may negate the acceptance of her testimony. In the instance, the commission of alleged crime against the prosecutrix cannot be ruled out.

27. In view of above, it is difficult to comprehend the circumstances in which the charge of rape and enticement against the accused-appellant cannot be levelled. The reason given by the trial court for conviction of the appellant are sufficient enough to hold him guilty."

14. Further,when the prosecutrix was traced based on the complaint lodged by her father all of them were not with her but she was found only with Ramasre @ Siri. That apart, as noted the other three accused apart from the appellant are the siblings and their father Raksharam has been acquitted by the trial court. In that circumstance, the charge of gang rape has not been established with convincing evidence. However, having already noted that the incident of rape alleged had been established, it would be a case to convict the appellant under Section 376 of IPC. However, the conviction handed down by the trial court and confirmed by the High Court under Section 363, 366and under Section 4 of POCSO Act and the sentence as ordered thereunder would not call for interference.

15. Insofar as the charge alleged against the appellant under Section 506 of IPC, it is noticed that the charge alleged against the appellant is that on the date referred to i.e 02.08.2013, the appellant threatened to kill the prosecutrix, the daughter of the complainant and therefore had committed the offence which is punishable under Section 506 IPC. In respect of the said charge we do not find that there is any supporting evidence except the vague statement of the prosecutrix in her evidence as PW-3 that whenever she shouted when he had attempted to have sexual acts with her, the appellant had threatened her not to say anything to anyone as otherwise he would kill her. There is no other statement or evidence relating to the incident or the manner in which the threat in its true sense was put forth. In that view, we are or of the opinion that the conviction and sentence under Section 506 imposed by the trial court and affirmed by the High Court is not sustainable and is liable to be set aside.

16. On arriving at the conclusion that the appellant is liable to be convicted under Section 376 IPC and not under Section 376 D IPC, the appropriate sentence to be imposed needs consideration. The incident in question is based on the complaint dated 09.08.2013. In this circumstance, though it is noted that Section 376 has been amended w.e.f. 21.04.2018 providing for the minimum sentence of 10 years, the case on hand is of 2013and the conviction of the appellant was on 20.05.2015. The incident having occurred prior to amendment,the pre-amended provision will have to be taken note. The same provides that a person committed of rape shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine. In the instant case, taking into consideration all facts including that no material is available on record to indicate that the appellant has any criminal antecedents and that he is also a father of five children and the eldest son is more than 18 years, it appears that there is no reason to apprehend that the appellant would indulgence similar acts in future. In that circumstance, we deem it appropriate that the sentence of 7 years would have been sufficient deterrent to serve the ends of justice. From the custody certificate dated 05.12.2017 issued by the Jail Superintendent, District Jail, Bahraich, it is noticed that the appellanthas been in custody from 20.09.2013. If that be the position, he has been in custody and served the sentence for more than 8 years which shall be his period of sentence.As such he has served the sentence imposed by us except payment of fine. The fine and default sentence as imposed by the trial court is maintained.

17. In the result we make the following order: -

(i) The conviction and sentence under Section 363, 366, and Section 4 of POCSO Act is confirmed. The conviction under Section 506 IPC is set aside.

(ii) The conviction order made by the trial court and confirmed by the High Court under Section 376 D IPC is modified.The appellant is instead convicted under Section 376 IPC and is sentenced, for the period undergone. The fine and default sentenceas imposed by the trial court shall remain unaltered.

(iii) Since the custody certificate dated 20.09.2013 indicates that the appellant has undergone sentence for more than 8 years, the appellant is ordered to be released on payment of fine

as all the sentences have run concurrently and if he is not required to be detained in any other case. A

(iv) The appeal is accordingly allowed in part.

(v) Pending application, if any, shall stand disposed of.

Divya Pandey Appeal partly allowed.