IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1133 OF 2023

Ramesh Dada Kalel … Appellant

vs.

The State of Maharashtra and another … Respondents

Mr. Tapan Thatte a/w. Mr. Vivek Arote and Mr. Akshay Dingale, i/b. Mr.Dayanand Mane for appellant.

Dr. Dhanalakshmi S. Krishnaiyer, APP for respondent No.1-State.

Ms. P. S. Potdar (appointed through legal aid) for respondent No.2.

CORAM : MANISH PITALE &
MANJUSHA DESHPANDE, JJ
RESERVED ON: 16th DECEMBER, 2025
PRONOUNCED ON: 19th JANUARY, 2026

JUDGMENT: *(Per Justice Manish Pitale, J):*

. The appellant is aggrieved by judgment and order dated 29.08.2023 passed by the Court of Extra Joint District and Additional Sessions Judge, Panvel-Raigad (hereinafter referred to as the Trial Court). By the said judgment and order, the appellant is sentenced to suffer rigorous imprisonment for life, which shall mean imprisonment for remainder of life under Section 376(3) of the Indian Penal Code, 1860 (IPC) and to pay fine of ₹ 50,000, in default of which he shall undergo additional rigorous imprisonment of one month.

2. The challenge to the impugned judgment and order on behalf of the appellant, has two facets. Firstly, the findings rendered by the Trial Court have been challenged on merits and secondly, it is claimed that there has been a fundamental procedural error

committed by the Trial Court from the stage of framing of charge to passing the final order of conviction and sentence, which has caused grave prejudice to the appellant, resulting in failure of justice. On both counts, it is claimed that the impugned judgment and order, deserves to be set aside. Before appreciating the contentions raised on behalf of the appellant, it would be necessary to refer to the prosecution case in brief.

3. The first informant in the present case, is PW1-Ashabai, who is the mother of the victim-PW4. At the point in time when the offence was committed, the victim was said to be 13 years old. According to the first informant-PW1-Ashabai, on 29.10.2018, her daughter i.e. the victim-PW4 had gone to school as usual. It was claimed that the victim was suffering from epilepsy and therefore, she used to return home at around noon to take a tablet and then, she used to go back to school. On the aforesaid date, the victim-PW4 is said to have come home to take medicine at around 12:30 p.m. and after taking medicine, she left for school. But, when the younger daughter of PW1-Ashabai returned from school at about 02:30 p.m., she informed that the victim had not reached school after taking medicine. Hence, PW1-Ashabhai visited the school along with her younger daughter, when the class teacher confirmed the fact that the victim had not come back to school. Thereupon, PW1-Ashabai started searching for the victim in the locality along with others. Her husband joined her in the evening, after returning back from work and it is claimed that the appellant i.e. the accused also joined them in searching for the victim. But, PW4-victim could not be found.

4. On the next day i.e. on 30.10.2018, the victim is said to have returned home at about 05:00 a.m. It is claimed that when PW1-

Ashabai took her daughter-PW4 in confidence, she informed that the appellant, who was their neighbour, had forcibly taken the victim in his house and committed rape on her. It is alleged that he had threatened the victim with dire consequences and it was further claimed that the victim was kept trapped inside the bedbox and that through the night, the appellant committed the aforesaid act three times upon the victim.

5. On the basis of the information given by the victim-PW4, the first informant-PW1 (Ashabai) reached the police station for registration of FIR. The victim was sent for medical examination in the evening on 30.10.2018. The appellant was arrested. The investigation was completed and chargesheet was filed.

6. Charge was framed against the appellant for offences under Sections 376(2)(i) and (n) & other provisions of the IPC as also, offence under Section 5(l) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act). The appellant claims that at the stage of framing of charge itself, a fundamental defect had arisen, as clause (i) of sub-section 2 of Section 376 of the IPC, had been already deleted by an amendment in the year 2018 and hence, charge was framed against the appellant for an offence, which did not exist in the statute book.

7. The prosecution examined 11 witnesses to prove its case against the appellant. PW1-Ashabai (mother of PW4- victim) was the first informant; PW4 was the victim herself; PW6 was the medical officer, who had examined the victim; PW10 was the headmistress of the school attended by the victim and other witnesses were panch

witnesses for recovery of clothes, etc. as also the investigating officers, including the officer, who recorded the victim's statement.

8. Upon recording of evidence of prosecution witnesses, the incriminating circumstances were put to the appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC). Thereupon, the Trial Court rendered the impugned judgment and order, convicting and sentencing the appellant. It is the case of the appellant that while the conviction was, amongst other provisions, under Section 376(2)(i) of the IPC, which did not exist on the statute book, the sentence was imposed under Section 376(3) of the IPC, while there was no charge and conviction under the said provision.

9. Mr. Thatte, the learned counsel appearing for the appellant made submissions on the two aspects indicated hereinabove i.e. (i) the contentions pertaining to the merits of the matter, in order to demonstrate that the evidence of prosecution witnesses was not sufficient to prove the case against the appellant beyond reasonable doubt and (ii) that the fundamental procedural defect in the present case, completely vitiated the impugned judgment and order, as grave prejudice was caused to the appellant and that there was complete failure of justice.

10. On the merits of the matter, the learned counsel for the appellant attacked the evidence of the victim-PW4. It was submitted that although as per settled law, the evidence of the victim i.e. the prosecutrix can be enough for convicting the accused for the offence of rape, such an evidence has to be of sterling quality. It was submitted that the evidence of the victim, in the present case, was

riddled with inconsistencies, thereby demonstrating that corroboration of her testimony was required. It was further submitted that the evidence of the first informant-PW1 Ashabai i.e. the mother of the victim and other witnesses, such as the PW6-doctor and PW10-headmistress of the school, was not enough to corroborate the evidence of the victim/prosecutrix i.e. PW4.

11. The learned counsel for the appellant contended that there was glaring contradiction in the victim's evidence, as she claimed that she used to return home during the school timings to take medicines as a usual practice, whereas, in the cross-examination, she conceded that it was a one-time act. There was also clear contradiction in the timing of the school, as claimed by her, when compared with the testimony of her mother PW1-Ashabai and PW10-headmistress of the school.

12. It was further contended that the narration of the incident dated 29.10.2018 and through the intervening night between 29.10.2018 and 30.10.2018, as given by PW4-victim, was highly improbable, for the reason that the victim remaining trapped inside the bed, was wholly unbelievable. This was compounded by the fact that PW2, who was the *panch* witness for the scene of offence, no where stated that when the *panchnama* was drawn, the victim informed the police team or the said *panch* about the aforesaid fact of being trapped inside the bed. It was further contended that contemporaneously, the victim also did not narrate this part of the incident to her mother at 05:00 a.m. on 30.10.2018 or to anybody else, thereby demonstrating material omission in her testimony. It was contended that the victim also claimed that she had shouted while suffering sexual assault at the hands of the appellant. But

nobody from the neighbourhood came to help her, while simultaneously claiming that she could hear her mother, while searching for her on 29.10.2018. It was further claimed that she was concealing the love affair between her and the appellant and that this was evident from some of the answers given in the cross-examination.

13. On this basis, it was submitted that the testimony of the victim was not of sterling quality and yet, the Trial Court chose to rely upon the same, while holding against the appellant. In support of the said submission, the learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of *Rai Sandeep alias Deepu vs. State (NCT of Delhi)* [(2012) 8 SCC 21].

14. It was further submitted that the medical evidence did not support the victim's version. The testimony of PW6-doctor demonstrated that statements were made recording opinion based on the medical report. But, such opinion was not found in the report itself. The three tears in the hymen were old and there were no external injuries to support victim's version that she suffered rape and sexual assault at the hands of the appellant at least 3 times through the night. As regards absence of physical injuries and medical evidence not corroborating her version, reliance was placed on the judgment of the Supreme Court in the case of *State of Haryana vs. Bhagirath and others* [(1999) 5 SCC 96].

15. It was further submitted that the statements of PW1-first informant Ashabai and PW4-victim, recorded under Section 164 of the CrPC, were deliberately suppressed by the prosecution, for the reason that the said statements did not support the versions

portrayed before the Court by the prosecution witnesses. It was claimed that in the facts of the present case, registration of FIR after about 10 hours of the victim first reporting the incident to PW1-Ashabai, demonstrated that the FIR was delayed. But, this aspect was also ignored by the Trial Court. On this basis, it was submitted that the impugned judgment and order of the Trial Court, cannot be sustained on merits.

16. As regards the second aspect concerning serious procedural defect causing prejudice to the appellant, attention of this Court was invited to the charge framed by the Trial Court. It was submitted that the charge specifically referred to Section 376(2)(i) of the IPC, apart from referring to Section 376(2)(n) of the IPC and Section 5(l) punishable under Section 6 of the POCSO Act, apart from other offences under the IPC. It was submitted that the charge itself was fundamentally defective, for the reason that clause (i) of sub-section 2 of Section 376 of the IPC, was deleted by Act 22 of 2018 with effect from 21.04.2018 and sub-section 3 to Section 376 was added by the very same amendment. The incident in the present case, having allegedly taken place on 29.10.2018, offence under clause (i) of sub-section 2 of Section 376 of the IPC, no longer existed in the statute book and yet, charge was framed under the same. According to the learned counsel for the petitioner, this fundamental defect further caused grave prejudice to the appellant at every stage of trial and particularly, when the Trial Court sentenced the appellant.

17. It was submitted that when the Trial Court heard the appellant on the point of sentence, he was given an impression that the hearing was being conducted in the context of offence under Section 376(2)(i) of the IPC, amongst other offences, and submissions were

made on behalf of the appellant without realizing that the Trial Court was considering sentencing him under Section 376(3) of the IPC. On this basis, it was contended that effective hearing was not given to him, thereby vitiating the sentence. On the question as to whether the aforesaid defect could be cured at the appellate stage, it was submitted that the Supreme Court, in the case of *X vs. State of Maharashtra* [**(2019) 7 SCC 1**], had indicated that if meaningful hearing was given at the appellate stage, the defect could be cured in a given case. But, subsequent judgment and order of the Supreme Court dated 19.09.2022, passed in *Suo Moto* Writ Petition (Crl.) No.1 of 2022, pertaining to framing of guidelines regarding potential mitigating circumstances to be considered while imposing death sentences, some doubt was expressed about the decision in the case of **X vs. State of Maharashtra** (*supra*). On this basis, it was submitted that this Court may consider remanding the matter to the Trial Court for a meaningful hearing on sentencing.

18. It was submitted that an even more fundamental defect could be demonstrated in the impugned judgment and order of the Trial Court, which cannot be addressed or cured by this Court exercising appellate powers under Section 386 of the CrPC. It was submitted that in this case, a peculiar situation has arisen, for the reason that while the appellant has been convicted under Section 376(2)(i) of the IPC, amongst other offences, he has not been sentenced under the said provision. Further, he has been sentenced under Section 376(3) of the IPC, in the absence of conviction under the said provision. It was submitted that this Court, while considering the appeal, could certainly not convict the appellant for the first time under Section 376(3) of the IPC. It was submitted that this was clearly impermissible in law, particularly when neither the State, nor

the informant or the victim, had come before this Court to raise any ground of challenge about the impugned judgment and order. In such circumstances, remand would be impermissible, in terms of law laid down by the Supreme Court in the case of *Sachin vs. State of Maharashtra* [(2025) 9 SCC 507].

19. Thereupon, it was submitted that even if this Court is not with the appellant on the merits of the matter, there was no way the conviction and sentence, as imposed by the Trial Court, could be upheld. In such a situation, it was indicated that the error committed by the Trial Court, has created a situation, where the procedural mechanism provided under the CrPC, may not provide a solution at this appellate stage and therefore, remand to the Trial Court would perhaps be inevitable.

20. On this basis, it was submitted that the appeal deserved to be allowed, firstly on merits, by setting aside the entire judgment and order of the Trial Court and in the alternative, at least to the extent of setting aside the order and remanding the matter to the Trial Court for re-trial or at least for fresh hearing on sentence.

21. On the other hand, Dr. Krishnaiyer, learned APP appearing for the State, submitted that the appeal deserves to be dismissed, as the appellant had failed to make out his case on both the aspects of the matter i.e. on merits as well as alleged procedural defects.

22. On the merits of the matter, the learned APP submitted that the evidence of the victim/prosecutrix-PW4 in the present case itself, was enough to sustain the conviction. It was submitted that her testimony was believable and that it inspired confidence, thereby

demonstrating that there was no necessity of any corroboration. In any case, the evidence of PW1-Ashabai i.e. the mother of the victim; PW6-doctor and PW-10-headmistress of the school, further supported the case of the prosecution.

23. It was submitted that the testimony of rape victim ought not be looked at with suspicion, as it is the testimony equivalent to that of an injured witness. Unnecessary scrutiny and hyper-technicality is to be eschewed and if the testimony of the prosecutrix is found to be believable and consistent, inspiring confidence, conviction ought to be sustained on her evidence itself.

24. Reliance was placed on the judgments of the Supreme Court in the cases of *State of Punjab vs. Gurmit Singh and others* [**(1996) 2 SCC 384**], *Ranjit Hazarika vs. State of Assam* [**(1998) 8 SCC 635**], *State of Himachal Pradesh vs. Asha Ram* [**(2005) 13 SCC 766**] and *Deepak Kumar Sahu vs. State of Chhattisgarh* (**2025 SCC OnLine SC 1610**).

25. It was submitted that the medical evidence in the present case, in the form of medical examination report of the victim-PW4 and the testimony of PW6-doctor, sufficiently demonstrated that the version of the victim was supported by medical evidence. Tenderness on private parts as well as redness surrounding the hymen showed signs of sexual assault upon the victim. Mother of the victim i.e. PW1-first informant as well as PW10-headmistress of the school, corroborated the victim's version, although considering the sterling quality of victim's evidence, such corroboration was not necessary. On this basis, it was submitted that the appellant has absolutely no case on merits.

26. On the aspect of technical and procedural defect, it was submitted that the error in the judgment and order of the Trial Court, allegedly from the stage of framing of charge, at worst, could be said to be an error covered under Section 215 of CrPC. The said provision indicates that such an error cannot be treated as a material error vitiating the prosecution case, unless it has resulted in failure of justice. Reference was also made to Section 216 of CrPC, to contend that the Court could always alter the charge and that in the facts of the present case, the appellant had suffered no prejudice.

27. The learned APP relied upon judgments of the Supreme Court in the cases of *Dalbir Singh vs. State of U.P.* [(2004) 5 SCC 334] and *State of Haryana vs. Janak Singh and others* [(2013) 9 SCC 431], to contend that on proper application of the relevant provisions of CrPC, including Sections 215, 386 and 464 thereof, it was clear that if the accused was aware about the basic ingredients of the offence and the facts had been established against him, which were explained to him clearly, coupled with the fact that he had fair chance to defend himself, the procedural defect cannot inure to the benefit of the appellant. It was submitted that in a given case, the appellate Court could convict the accused for the offence, for which he was not charged, so long as there is no failure of justice.

28. In the present case, although the Trial Court did refer to a provision that was deleted, the basic ingredients of the offence under the said provision were retained by the very same amendment in the form of Section 376(3) of the IPC. It was submitted that the appellant did not suffer any prejudice in the facts and circumstances of the present case and he has not been able to demonstrate failure of justice, as a consequence of which this Court exercising appellate

power, can certainly correct the error and sustain the punishment imposed upon the appellant. On this basis, it was submitted that the appeal deserves to be dismissed.

29. Ms. Potdar, learned counsel appointed through legal aid, to appear on behalf of respondent No.2 (victim), supported the submissions made by the learned APP and prayed for dismissing the appeal.

30. It is evident from the submissions made on behalf of the appellant as also the State and respondent No.2, that two aspects arise for consideration firstly, on the merits of the matter, as to whether the impugned judgment and order of the Trial Court, can be sustained on the basis of the evidence led by the prosecution and secondly, as to whether the errors committed in the present case, from the stage of framing of charge by the Trial Court, completely vitiated the conviction and sentence, thereby requiring the appeal to be allowed to the extent of the matter being remanded to the Trial Court.

31. On the merits of the matter, we have considered the evidence of 11 prosecution witnesses, particularly PW1-Ashabai (first informant), PW4-victim, PW6-doctor and PW10-headmistress of the school. The omissions and contradictions relied upon by the learned counsel for the appellant, to attack the testimony of PW4-victim, deserve to be considered at the outset. The alleged discrepancy about timing of the school is a very minor and trivial issue. In any case, nothing much turns on the said aspect of the matter, for the reason that the PW4-victim herself, PW1-first informant i.e. victim's mother and PW10-headmistress of the school, have indicated the the school

used to start at about 10:00 a.m. and it used to be over for the day in the evening. Merely because there was difference in the timing of about an hour in the evening in the testimonies of the witnesses, would not create any serious doubt about the victim's version. The prosecution witnesses have consistently stated that since the victim was suffering from epilepsy, she was required to visit home during school hours for taking medicine and then returning back to school. We are not in agreement with the learned counsel for the appellant that there is some glaring contradiction about the same being the usual practice or a one-time act. On proper appreciation of the evidence of the prosecution witnesses, it becomes clear that it was a daily routine of the victim to come back home to take medicine during the school hours and then return back to school.

32. The victim has specifically described as to the manner in which the appellant forcibly took her to his house, when she was going back to school, after taking medicine. She has also stated as to the manner in which he committed rape on her and trapped her inside the bedbox. She also stated that the appellant committed the said act thrice on her during the time she was confined in his house. She had narrated all of this to her mother on the next day in the morning, when she reached her home.

33. Much emphasis was placed on behalf of the appellant on the aspect that the victim did not mention to her mother about she having remained trapped inside the bedbox during the contemporaneous period. It was indicated that this was a material improvement in her version. It was also sought to be indicated that the victim had suppressed her love affair with the appellant and after referring to the medical evidence, it was sought to be indicated that this could not be a case of forcible sexual assault.

34. The said line of submissions adopted on behalf of the appellant, is wholly misdirected, for the reason that age of the victim was never disputed. Sufficient evidence was led to prove the fact that she was 13 years old, when the incident took place, thereby demonstrating that consent was irrelevant and that the act attributed to the appellant, amounted to rape and that too, on a girl, who was less than 16 years old.

35. There is substance in the contention raised by the learned APP, by relying upon the judgments of the Supreme Court in the cases of **State of Punjab vs. Gurmit Singh and others** (*supra*), **Ranjit Hazarika vs. State of Assam** (*supra*), **State of Himachal Pradesh vs. Asha Ram** (*supra*) and **Deepak Kumar Sahu vs. State of Chhattisgarh** (*supra*). In the aforesaid judgments, the Supreme Court has questioned as to why the evidence of a girl, who complains about the offence of rape, is to be viewed with doubt, disbelief or suspicion. It is laid down that once the judicial conscience of the Court is satisfied that the evidence of the prosecutrix inspires confidence, further corroboration is not necessary. It is emphasized that the evidence of a victim of sexual assault, is entitled to great weight, absence of corroboration notwithstanding.

36. The Supreme Court has held in the said judgments that if, for some reason, the Court finds it difficult to place implicit reliance on the testimony of the prosecutrix, it may look for evidence that would lend assurance to her testimony, short of corroboration required in the case of an accomplice. The Supreme Court has indicated that in cases where victims are minor, appropriate sensitivity is to be observed and the evidence of such a minor victim of sexual offence, needs to be taken into account without showing undue suspicion or hyper technicality.

37. When the aforesaid tests are applied to the testimony of the victim in the present case, this Court finds that her version is believable and the omissions or contradictions sought to be highlighted on behalf of the appellant, cannot be said to be material omissions, adversely affecting her credibility. Even if the judgment in the case of *Radhu vs. State of Madhya Pradesh* [(2007) 12 SCC 57] on which the learned counsel for the appellant, has placed reliance, has to be taken into consideration, there is nothing to indicate that the Supreme Court has taken a view different from the judgments upon which the learned APP has relied. On the facts of each case and on an overall appreciation of the material on record, the Court may reach a particular conclusion. But, applying the tests as indicated hereinabove, this Court finds no reason to doubt the victim's version.

38. It is crucial to note that in the present case, the prosecution did prove that at the relevant time, the victim's age was 13 years, thereby indicating that she was less than 16 years of age. This fact has a crucial bearing on the question of rape and the aspect of consent, pales into insignificance.

39. Nonetheless, this Court has considered the evidence of PW1-mother of the victim along with the evidence of PW10-headmistress of the school. The testimonies of these two witnesses clearly support the victim's version, as regards the chain of events that occurred on 29.10.2018 and 30.10.2018, leading to registration of FIR.

40. The testimony of PW6-doctor was criticized on behalf of the appellant, on the ground that the medical examination report was interpreted in such a manner by the said witness, that such interpretation, on the face of it, was in the teeth of the contents of the said report itself.

41. In this context, we have perused the evidence of the said witness. At one place, the said witness does state that the medical examination report opined that it was a case of sexual violence, suffered about 29 hours and 14 minutes ago. The medical examination report indeed shows that this was not a part of the opinion and it was merely narration of the report given by the victim herself, at the time when the alleged incident took place.

42. Be that as it may, the said witness went on to depose about hymenal tear and redness on private parts and the fact that the victim was a known case of epilepsy. The said testimony of PW6-doctor, when read with the medical examination report, clearly demonstrates that the contentions raised on behalf of the appellant in this regard, cannot be accepted.

43. It is crucial to note that in the history recorded by the said witness, the victim herself narrated that there had been 4 episodes of such sexual assault by the appellant, details of two being given with date and time. The report further recorded that there was old hymen tear, coupled with redness around the hymen, tenderness of breasts and anus as also supra pubic tenderness. The said contents of the medical report sufficiently corroborate the victim's version. Even otherwise, it is settled position of law that ocular evidence always prevails over medical evidence.

44. In the present case, there is direct evidence of the victim herself as regards the acts of the appellant, of inflicting rape and violence upon her throughout the period when she was confined in the appellant's house from the afternoon of 29.10.2018 to early morning hours of 30.10.2018. Hence, we find that the appellant is

unable to dislodge the findings rendered by the Trial Court on proper appreciation of the evidence of the prosecution witnesses. Therefore, on the first aspect of the matter, this Court is not with the appellant.

45. The second aspect concerns procedural error, which according to the appellant, caused him grave prejudice and resulted in failure of justice. A perusal of charge framed by the Trial Court indeed shows that an error was committed. The charge framed on 13.06.2019, pertained to offences under Section 342 of the IPC pertaining to wrongful confinement; Section 363 thereof pertaining to kidnapping; Section 376(2)(i) thereof (deleted from IPC with effect from 21.04.2018) pertaining to rape on a woman under 16 years of age, Section 376(2)(n) thereof pertaining to rape being committed repeatedly on the same woman; Section 506 thereof pertaining to criminal intimidation and Section 5(l) punishable under Section 6 of the POCSO Act, pertaining to aggravated penetrative sexual assault on a child more than once or repeatedly.

46. Before considering the effect of the apparent error committed by the Trial Court in the present case, it would be appropriate to refer to the position of law laid down by the Supreme Court in various judgments.

47. In the case of *Willie (William) Slaney vs. State of Madhya Pradesh* [**(1955) 2 SCC 340**], the Supreme Court recognized that while framing of charge does constitute an important step during the course of trial, if an error occurs, which is not corrected during the course of trial and the accused is convicted, the High Court would be required to order a re-trial, only if in the opinion of the Court, the accused was misled in his defence. It was held that if the error or

defect goes at the root of the trial, then the conviction would not stand. It was further held that the conviction must stand, if on a careful consideration of all the facts, it is found that no prejudice or a reasonable and substantial likelihood of it, was caused. The Supreme Court further held that it would always be material to consider whether the objection as to the nature of the charge, was taken at an early stage on behalf of the accused.

48. In the case of *K. Prema S. Rao and another vs. Yadla Srinivasa Rao and others* [**(2003) 1 SCC 217**], reference was made to Section 215 of the Cr.P.C., concerning effect of error in framing of charge and it was emphasized that such an error would be material, only if it resulted in any failure of justice.

49. In the case of **Dalbir Singh vs. State of U.P.** (*supra*), the Supreme Court reiterated that the accused must demonstrate that failure of justice had occasioned due to such an error. In this context, reference was made to Section 464 of Cr.P.C., which specifically pertains to error in charge and indicates that even if there is an error, omission or irregularity or for that matter, absence of charge, the Court of appeal would not interfere, unless there was failure of justice.

50. The said position of law was reiterated by the Supreme Court in the cases of *Sanichar Sahni vs. State of Bihar* [**(2009) 7 SCC 198**] and State of *Uttar Pradesh vs. Paras Nath Singh* [**(2009) 6 SCC 372**].

51. In the case of *Darbara Singh vs. State of Punjab* [**(2012) 10 SCC 476**], the Supreme Court explained the expressions 'failure of justice' and 'prejudice', while considering such situation of error in framing of charge. It was held in the said judgment as follows:

"20. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a *failure of justice*. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

21. "Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice", not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek

> benefit under the orders of the court. (Vide *Rafiq Ahmed v. State of U.P.*, SCC p. 320, para 36; *Rattiram v. State of M.P.* and *Bhimanna v. State of Karnataka*)"

51. Thus, the aforesaid second contention raised on behalf of the appellant in the present case, is required to be tested on the said position of law, requiring the appellant to show that framing of charge for the deleted Section 376(2)(i) of the IPC, had caused prejudice to his defence or that he was misled about the case of prosecution and/or this had resulted in failure of justice.

52. This would necessarily require perusal of the order framing the charge, which recorded at five places that the victim's age was 13 years. Thus, the appellant was clearly put to notice and made aware about the fact that the charge was framed on the basis that the victim was less than 16 years of age. The appellant was never prejudiced on that count. It is also evident that the major offence in the present case, pertained to rape of the victim, who was less than 16 years old at the time of the incident.

53. The evidence of the prosecution was led on this basis and the line of cross-examination adopted on behalf of the appellant, clearly indicated that he was indeed aware about the basic charge against him, of having committed rape of a girl, who was less than 16 years old. The cross-examination of PW7-PSI attached with the concerned police station, conducted on behalf of the appellant, shows that questions were put to the said witness, referring to the fact that the victim was hardly 13 to 13½ years old. Thus, the defence of the appellant and cross-examination of the prosecution witnesses on his behalf, proceeded on the basis that the victim was clearly below 16 years of age. Hence, it cannot be said that mere error in framing of

charge, had caused any prejudice to the appellant (accused) in conducting his defence, during the course of trial.

54. Judgment of the Supreme Court in the case of **Dalbir Singh vs. State of U.P.** (*supra*) holds that while considering the appeal of an accused, the Appellate Court can convict the accused for an offence in respect of which charge was not framed, so long as the accused is aware about the basic ingredients of such offence and the main facts established against him were explained to him clearly and that he had a fair chance of defending himself. On the said touchstone, in the present case, the appellant cannot claim that he was completely unaware about the ingredients of the offence for which he was facing trial, because the fundamental ingredient of the offence under Section 376(2)(i) of the IPC (deleted) and 376(3) thereof (added), is that the victim is less than 16 years old. Therefore, the plea of prejudice being suffered by the appellant and failure of justice, cannot be accepted in the facts and circumstances of the present case.

55. As held in the above-quoted portion of the judgment of the Supreme Court in the case of **Darbara Singh vs. State of Punjab** (*supra*), when this Court considers whether there has been failure of justice, the rights of the appellant (accused) alone cannot be kept in mind. Although they have to be certainly considered, the rights of the victim also cannot be forgotten or ignored.

56. In our system, sometimes there is a danger of over-emphasis on the rights of the accused, while completely forgetting or ignoring the rights of the victim. It is often observed that the accused raises a plethora of contentions regarding his or her rights claiming fair trial, while the victim is forgotten. It has to be kept in mind that the victim

triggers the criminal justice system and quite often, the focus on the rights of the accused is over-emphasized to such an extent that the victim is bewildered and feels completely lost, as regards his or her rights and concerns. Therefore, the rights of the accused as well as the victim should be balanced because the enquiry in a criminal trial and also, while considering an appeal against order of conviction, is to cut to the truth of the matter to examine as to whether the guilt of the accused has been proved beyond reasonable doubt. So long as no prejudice is caused to the accused and there is no failure of justice, even if there is an error in framing of charge, the appellant cannot claim re-trial and remand of proceedings to the Trial Court. Instead, the appellate Court can correct the error.

57. It is in the backdrop of the said position of law that we have examined the material on record, starting from the order of the Trial Court framing charge to ascertain as to whether the appellant in the facts of the present case, can claim that the appeal deserves to be allowed, at least to the extent of directing re-trial. While examining such material, we have applied the aforementioned position of law, clarified by the Supreme Court in the said judgments.

58. As noted hereinabove, in the order framing charge itself, at number of places, the age of the victim was specifically stated to be 13 years and therefore, on this basis, the appellant cross-examined the prosecution witnesses, particularly PW7 i.e. the PSI attached to the concerned police station. The material clearly indicates that the appellant was never misled about the case against him and hence, he had full opportunity to defend himself, which he indeed utilized. There was no prejudice caused to the appellant and failure of justice was certainly not occasioned.

59. The judgment upon which the learned counsel for the appellant has placed much reliance i.e. **Sachin vs. State of Maharashtra** (*supra*), concerns a different set of facts, where a learned Single Judge of the High Court had remanded the matter back to the Special Court on the aspect of conviction and sentencing and eventually, the Special Court, on remand, convicted and sentenced the accused therein for a higher offence, which provided for imprisonment for life. In other words, the Supreme Court found that the appellant was worse-off, having filed appeal against his conviction and sentencing.

60. In the present case, this Court, in appeal, altering the conviction to Section 376(3) of the IPC, would not have the effect of convicting the appellant for a higher offence, for the reason that maximum punishment prescribed in the now deleted Section 376(2)(i) of the IPC and Section 376(3) thereof, is the same i.e. imprisonment for life, which means imprisonment for remainder of the natural life of the convict. As noted hereinabove, the ingredients of the offences are also the same.

61. A submission was made on behalf of the appellant linked with the aforesaid contention, that meaningful hearing on sentence was not granted to the appellant, as the Trial Court had proceeded on the basis that the appellant was facing trial for offence under Section 376(2)(i) of the IPC, while eventually he was sentenced under Section 376(3) thereof. Much emphasis was placed on the fact that the deleted Section 376(2)(i) of the IPC provided for a minimum punishment of 10 years of rigorous imprisonment, while Section 376(3) of the IPC provides for minimum sentence of 20 years of rigorous imprisonment. We are unable to understand as to what

prejudice the appellant suffered, for the reason that when the Trial Court gave hearing on sentencing to the appellant for offences with which he was charged, including reference to the erroneous provision of Section 376(2)(i) of the IPC, he had an opportunity to argue as to why he should be given minimum sentence of 10 years rigorous imprisonment. If he was given hearing on the basis of Section 376(3) of the IPC, he could have argued only for a minimum sentence of 20 years of rigorous imprisonment.

62. In such a situation, law laid down by the Supreme Court in the case of **X vs. State of Maharashtra** (*supra*), would apply to the effect that this Court hearing the appeal at the appellate stage, can certainly rectify such an error, if at all, by granting hearing on sentence. The appellant in this case, was granted full opportunity before this Court to demonstrate why maximum sentence ought not to be imposed upon him and therefore, defect/error, if any, has been rectified at the appellate stage.

63. We do not find any substance in the contention that subsequently referred *Suo Moto* Writ Petition (Crl.) No.1 of 2022 dilutes the position of law clarified by the Supreme Court in the case of **X vs. State of Maharashtra** (*supra*) in paragraph Nos.36 to 40.8 thereof. Thus, on this count also, we are not in agreement with the contentions raised on behalf of the appellant.

64. It was further submitted on behalf of the appellant that the present case manifests a unique situation, which could not be rectified under the procedure prescribed as per CrPC and therefore, this Court would have no alternative but to remand the matter, at least on the aspect of conviction and sentence. We are unable to agree with the said contention. It cannot be ignored that the

appellant was also convicted under Section 376(2)(n) of the IPC, which we have found to be correct. The said provision also prescribes maximum sentence of imprisonment for life, which means imprisonment for the remainder of life. The appellant was certainly granted proper hearing, while being convicted and sentenced under the said provision. In fact, the Trial Court correctly appreciated the material and evidence on record to convict the appellant for the other offences also.

65. We do find that the Trial Court in the present case, convicted the appellant for all the offences with which he was charged, including Section 376(2)(i) of the IPC, which was no longer existing and made no reference to Section 376(3) thereof. But, while sentencing, the Trial Court took recourse to Section 42 of the POCSO Act and at that stage, imposed punishment on the appellant under Section 376(3) of the IPC, handing down the maximum sentence of undergoing rigorous imprisonment for life, which shall mean imprisonment for remainder of life of the appellant along with fine. Since Section 376(3) of the IPC indeed provides for punishment greater in degree as compared to punishment pertaining to other provisions of the IPC and POCSO Act, the Trial Court correctly took recourse to the same.

66. We are of the opinion that once it is found that at the appellate stage, this Court has the power to alter the conviction to that under Section 376(3) of the IPC, to correct the error committed by the Trial Court, there can be no impediment in sustaining the sentence, particularly when the alleged defect of 'lack of meaningful hearing' does not exist and in any case, it has been cured at the appellate stage, while hearing this appeal. It cannot be ignored that the

maximum sentence that could be imposed under the deleted Section 376(2)(i) of the IPC, is exactly the same, as the maximum sentence that can be imposed under Section 376(3) of the IPC, which was added by way of the very same amendment, brought into effect in the year 2018. Thus, the case of prejudice suffered by the appellant and failure of justice, is not made out on behalf of the appellant and the contentions raised regarding the same, are rejected.

67. In view of the above, the appeal is disposed of in the following manner:

(a) The conviction of the appellant under Sections 342, 363, 376(2)(n) and 506 of the IPC, is maintained, while conviction under Section 376(2)(i) of the IPC is altered to that under Section 376(3) of the IPC.

(b) The conviction under Section 5(l) punishable under Section 6 of the POCSO Act is also maintained and we find that the Trial Court correctly applied Section 42 of the POCSO Act, by imposing sentence upon the appellant under Section 376(3) of the IPC, of undergoing rigorous imprisonment for life, which shall mean remainder of life along with fine of ₹ 50,000 and in default, additional rigorous imprisonment for one month. The same is accordingly maintained and upheld.

68. Pending applications, if any, also stand disposed of.

(MANJUSHA DESHPANDE, J.) **(MANISH PITALE, J.)**