[2025] 4 S.C.R. 2500 : 2025 INSC 716

Sachin
v.
State of Maharashtra

(Criminal Appeal No(s). 2073-2075 of 2025)

21 April 2025

[B.V. Nagarathna* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Issue arose whether, the High Court could enhance the sentence under its revisional powers in a convict's appeal against conviction.

Headnotes†

Code of Criminal Procedure, 1973 – s.386 – Powers of the Appellate Court to enhance sentence in appeal against conviction – Conviction of the appellant for the offences punishable u/ss.3(a) and 4 of the POCSO Act and s.376 IPC for committing penetrative sexual assault on the minor victim, and sentenced to rigorous imprisonment for seven years and fine by the Special Court – Appeal against conviction by the appellant – High Court affirmed the finding of the Special Court as regards the commission of offence, however observed that the Special Court while convicting the appellant, overlooked the provisions of ss.5(m) and 6 of the POCSO Act and s.376(2)(i) IPC – High Court issued show cause notice to the appellant on enhancement of sentence and remitted the case to the Special Court for reconsidering the quantum of the sentence – Special Court convicted the appellant u/ss.5(m) and 6 of the POCSO Act to suffer life imprisonment and fine and also convicted for offence punishable u/ss.376(2)(i) IPC for which no separate sentence is provided – In appeal, the Division Bench of the High Court expressed its inability to proceed in the matter and instead suggested the High Court Legal Services take steps to restore justice to the appellant – Correctness:

Held: Appellate court, in an appeal filed by the accused cannot, while maintaining the conviction, enhance the sentence – While

* Author

exercising its appellate jurisdiction at the instance of the convict, the High Court cannot act as a revisional court, particularly, when no appeal or revision has been filed either by the State, victim or complainant for seeking enhancement of sentence against accused – In an appeal filed by the accused/convict, the High Court cannot suo motu exercise its revisional jurisdiction and enhance the sentence against the accused while maintaining the conviction – Power to enhance the sentence can be exercised by the appellate court only in an appeal filed by the State, victim or complainant provided the accused has had an opportunity of showing cause against such enhancement – Appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order of sentence under appeal – Thus, even in an appeal for enhancement of sentence, unless the conditions prescribed in the form of provisos are complied with by the appellate court, there cannot be an enhancement of sentence – No appellant by filing an appeal can be worse-off than what he was – In an appeal filed by an accused against a judgment of conviction and sentence, he cannot be remitted to the trial court to impose a higher sentence on him – Single Judge of the High Court was not right in remanding the matter to the Special Court for enhancing the sentence to be imposed on the appellant-accused, that too, in an appeal filed by accused seeking setting aside of a judgment of conviction and sentence imposed on him – Consequently, the Special Court not right in enhancing the sentence to life imprisonment by following the said direction – Appellant while initially subjected to imprisonment of seven years, has completed actual sentence of eleven years and eight months – Orders of the High Court and consequently of the Special Court erroneous and liable to be set aside – To do the complete justice in exercise of powers u/Art.142, the original sentence of seven years of rigorous imprisonment imposed on the appellant restored – Instead of rehearing his appeal on the original sentence, the matter is concluded and the appellant is released from jail forthwith – Protection of Children from Sexual Offences Act, 2012 – ss.3(a), 4, 5(m), 6 – Penal Code, 1860 – ss.363-A, 376. [Paras 23, 26, 27, 29.1, 31-33, 34.4-37]

Jurisdiction – Appellate jurisdiction and revisional jurisdiction – Difference between:

Held: Ordinarily, appellate jurisdiction involves a rehearing, as it were, on law as well as on facts and is invoked by an aggrieved person – Ordinarily, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without it being invoked by a party – Extent of revisional jurisdiction is defined by the statute conferring such jurisdiction – Conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising tribunal within the bounds of their authority to make them act according to the procedure established by law and according to well defined principles of justice. [Paras 28, 28.4]

Case Law Cited

Kumar Ghimrey v. State of Sikkim **[2019] 6 SCR 203 : (2019) 6 SCC 166;** *Nadir Khan v. State (Delhi Admn.)* **[1975] Supp. 1 SCR 489 : (1975) 2 SCC 406;** *Eknath Shankarrao Mukkawar v. State of Maharashtra* **[1977] 3 SCR 513 : (1977) 3 SCC 25;** *Sahab Singh v. State of Haryana* **[1990] 1 SCR 512 : AIR 1990 SC 1188;** *Govind Ramji Jadhav v. State of Maharashtra* **[1990] 1 SCR 855 : (1990) 4 SCC 718;** *State of Himachal Pradesh v. Nirmala Devi* **[2017] 2 SCR 112 : (2017) 7 SCC 262;** *Surjit Singh v. State of Punjab,* **1984 Supp. SCC 518;** *Govind Ramji Jadhav and Surendra Singh Routela v. State of Bihar* **[2001] Supp. 5 SCR 340 : (2002) 1 SCC 266;** *AR Antulay v. RS Nayak* **[1988] Supp. 1 SCR 1 : AIR 1988 SC 1531;** *James Joseph v. State of Kerala* **[2010] 10 SCR 844 : (2010) 9 SCC 642, para 19(i);** *Bolin Chetia v. Jagdish Bhuyan* **[2005] 2 SCR 692 : AIR 2005 SC 1872 : (2005) 6 SCC 81;** *State of Kerala v. Charia Abdulla & Co.* **[1965] SCR 601 : AIR 1965 SC 1585;** *Sri Raja Lakshmi Dyeing Works v. Rangaswamy* **(1980) 4 SCC 259 – referred to.**

Chautala Workers Co-op Transport Society Ltd. v. State of Punjab, **AIR 1962 Punj 94 – referred to.**

Attorney General v. Herman James Sillem **(1864) 10 HLC 704 – referred to.**

Books and Periodicals Cited

Black's Law Dictionary, Ninth Edition; P Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition, Volume–1; P Ramanatha Aiyar's Advanced Law Lexicon, 6th Edition, Volume 4 **– referred to.**

List of Acts

Code of Criminal Procedure, 1973; Protection of Children from Sexual Offences Act, 2012; Penal Code, 1860; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

List of Keywords

Enhancement of sentence; Revisional powers; Appeal against conviction; Powers of the Appellate Court; Penetrative sexual assault on minor victim; Special Court; Show cause notice; Quantum of sentence; High Court Legal Services; Opportunity of hearing; Retrial; Appellate jurisdiction; Revisional jurisdiction; Incarceration.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No(s). 2073-2075 of 2025

From the Judgment and Order dated 26.02.2016 in CRLA No. 30 of 2015, 08.03.2016 in CRLA No. 30 of 2015 and 28.04.2016 in CN No. 05 of 2013 passed by the Special Judge, Warora, in Special (POCSO) Case No. 05 of 2013

Appearances for Parties

Advs. for the Appellant:
Ms. Sangeeta Kumar, Mrs. Vithika Garg, Ms. Vidushi Garg, Hemant Kumar Tripathi.

Advs. for the Respondent:
Shrirang B. Varma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande.

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

Leave granted.

2. This is an unfortunate case where the appellant herein, instead of suffering a sentence of rigorous imprisonment for ***seven*** years has been incarcerated for ***eleven*** years simply owing to the fact that

Criminal Appeal No.30/2015 preferred by him before the High Court of Judicature at Bombay, Nagpur Bench, Nagpur, the matter was remitted to the Special Court for enhancement of sentence without even adhering to the salient principles of natural justice.

3. The appellant herein faced trial pursuant to FIR No. 154/2013 registered with P.S. Bhadrawati District, State of Maharashtra under Sections 3(a) and 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") and Section 363-A, 376 of the Indian Penal Code, 1860 (for short, "IPC") and Sections 3(1)(xii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Charges were framed against the appellant under the aforesaid sections.

4. The case of the prosecution is that the appellant was a neighbour of the family of the minor victim, aged four years. On 15.09.2013, while the father of the minor victim was away for work and the mother had gone out for cooking, the appellant induced the minor victim to his house, undressed her and committed the offence of rape on her. Two independent witnesses residing in the same neighbourhood informed the minor victim's mother about the incident. Later, the minor victim narrated the incident to the complainant who took his daughter to a doctor. After gathering courage, the complainant registered Crime No.154/2013 on 23.09.2023 under the aforesaid provisions.

5. By judgment dated 24.11.2014, the Special Judge, Warora, concluded that the prosecution had proved that the accused had committed penetrative sexual assault on the minor victim. Thereby, the Special Court convicted the appellant herein for the offences punishable under Sections 3(a) and 4 of the POCSO Act and Section 376 of IPC. Consequently, the appellant was sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.2,000/- and in default to undergo rigorous imprisonment for two months. As offence under Section 376 IPC was merged in the aforesaid offences, no separate punishment was awarded by the Special Court.

6. Aggrieved by his conviction and sentence, the accused-appellant herein preferred Criminal Appeal No.30/2015 before the High Court. It is pertinent to note that the State had not assailed by way of an appeal the sentence of rigorous imprisonment for seven years imposed by the Special Court on the appellant herein. Neither was any appeal filed by the complainant or on behalf of the victim.

7. On the other hand, the appellant – accused assailed the judgment of conviction and sentence before the High Court. By impugned judgment dated 26.02.2016, the High Court affirmed the finding of the Special Court to the effect that the victim was present in the house of the accused at the time of incident and there was no one else in the house except the accused and the victim. Pertinently, the High Court was of the view that this exceptional fact had not been sufficiently explained by the appellant. Relying on the evidence of Dr. Dipti Vinay Shrirame (P.W.6) and the medical examination report of the victim issued by the General Hospital, Chandrapur, the High Court concluded that the fact of penetrative sexual assault was proved beyond reasonable doubt. Also, as per Section 29 of POCSO Act, the appellant was found to have failed to discharge the burden of explaining the presence of the victim in his house and the medical evidence which proved the commission of penetrative sexual assault.

8. Section 3 of POCSO Act defines when a person is said to commit penetrative sexual assault and Section 4 prescribes the punishment for the same. Prior to its amendment, Section 4 provided for imprisonment of either description 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. The Section has been amended with effect from 16.08.2016.

9. A comparison of aforesaid sections with Sections 5 and 6 of POCSO Act, is necessary. Section 5 provides when an accused is said to commit 'aggravated penetrative sexual assault'. In particular, Section 5(m) provides that whoever commits penetrative sexual assault on a child below twelve years is said to commit aggravated penetrative sexual assault. At the time of commission of offence in the instant case, Section 6 enumerated punishment of rigorous imprisonment for a term not less than ten years but which may extend to imprisonment for life and shall also be liable to fine. The aforesaid Sections read as under:

> **"3. Penetrative sexual assault.—**A person is said to commit "penetrative sexual assault" if—
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Punishment for penetrative sexual assault.—(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description 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.

xxx

5. Aggravated penetrative sexual assault.—

xxx

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

xxx

is said to commit aggravated penetrative sexual assault.

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."

10. It is an undisputed fact that the minor victim was four years of age at the time of commission of the offences. In this context, the High Court observed that the Special Court in convicting the appellant under Sections 3(a) and 4 of POCSO Act had overlooked the provisions of Sections 5(m) and 6 of POCSO Act as well as Section 376(2)(i) of the IPC. Finally, the High Court held that the appellant herein is liable for punishment under Section 6 of the POCSO Act and under Section 376(2)(i) of IPC. While maintaining the findings recorded by the Special Court that the appellant indeed committed penetrative sexual assault on the victim, the High Court issued show cause notice to the appellant as to why he should not be sentenced as per Section 6 of the POCSO Act and for the offence under Section 376(2)(i) of IPC. Considering the minimum statutory punishment, it is apparent that sentencing under Section 6 of POCSO Act would inevitably result in enhancement of sentence by at least three years.

11. The contention raised by learned counsel for the appellant herein before the High Court was that such a course was impermissible in law as it would amount to altering/modifying the charge was to be considered on the next date. The appeal was listed before the High Court on 02.03.2016 for further hearing on the point of sentencing and the appellant was also directed to be produced before the Court. On 02.03.2016, the appellant was produced before the High Court and was made aware about the issuance of notice regarding hearing on enhancement of sentence. What appears is that despite the judgment of the High Court dated 26.02.2016, the appellant was made aware of the issuance of show cause notice only for enhancement of sentence on 02.03.2016. Subsequently, on 08.03.2016, the High Court passed the order and reiterated that appellant is liable to be punished under Section 6 of the POCSO Act and Section 376(2)(i) of IPC, both provisions having been overlooked by the Special Court and finally remitted the case to the Special Court for reconsidering the quantum of the sentence to be imposed on the appellant by way of enhancement for the offences said to have committed by the appellant.

12. Consequently, the Special Court vide order dated 28.04.2016 sentenced the appellant to life imprisonment and to pay fine of Rs. 5000/-, in default to undergo further rigorous imprisonment for six months.

13. Aggrieved by the enhancement of sentence in pursuance of his own appeal, the appellant herein preferred Criminal Appeal No.311/2021 before the Division Bench of the High Court by assailing order dated 28.04.2016 which obviously expressed its inability to proceed in the matter and instead suggested that the High Court Legal Services Sub-Committee, Nagpur take steps to restore justice to the appellant herein.

14. It is in the above circumstances, that we have heard learned counsel Ms. Sangeeta Kumar appearing on behalf of the Supreme Court Legal Services Committee for the appellant – accused and Shri Rang Verma, learned counsel for the respondent-State at length.

15. Ms. Kumar, learned counsel appearing for the appellant, contended that in the absence of any appeal preferred by the State Government or the complainant, the High Court grossly erred in enhancing the sentence. The decision of the High Court has left the appellant worse-off in his own appeal, it was argued.

16. *Per contra*, learned counsel appearing for the respondent-State relied on the judgment of this Court in ***Kumar Ghimrey vs. State of Sikkim, (2019) 6 SCC 166 ("Kumar Ghimrey")*** to buttress his submission that the High Court, even in the absence of a State appeal, is competent under Section 401 Code of Criminal Procedure, 1973 (for short, "CrPC") to exercise its powers under Section 396(c) and enhance the sentence once appellant-accused's appeal was filed.

17. On that note, learned counsel appearing for the appellant vociferously highlighted the grave injustice of prolonged incarceration has caused to the appellant due to High Court not granting an effective opportunity of hearing. It was contended that the Order dated 08.03.2016 does not reflect that the counsel for the appellant-accused or the accused himself was actually heard on the question of modifying the charge from a minor offence to a major offence and thereby altering the finding and enhancing the sentence.

18. We find merit in the submission of learned counsel for the appellant that the record does not reflect that the counsel for the appellant-accused or the accused himself was heard on the question of modifying the charge from a minor offence to a major offence and thereby altering the finding and enhancing the sentence. The further and more important submission is that, in an appeal filed by the accused/convict the sentence cannot be enhanced by the appellate court.

19. Section 386 CrPC discusses the powers of the appellate court. For ease of reference, Section 386 reads as under:

> **"386. Powers of the Appellate Court.—**After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
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> (a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction—
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> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
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> (ii) alter the finding, maintaining the sentence, or
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> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same—
>
> (c) in an appeal for enhancement of sentence—
>
> (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
>
> (ii) alter the finding maintaining the sentence, or
>
> (iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;
>
> (d) in an appeal from any other order, alter or reverse such order;
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> (e) make any amendment or any consequential or incidental order that may be just or proper:

> Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:
>
> Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

The said provision delineates four categories of appeals, (i) an appeal from an order of acquittal; (ii) an appeal from conviction; (iii) an appeal for enhancement of sentence; and (iv) an appeal from any other order.

20. Section 377 CrPC which provides for appeal by the State Government against inadequacy of sentence was a novel provision brought in by the CrPC. The 41st Law Commission had noted in its report that, pre-1973, in the absence of a statutory provision which permitted the State to prefer an appeal against inadequate sentence, the State was compelled to invoke the revisional powers of the High Court for correction of any error in sentencing. Finding this to be unsatisfactory, the Law Commission recommended that the State Government should be able to appeal against an inadequate sentence before an ordinary Court of Appeal as well. To effectuate this intent, the Parliament inserted Section 377.

20.1 In ***Nadir Khan vs. State (Delhi Admn.), (1975) 2 SCC 406 ("Nadir Khan"),*** the petitioner was found in illegal possession of ganja weighing 7 kgs, and was convicted under Section 61(*a*) of the Punjab Excise Act, 1914 as extended to Delhi and sentenced to two months' rigorous imprisonment. As no right to appeal was available, an unsuccessful revision application was preferred before the Sessions Court. Aggrieved, the petitioner had then moved the High Court under Section 482 CrPC read with Article 227 of the Constitution against the conviction. In turn, the High Court left the petitioner worse off as it thought that the sentence awarded was inadequate. By *suo moto* invoking its revisional jurisdiction, the High Court enhanced the sentence to six months. In a special leave petition before this Court, the question raised was, whether, the High Court, in a revision under Section 401 CrPC, has the jurisdiction to

enhance the sentence in the absence of an appeal by the State against the inadequacy of sentence under Section 377.

20.1.1 Noting that the High Court did leave the petitioner worse off, this Court speaking through Goswami, J., characterised the question to be an unmerited doubt on the undoubted jurisdiction of the High Court in acting *suo motu* in criminal revision in appropriate cases. It was observed that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. It was held as follows:

> "The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law. **The character of the offence and the nature of disposal of a particular case by the subordinate court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code**. … This position was true and extant in the old Code of 1898 and this salutary power has not been denied by Parliament under the new Code by rearrangement of the sections. It is true the new Code has expressly given a right to the State under Section 377 CrPC to appeal against inadequacy of sentence which was not there under the old Code. That however does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court.…
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> Section 401 expressly preserves the power of the High Court, by itself, to call

> for the records without the intervention of another agency and has kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court. The provisions under Section 401 read with Section 386(c)(iii) CrPC are clearly supplemental to those under Section 377 whereby appeals are provided for against inadequacy of sentence at the instance of the State Government or Central Government, as the case may be. There is therefore absolutely no merit in the contention of the learned counsel that the High Court acted without jurisdiction in exercising the power of revision suo motu, for enhancement of the sentence in this case. The application stands rejected."
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> (underlining by us)

20.2 In ***Eknath Shankarrao Mukkawar vs. State of Maharashtra, (1977) 3 SCC 25 ("Eknath Shankarrao Mukkawar"),*** an appeal was indeed preferred by the State Government under Section 377(1) CrPC against the inadequacy of the sentence of the appellant convicted under Section 16(1)(*a*)(*i*) read with Sections 2(*i*)(1) and 7(*i*) of the Prevention of Food Adulteration Act, 1954 and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs.500 and in default rigorous imprisonment for two months. The High Court allowed the appeal of the State with regard to the inadequacy of the sentence and while affirming the conviction of the appellant under aforesaid provisions enhanced the sentence to six months' simple imprisonment and a fine of Rs.1000 and in default simple imprisonment for two months. In appeal before this Court, the principal submission of the appellant was that the appeal under Section 377(1) was not maintainable due to the bar operating then under Section 377(2). This argument is not relevant for our consideration in the present case. Additionally and alternatively, it was argued that the appeal not being maintainable, the High Court could not have, in any event, invoked its revisional powers under Section 401 CrPC

to enhance the sentence *suo moto* as the power of the High Court to enhance sentence which was available under Sections 435/439 CrPC of the old CrPC is absolutely replaced by the provision of appeal under Section 377 CrPC of the new CrPC. Rejecting the submission, a three-judge Bench of this Court held that the High Court has revisional powers to, *suo motu*, enhance the sentence. It was held that:

> "6. We should at once remove the misgiving that the new Code of Criminal Procedure, 1973, has abolished the High Court's power of enhancement of sentence by exercising revisional jurisdiction, *suo motu*. The provision for appeal against inadequacy of sentence by the State Government or the Central Government does not lead to such a conclusion. High Court's power of enhancement of sentence, in an appropriate case, by exercising suo motu power of revision is still extant under Section 397 read with Section 401 of the Criminal Procedure Code, 1973, inasmuch as the High Court can "by itself" call for the record of proceedings of any inferior criminal court under its jurisdiction. The provision of Section 401(4) is a bar to a party, who does not appeal, when appeal lies, but applies in revision. Such a legal bar under Section 401(4) does not stand in the way of the High Court's exercise of power of revision, suo motu, which continues as before in the new Code."
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> (underlining by us)

The aforesaid judgments of this Court settled the question that a High Court has the jurisdiction to *suo moto* enhance the sentence under the CrPC by invoking its revisional powers. The pertinent question then is, whether, the High Court could enhance the sentence under its revisional powers in a convict's appeal against conviction.

21. In this case we are concerned with an appeal from a conviction. In such an appeal the appellate court can exercise its powers in three ways, as per clause (b) of Section 386 CrPC. Clause (c) is with regard to an appeal for enhancement of sentence. While an appeal from a conviction is filed by the accused, an appeal from an order

of acquittal or for enhancement of sentence could be filed either by the State or by the complainant or even by the victim under Section 378 CrPC and in the case of a victim as per proviso to Section 372. In the case of an appeal from any other order i.e. not an order of conviction or acquittal, the High Court can either alter or reverse such order under clause (d). The High Court has also the power to make an amendment or pass any consequential or incidental order that may be just or proper in any of the above situations. However, there are two provisos to Section 386. The first proviso states that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement. The second proviso states that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing that order for sentence under appeal.

22. Some judgments of this Court on the interpretation of Section 386 CrPC may be referred to at this stage.

22.1 In ***Sahab Singh vs. State of Haryana, AIR 1990 SC 1188 ("Sahab Singh")*** seven appellants were convicted by the learned Additional Sessions Judge, Sonepat on three counts and sentenced as follows:

(a) rigorous imprisonment for one year under Section 148, IPC;

(b) rigorous imprisonment for six months under Section 323/149, IPC; and

(c) imprisonment for life and a fine of Rs. 200 under Section 302/149, IPC.

All the said substantive sentences were directed to run concurrently.

The seven appellants preferred an appeal against the order of conviction and sentence passed by the trial court. The High Court while dismissing their appeals clarified that their conviction were on six counts and altered the fine awarded under Section 302/149 IPC from Rs. 200/- to Rs. 5,000/- in respect of each appellant per count, i.e., Rs. 30,000/- per appellant. Being aggrieved by the enhancement of fine the appellant preferred their appeal before this Court on the

question of enhancement only. While discussing Sections 374 and 401 CrPC this Court observed that on a co-joint reading of Section 377, 386, 397 and 401, if the State is aggrieved about the inadequacy of the sentence, it can prefer an appeal under Section 377 (1) CrPC. The failure on the part of the State to prefer an appeal does not, however, preclude the High Court from exercising *suo motu* power of revision under Section 397 read with Section 401 CrPC since the High Court itself is empowered to call for the record of the proceeding of any court subordinate to it. Sub-section (4) of Section 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that sub-section cannot stand in the way of the High Court exercising revisional jurisdiction *suo motu*. But before the High Court exercises its *suo motu* revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice and is given an opportunity of being heard on the question of sentence wither in person or through his advocate. The revisional jurisdiction cannot be exercised to the prejudice of the convict without putting him on guard that it is proposed to enhance the sentence imposed by the trial court. Discussing the facts of the said case, it was noted that the accused convict had filed their appeals, while no appeal had been filed by the state against the sentence awarded by the trial court on the ground of its inadequacy *vis-à-vis* Section 302/149 IPC nor did the High Court exercise *suo motu* revisional powers under Section 397 read with Section 401 CrPC. If the High Court intended to enhance the sentence the proper course was to exercise *suo motu* powers under Section 397 read with Section 401 CrPC by issuing notice of enhancement and hearing the convicts on the question of inadequacy of sentence. Without following such procedure, it was not open to the High Court in the appeal filed by the convicts to enhance the sentence by enhancing fine as this would be without jurisdiction. On this ground the appeals were allowed and the enhanced fine imposed by the High Court set aside and fine imposed by the trial court was restored and direction was issued to refund the additional fine, if paid.

22.2 In ***Govind Ramji Jadhav vs. State of Maharashtra, (1990) 4 SCC 718 ("Govind Ramji Jadhav"),*** the question was whether the High Court had jurisdiction to enhance the sentence without

issuing notice and affording to the appellant an opportunity of showing cause against such enhancement of the sentence in the absence of an appeal by the State for enhancement of sentence on the ground of inadequacy. The appellant therein had preferred criminal appeal against the conviction and sentence before the Bombay High Court, Aurangabad Bench. The High Court neither issued notice to the appellant therein nor afforded him any opportunity of showing cause against the said enhancement while enhancing the sentence. There was no appeal for the said enhancement of sentence under Section 377 CrPC on the ground of its inadequacy. It was observed that the High Court enjoys the power of enhancing the sentence either in exercise of its revisional jurisdiction under Section 397 read with Section 401 or its appellate jurisdiction under Section 377 read with Section 386(c) CrPC subject to proviso (1) and (2) to Section 386. That while exercising its revisional jurisdiction under Section 397 read with Section 401 CrPC for enhancement of sentence, opportunity must be provided to the accused.

Referring to certain judgments of this Court, it was observed that Section 386 CrPC deals with the powers of the appellate court in disposing of an appeal preferred under Section 374 and also in case of an appeal under Sections 377 or 378 CrPC. Under clause (c)(iii) of Section 386 CrPC, the appellate court may in an appeal for enhancement of sentence with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence so as to enhance or reduce the same. That in both the above situations, for the power of enhancement of the sentence, the accused must be given a reasonable opportunity to showing cause as contemplated under the first proviso to Section 386 as well under sub-section (3) of Section 377 CrPC. Rules of natural justice would mandate issuance of notice to the appellant and affording an opportunity to be heard on the proposed action for enhancement of sentence. Applying the aforesaid principle to the facts of the said case, it was observed that enhancement of sentence from three years to seven years for the conviction under Section 201 IPC was impermissible. Consequently, this Court set aside the High Court's order enhancing the

sentence and restored the order of the trial court imposing the sentence of three years rigorous imprisonment and the fine of Rs. 2500/- with the default clause.

22.3 In ***State of Himachal Pradesh vs. Nirmala Devi, (2017) 7 SCC 262,*** the issue was whether the High Court in its appellate jurisdiction under Section 386 CrPC could have set-aside the sentence of imprisonment as imposed by the trial court under Sections 328, 392 and 307 IPC by enhancing the amount of fine to Rs.30000/- from the fine of Rs.2000/- as ordered by the trial court. There were two concurring opinions expressed through Dr. A.K. Sikri and Ashok Bhushan, JJ.

22.3.1 Ashok Bhushan, J. while observing that in the said case the High Court had not altered the finding of guilt and only altered the sentence, considered the meaning and content of the statutory scheme as delineated by the words "altered the nature or the extent of the sentence, but not so as to enhance the same". The question therein was whether, while altering the sentence, the High Court is empowered to alter the sentence to an extent which could not have been awarded by the trial court after recording the finding of guilt. It was found that the High Court by its judgment had punished the accused only with fine after affirming the finding of guilt recorded, whereas the trial court after holding the accused guilty had sentenced him with rigorous imprisonment of two years with a fine of Rs.2000/- and in default of payment, further simple imprisonment for a period of three months for each of the offences under Sections 307, 328 and 392 IPC. The question was, whether, the High Court could have imposed a sentence only of a fine or it was incumbent on High Court to impose imprisonment as well as fine. After referring to a number of judgments, Ashok Bhushan, J. observed that the punishment provided in the aforesaid sections which contains the imprisonment ***and*** fine has to be read to mean that upon the offence being proved under Sections 397, 329 and 392 IPC, the punishment of imprisonment and fine are imperative.

22.3.2 The trial court had awarded sentence of two years' imprisonment with fine of Rs.2000/- for each of the aforesaid offences. Thus, it was held that, for the said offences, the punishment of only fine was incorrect as imprisonment is an imperative part of the punishment. It was observed that while exercising jurisdiction under Section 386(b)(iii) CrPC, the appellate court cannot alter the sentence of imprisonment and fine into a sentence only of fine which shall be contrary to the statutory scheme. This would be unfair and unjust. Therefore, setting-aside the sentence of punishment of imposing only fine by the High Court, the appeal filed by the State was allowed. The judgment of the High Court was set-aside and the judgment and sentence awarded by the trial court was restored. The respondent therein was directed to be taken into custody to serve the sentence as imposed by the trial court.

22.4 In ***Kumar Ghimrey,*** the appellant therein assailed the judgment of the Sikkim High Court dismissing his criminal appeal questioning the order of conviction and sentence passed by the Special Judge (POCSO Act, 2012) convicting the appellant therein under Sections 9/10 of the said Act and Section 341 IPC. The appellant therein was sentenced to undergo simple imprisonment for a period of seven years and to pay a fine of Rs.50,000/- under Sections 9/10 of the POCSO Act, 2012 and under Section 341 IPC the appellant was sentenced to undergo simple imprisonment for one month by the Special Court. Aggrieved by the judgment of the Special Court, the accused filed an appeal before the High Court. The High Court dismissed the appeal and the sentence under Sections 9/10 of the POCSO Act was converted into a sentence under Section 5(m) of the POCSO Act read with Section 6 of the said Act and the sentence was enhanced from seven years to ten years with a fine of Rs.5000/-.

22.4.1 Challenging the enhancement of punishment even when there was no appeal filed seeking such an enhancement and contending that the High Court ought not to have enhanced the sentence, the

appellant therein filed the appeal before this Court. While analyzing Section 386(b) CrPC, which deals with an appeal from conviction, this Court noted that the High Court had enhanced the sentence in the appeal filed by the accused challenging his conviction. It was observed by this Court that the High Court has generally the power to enhance the sentence in an appropriate case. The High Court can also exercise its powers under Section 401 CrPC which deals with the power of revision of the High Court in an appropriate case. The High Court under Section 401 CrPC can exercise any of the powers conferred on a Court of Appeal by Sections 386, 390, 391 or a Court of Session by Section 307 CrPC. It was observed that the High Court under Section 386(c) could have enhanced the sentence but the said course is permissible only after giving notice of enhancement. The power of the High Court has been accepted and reiterated by this Court in a large number of cases.

22.4.2 In this regard, reference was made to ***Surjit Singh vs. State of Punjab, 1984 Supp SCC 518; Govind Ramji Jadhav*** and ***Surendra Singh Routela vs. State of Bihar, (2002) 1 SCC 266***. While discussing these cases, this Court observed that the High Court had rightly affirmed the conviction of the appellant therein. On the facts of the said case, this Court refused to reduce the sentence from seven years to five years as sought by the accused. However, it set-aside the direction of the High Court insofar as it enhanced the sentence from seven years to ten years rigorous imprisonment and the sentence awarded by the Special Judge i.e. seven years under the POCSO Act and one month under Section 341 was maintained.

22.4.3 We find that the above judgment was a case of enhancement of sentence by the High Court in an appeal filed by the accused and this Court by its judgment maintained the sentence of seven years

imposed by the Special Judge while setting aside the direction of the High Court insofar as it enhanced the sentence from seven years to ten years rigorous imprisonment. This Court observed that the High Court enhancing the sentence from seven years to ten years was not in accordance with the procedure prescribed.

23. The question for consideration in this case is, whether, in an appeal against conviction, the appellate court could have directed enhancement of the sentence in an appeal filed by the accused. Under clause (b) of Section 386 CrPC, firstly, the appellate court can no doubt alter the findings and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such appellate court or committed for trial. Secondly, the appellate court can also alter the findings but maintain the sentence. Thirdly, the appellate court can, in an appeal from a conviction, with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence but not so as to enhance the same. A plain reading of this would imply that in an appeal against conviction which is obviously filed by the accused, the challenge could be two-fold: *firstly,* it could be against the conviction itself in which case there is a challenge to the sentence also; and *secondly,* the challenge could be only to the sentence while accepting the conviction. In other words, the challenge would also be only for reduction of the sentence. The question is, whether, in an appeal challenging the conviction and sentence, the appellate court could, while affirming the conviction enhance the sentence imposed by the trial court by directing that the same had to be with reference to other statutory provisions. There is no doubt that the appellate court while maintaining the conviction can reduce the sentence and grant partial relief to an accused. But in an appeal filed by the appellant-accused, can the appellate court not only affirm the conviction but go a step further and seek to enhance the sentence than what had been imposed by the trial court. It cannot be lost sight of that in an appeal filed by the accused, the appellant-accused is, at best, seeking a reversal of the conviction as well as setting aside of the sentence and the least that the appellant-accused can expect is even while the conviction is affirmed, the sentence could be maintained, if not reduced.

24. Thus, in an appeal filed by the appellant-accused against the judgment of the conviction and sentence, can the accused be left worse-off while the conviction is affirmed by the appellate court exercising appellate jurisdiction by enhancing the sentence? In such an event, the appellant-accused would be better off, if he either withdraws his appeal or, not to file an appeal at all !

25. An appeal by an accused/convict is not only a valuable statutory right but also a constitutional right in criminal cases. In ***AR Antulay vs. RS Nayak, AIR 1988 SC 1531, ("Antulay"),*** the majority of a seven-Judge Bench (5:2) observed that the creation of a right to an appeal is an act which requires legislative authority, neither an inferior court nor the superior court nor both combined can create such a right, it being one of limitation and extension of jurisdiction. In the said case, it was observed that the withdrawal of the trial under progress before a trial court and its transfer to a Special Court of the High Court resulted in the appellant therein losing his right of appeal. That a right of appeal is an invaluable right, particularly, for an accused who cannot be condemned eternally by a trial judge, without having a right to seek a re-look of the trial court's judgment by a superior or appellate court.

26. The right to prefer an appeal is not only a statutory right but also a constitutional right in the case of an accused because an accused has a right to not only challenge a judgment on its merits, namely, with respect to the conviction and sentence being imposed on him but also on the procedural aspects of the trial. An accused can also question procedural flaws, impropriety and lapses that may have been committed by the trial court in arriving at the judgment of conviction and imposition of sentence in an appeal filed against the same.

    It then becomes the duty of the appellate court to consider the appeal from the perspective of the accused-appellant to see if he has a good case on merits and to set aside the judgment of the trial court and acquit the accused or to remand the matter for a re-trial in accordance with law or reduce the sentence while maintaining the conviction or, in the alternative, to dismiss the appeal.

27. In our considered view, the appellate court, in an appeal filed by the accused cannot, while maintaining the conviction, enhance the sentence. While exercising its appellate jurisdiction at the instance of the convict, the High Court cannot act as a revisional court,

particularly, when no appeal or revision has been filed either by the State, victim or complainant for seeking enhancement of sentence against accused.

27.1 While we have analysed Section 386 CrPC which deals with the right of a party including an accused to file an appeal, we may peruse Section 401 CrPC which deals with the revisional powers of the High Court which is extracted as under:

> "**401. High Court's powers of revision.—**(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.
>
> (2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one conviction.
>
> (4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.
>
> (5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of Justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

27.2 Sub-section (4) of Section 401 CrPC states that where under the CrPC an appeal could have been filed and has not been filed then no proceeding by way of revision could be entertained at the instance of the party who could have appealed. This means that if a State, complainant or the victim who has the right to file an appeal does not opt to do so then the High Court cannot entertain a revision at their behest. Also, if an appeal lies under the CrPC but an application for revision has been made to the High Court by any person under an erroneous belief then the High Court can treat the application for revision as petition of appeal and deal with the same accordingly. What is the pertinent is that under Section 401 CrPC, the High Court is not authorised to convert the findings of acquittal into one of conviction by exercise of revisional jurisdiction. This salutary principle can be extended to also mean that the High Court cannot extend the sentence imposed by a trial court on conviction to enhance sentence in an appeal filed by the accused/convict. Thus, in sum and substance, it is observed that in an appeal filed by the accused seeking setting aside of the conviction of sentence, the High Court cannot exercise its revisional powers and while affirming the conviction, direct for enhancement of sentence where appeal could have been filed by the State, complainant or the victim and has not been filed. Therefore, where an appeal has been filed by the accused challenging the conviction and the sentence, the revisional jurisdiction cannot be exercised by the High Court so as to remand the matter to the trial court for the purpose of enhancement of the sentence.

28. The difference between an appellate jurisdiction and revisional jurisdiction are well known. The same could be briefly re-visited by bearing in mind the factual aspects of this case.

28.1 According to ***Black's Law Dictionary, Ninth Edition***, an appeal is a proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court's or agency's decision to a higher court for review and possible reversal. According to ***P Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition, Volume–1,*** an appeal is a proceeding where the higher forum reconsiders the decision of a lower forum, on questions of fact and questions of law,

with jurisdiction to confirm, reverse, modify the decision or remand the matter to the lower forum for fresh decision in terms of its directions. ***[James Joseph vs. State of Kerala, (2010) 9 SCC 642, para 19(i)].***

28.2 In its natural and ordinary meaning, the word 'appeal' means a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum. [***Bolin Chetia vs. Jagdish Bhuyan, AIR 2005 SC 1872 : (2005) 6 SCC 81].*** An appeal in legal parlance is held to mean the renewal of a cause from an inferior or subordinate to a superior tribunal or forum in order to test and scrutinise the correctness of the impugned decision. It amounts in essence and pith to a complaint to a higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set right. ***Chautala Workers Co-op Transport Society Ltd. vs. State of Punjab, AIR 1962 Punj 94 : 100.***

28.3 There is an essential distinction between an appeal and a revision. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. ***State of Kerala vs. Charia Abdulla & Co, AIR 1965 SC 1585.***

28.4 The distinction between 'appellate jurisdiction' and 'revisional jurisdiction' is well known though not well defined. Ordinarily, appellate jurisdiction involves a rehearing, as it were, on law as well as on facts and is invoked by an aggrieved person. Ordinarily, again, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without it being invoked by a party. The extent of revisional jurisdiction is defined by the statute conferring such jurisdiction. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising tribunal within the bounds of their authority to make them act according to the procedure established by law and according to well defined principles of justice.

28.5 According to ***Black's Law Dictionary, Ninth Edition***, revision is a re-examination or careful review for correction or improvement. A revision can occur only if it will not materially prejudice the accused. According to ***P Ramanatha Aiyar's Advanced Law Lexicon, 6th Edition, Volume 4***, revision is an act of examining again in order to remove any defect or grant relief against the irregular or improper exercise or non-exercise of jurisdiction by a lower Court. The expression 'revision' is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression 'appeal'. ***[Sri Raja Lakshmi Dyeing Works vs. Rangaswamy, (1980) 4 SCC 259 : 262, para 3]***

28.6 In law, 'revision' stands on a different footing from an 'appeal'. In a revision, the revising authority is not bound to examine the facts for itself but is entitled to give its decision on points of law alone, whereas in an appeal, the whole case is before the appellate authority, which must enter into questions both of fact and law. Also in a revision, the person seeking revision has mere restricted rights than one who prefers an appeal. Whereas an appeal confers statutory vested right on the litigant which accrues the moment the proceedings in question are instituted, the right of revision is merely a discretionary power to be exercised by the revisional court according to the circumstances of the case or exigencies of the situation. A person cannot as a matter of right claim the proceedings to be revised.

29. We have examined the scope of powers that can be exercised by an appellate court under Section 386 CrPC in juxtaposition with Section 401 CrPC which deal with the appellate and revisional powers of the High Court respectively. We have considered the judicial dicta. On consideration of the judgments of this Court in ***Nadir Khan*** and ***Eknath Shankarrao Mukkawar***, we find that even while exercising appellate powers under Section 377 CrPC, there cannot be exclusion of revisional jurisdiction of the High Court to act *suo motu* for enhancement of sentence in appropriate cases and what is an appropriate case has to be left to the discretion of the High Court. Further, the High Court can *suo motu* call for the record of proceedings of any inferior criminal court under its jurisdiction and exercise revisional powers. The observations of this Court in ***Sahab***

Singh and ***Govind Ramji Jadhav*** have to be juxtaposed in light of their peculiar facts and in the background of the observations of this Court in ***Nadir Khan*** and ***Eknath Shankarrao Mukkawar***.

29.1 However, in this case, our focus of attention is whether, in the absence of any appeal or revision filed by the State, a complainant or a victim in a particular case and when the appeal has been filed only by the accused assailing the judgment of conviction and sentence, the High Court can exercise its revisional jurisdiction while dealing with an appeal filed by the accused/convict. In other words, when an accused is seeking setting-aside of a judgment of conviction and sentence, can the High Court, in the absence of there being any challenge to the same from any other quarter, *suo motu* exercise its revisional power and thereby condemn the accused by awarding an enhancement in his sentence. Even if an opportunity of hearing is given to such an accused/convict, we do not think that the High Court can exercise its revisional jurisdiction under Section 401 CrPC while exercising its appellate jurisdiction in an appeal filed by the accused/convict in the High Court. All that the High Court can do is to set-aside the judgment of conviction and sentence and acquit the accused, or while doing so, order for a retrial or, in the alternative, while maintaining the conviction, reduce the sentence. In other words, in an appeal filed by the accused/convict, the High Court cannot *suo motu* exercise its revisional jurisdiction and enhance the sentence against the accused while maintaining the conviction.

29.2 In this regard, we find that the expression "but not so as to enhance the same" in sub-clause (iii) of clause (b) of Section 386 CrPC throws some light on the view we have taken, which reads as under:

> **"386. Powers of the Appellate Court.—**
>
> xxx
>
> (b) in an appeal from a conviction—
>
> xxx
>
> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same"

Although the said expression "but not so as to enhance the same" is in the context of sub-clause (iii) of clause of (b) of Section 386, the spirit of the said provision must be understood, inasmuch as while maintaining the finding of conviction, the High Court cannot exercise its *suo motu* revisional jurisdiction under Section 401 CrPC and enhance sentence awarded to the accused/appellant.

29.3 The trial courts should also be very careful while passing an order of sentence inasmuch as the sentence imposed must be concomitant with the charge(s) framed and the findings arrived at while arriving at a judgment of conviction. If the charges are proved beyond reasonable doubt against an accused then, the sentence following a finding and judgment of conviction must be appropriate to the nature of the charges which are proved by the prosecution.

30. By placing reliance on ***Attorney General vs. Herman James Sillem, (1864) 10 HLC 704,*** it was further observed in ***Antulay*** that directions issued by this Court earlier with regard to the very same accused dated 16.02.1984 had violated fundamental right guaranteed under Articles 14 and 21 of the Constitution. Article 14 of the Constitution provides, *inter alia,* that there shall be equal protection of the laws within the territory of India. Moreover, Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. The aforesaid observations in ***Antulay*** are apposite to the present case also by way of analogy. In the instant case, the accused-appellant who had the right to file an appeal against the conviction and sentence could not have been worse-off and be at the receiving end when he had, in fact, sought for setting aside of the conviction and the sentence, by being told by the appellate court (High Court herein) that not only would the conviction be confirmed but the sentence would also be enhanced.

31. In this regard, it must be noted that for exercise of powers of the appellate court for enhancement of sentence in an appeal filed either by the State or the complainant or the victim, the CrPC provides that the appellate court can reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court competent to try the offence or alter the finding by maintaining the sentence or

with or without altering the finding, alter the nature or the extent, of the sentence but not so as to enhance the same. Thus, the power to enhance the sentence can be exercised by the appellate court only in an appeal filed by the State, victim or complainant provided the accused has had an opportunity of showing cause against such enhancement. It is further provided that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order of sentence under appeal. Therefore, even in an appeal for enhancement of sentence, unless the conditions prescribed in the form of provisos are complied with by the appellate court, there cannot be an enhancement of sentence. Obviously in such an appeal for enhancement of sentence, the convict or the accused is the respondent and therefore there cannot be enhancement of sentence unless the accused or convict has been heard.

32. However, under the scheme of Section 386 *vis-à-vis* in an appeal for enhancement of sentence there can also be an acquittal of the accused as per sub-clause (i) of clause (c) of Section 386. But, on the other hand, in an appeal from a conviction, it has been expressly stated that there cannot be enhancement of the sentence. Therefore, while in an appeal for enhancement of sentence filed by the State, the accused can make out a case for acquittal or discharge or retrial, in the case of an appeal from conviction the respondent in such an appeal, namely the State or the victim or the complainant cannot seek enhancement of the sentence than what has been awarded by the trial court. The above distinction can be explained by way of a latin maxim which has been discussed by Ujjal Bhuyan, J., while in the Bombay High Court[1], in the following words:

> "40. In this connection we may refer to the maxim *reformatio in peius*. It is a latin phrase meaning a change towards the worse i.e., a change for the worse. As a legal expression it means that a lower court judgment is amended by a higher court into a worse one for those appealing it. In many jurisdictions, this practice is forbidden ensuring that an appellant cannot be placed in a worse position as a result of filing an appeal. When the above phrase is prefixed

1 Jyoti Plastic Works P. Ltd. v. UOI & Others, 2020 SCC Online Bom 2276

> by the words 'no' or 'prohibition', which would render the maxim as no reformatio in peius or prohibition of *reformatio in peius*, it would denote a principle of procedure as per which using a remedy available in law should not aggravate the situation of the person who avails the remedy. In other words, a person should not be placed in a worse position as a result of filing an appeal. No reformatio in peius or prohibition of reformatio in peius is a part of fair procedure and thus by extension can also be construed as part of natural justice. It is not only a procedural guarantee but is also a principle of equity."
>
> (underlining by us)

33. The rationale of the above can be explained in simple language by stating that no appellant by filing an appeal can be worse-off than what he was. That is exactly what we are seeking to reiterate in our judgment having regard to the facts of the present case.

34. In the instant case, the appellant-accused was charged with offence under Section 3(a) punishable under Section 4 of the POCSO Act and under Section 363-A, 376 of the IPC and Section 3(1)(xii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention and Atrocities) Act. But the appellant herein was convicted by the Special Court vide order dated 24.11.2014 as under:

> "**ORDER**
>
> Accused Sachin Shivaji Dhongade is hereby convicted u/Sec. 235(2) of the Code of Criminal Procedure, for the offence under Sec. 3(a) punishable under Sec. 4 of the Protection of Children from Sexual Offences Act, 2012, and sentenced to suffer Rigorous Imprisonment for seven years and to pay fine of Rs. 2000/- (Rs. Two thousand) and in default to undergo rigorous imprisonment for two months.
>
> The accused is hereby acquitted under Section 235(1) of the Code of Criminal Procedure, for the offence punishable under Sec. 363-A of the Indian Penal Code and under Section 3(1)(xii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

> However, the offence under Section 376 of Indian Penal Code is merged in the offence u/Sec. Sec. 3(a) punishable under Sec. 4 of the Protection of Children from Sexual Offences Act, 2012, and, therefore, no separate punishment is awarded.
>
> The accused is in jail since 23.09.2013; therefore, set off be given for the period which he has already undergone, under Sec. 428 of Criminal Procedure Code"

34.1 In Criminal Appeal No.30 of 2015 filed by the accused, the High Court while maintaining the findings recorded by learned Special Judge to the effect that the accused had committed penetrative sexual assault on the victim however, found that Section 5(m) and Section 6 of the POCSO Act and Section 376(2)(i) of the IPC were applicable although no charges were framed regarding those offences alleged against the appellant-accused by the High Court. In fact, the show-cause notice was issued to the appellant by the High Court as to why he should not be sentenced as per Section 6 of the POCSO Act and for the offence under Section 376(2)(i) of the IPC. The aforesaid proposed step was objected to by the learned counsel for the appellant by contending that it amounted to alteration/modification of the charge which was impermissible in the accused's appeal. Plea was also made for hearing on the point on the next date. Hence, a direction was issued to list the case on 02.03.2016 and that the accused, who was in Central Jail, Nagpur was to be produced before the Court on 02.03.2016 at 11.30 a.m. On 02.03.2016, the order recorded is as follows:

> "In view of the above, I maintain the findings recorded by the learned Special Judge that the accused has committed penetrative sexual assault on the victim. However, considering the provisions of Section 5(m) and Section 6 of the POCSO Act, 2012 and Section 376(2)(i) of the Indian Penal Code, show cause notice is given to the appellant as to why he should not be sentenced as per Section 6 of the POCSO Act, 2012 and for the offence under Section 376(2)(i) of the Indian Penal Act.

> Shri Anuj Hazare, learned Advocate has submitted that the course proposed by this Court cannot be adopted as it will amount to altering/modifying the charge and it is not permissible. The appellant would be granted hearing on the point on the next date and the submission made by the learned Advocate for the appellant will be considered while dealing with the point.
>
> List the appeal for further hearing on the point on which notice is given to the appellant, on 02-03-2016. It is stated that the appellant is in Central Jail, Nagpur. The appellant shall be produced before this Court on 02-03-2016 at 11-30 a.m."

34.2 Thereafter, on 08.03.2016, it was recorded by the High Court that there was a failure on the part of the learned Special Judge to consider Sections 5(m) and 6 of the POCSO Act and Section 376(2)(i) of the IPC by losing sight of the fact that the accused had filed the appeal assailing the conviction and sentence imposed on him. The matter was remitted to the learned Special Judge for considering the imposition of sentence for the offence punishable under the aforesaid Sections. The operative portion of the order of the High Court dated 26.02.2016 reads as under:

> "Hence, the following order:
>
> i) The conviction of the appellant for the charge that the appellant has committed penetrative sexual assault on the victim aged 4 years is confirmed.
>
> ii) It is recorded that the appellant is convicted commission of the aggravated penetrative sexual assault as per Section 5 (m) of the Protection of Children from Sexual offences Act, 2012 and Section 376(2)(i) of the Indian Penal Code.
>
> iii) It is held that the appellant is liable for aggravated penetrative sexual assault under Section 6 of

the Protection of Children from Sexual Offences Act; 2012 and tor rape under Section 376(2)(i) of the Indian Penal Code.

iv) As per Section 6 of the Protection of Children from Sexual Offences Act, 2012 the minimum sentence is of ten years which may extend to imprisonment for life. Similarly, under Section 376(2)(i) of the Indian Penal Code, the minimum sentence is ten years which may extend to imprisonment tor life.

v) The matter is remitted to the learned Special Judge to consider the quantum of sentence which is to be imposed on the appellant. Needless to say that the learned Special Judge shall hear the appellant/accused on the point of quantum of sentence.

The appeal is disposed of in the above terms."

34.3 On remand, the learned Special Judge on 28.04.2016 in continuation of his judgment and in the view taken by the High Court recorded that the accused was directed to be produced from Central Jail, Nagpur on 25.04.2016 and he was heard on the quantum of sentence as per the operative portion of the order dated 28.04.2016 which reads as under:

"**ORDER**

1. The accused Sachin Shivaji Dhongade is heareby convicted of the offence under Section 5 (m) punishable under Section 6 of the protection of Children from Sexual Offence Act, 2012 Vide Section 235(2) of Cr.PC and sentenced to suffer life imprisonment and to pay fine of Rs. 5000/- (Five thousand) in default of suffer further rigorous imprisonment for six months.

2. The accused Sachin Shivaji Dhongade is also convicted of the offence punishable under section 376(2) (i) of the Indian Penal Code vide section 235 (2) of Cr.PC, but no separate sentence is provided.

> 3. The period of detention, if any, undergone by the accused during investigation, inquiry, or trial shall be set off against the term of impugned imposed on him vide Sec. 428(1) of the Code of Criminal Procedure.
>
> 4. The copy of order be supplied free of cost to the accused.
>
> 5. Amount of Rs. 2000/- already paid as fine.
>
> Hence accused is required to pay only Rs.3000/- towards fine."

34.4 Thus, the appellant-accused was convicted under Sections 5(m) and 6 of the POCSO Act to suffer life imprisonment and to pay fine of Rs.5,000/- in default of suffer further rigorous imprisonment for six months and also convicted for offence punishable under Section 376(2)(i) of the IPC for which no separate sentence is provided. This was in *lieu* of the earlier order of sentence imposed by the Special Court. In an appeal filed by an accused against a judgment of conviction and sentence, he cannot be remitted to the trial court to impose a higher sentence on him !

34.5 Such an order was passed by the Special Court simply in compliance with the order of the High Court. When the appellant-accused appealed against this order in Criminal Appeal No.311 of 2021 before the Division Bench of the High Court, this time, the Division Bench of the High Court realised that orders dated 26.02.2016 and 08.03.2016 in Criminal Appeal No.30/2015 had to be assailed by way of a special leave petition before this Court. The aforesaid criminal appeal was listed before the Division Bench on 17.02.2025 and was adjourned by two weeks.

34.6 In the above facts and circumstances, we find that the learned Single Judge of the High Court was not right in remanding the matter to the Special Court for enhancing the sentence to be imposed on the appellant-accused, that too, in an appeal filed by accused seeking setting aside of a judgment of conviction and sentence imposed on him. Consequently, the Special Court was not right in enhancing the sentence from rigorous

imprisonment for seven years, which was earlier awarded, to life imprisonment by following the aforesaid direction. Noting this aspect of the matter, the Division Bench of the High Court rightly indicated that the earlier judgment of the High Court as well as the subsequent order enhancing the sentence passed by the Special Court ought to be assailed before this Court, and it has been rightly assailed through the Supreme Court Legal Services Committee.

35. It is noted that the appellant herein, while initially subjected to imprisonment of seven years, has completed actual sentence of eleven years and eight months. We find the orders of the High Court and consequently of the Special Court to be erroneous and the same are liable to be set aside. In these circumstances, the impugned judgment dated 26.02.2016 and subsequent orders passed therein on 02.03.2016 as well as the order dated 08.03.2016 in Criminal Appeal No.30/2015 are set aside. Consequently, the order of the Special Court dated 28.04.2016 passed in Special (POCSO) Case No.5/2013 convicting and sentencing the appellant herein to suffer life imprisonment and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months is set aside.

36. Now, what follows is that the original judgment of the Special Court convicting the appellant and imposing a sentence of rigorous imprisonment for seven years survives. However, the unfortunate reality is that in view of the impugned judgment and orders, the appellant has undergone eleven years of actual sentence.

37. In the circumstances, we find that to do the complete justice in the matter, instead of remanding the Criminal Appeal No.30/2015 on the file of the High Court, we exercise our powers under Article 142 of the Constitution of India and restore the original sentence imposed on the appellant herein which is seven years of imprisonment. Since the appellant has completed eleven years and eight months of incarceration i.e. a sentence more than that originally imposed on him, we find that the ends of justice would be met if instead of rehearing his appeal on the original sentence, the matter is concluded and the appellant is released from jail forthwith. Ordered accordingly.

38. Consequently, the Criminal Appeal No.30/2015 pending on the file of the High Court of Judicature at Bombay Nagpur Bench, Nagpur is rendered infructuous and therefore, the same stands disposed of.

39. Resultantly, the respondent-State and Superintendent, Nagpur Central Jail, Maharashtra are directed to release the appellant from the jail forthwith.

40. The appeals are allowed and disposed of in the aforesaid terms.

Result of the case: Appeals disposed of.

†*Headnotes prepared by:* Nidhi Jain