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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 534/2022 & CRL.M.(BAIL) 1277/2022**

DEEPAK

..... Appellant

Through: Mr. Himansh Anand Gupta
(DHCLSC) and Mr. Ishwar Raj
Chandra, Advocates.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Ajay Vikram Singh, APP with
W/SI Khiloni, PS: ACB and SI
Kapuanthang, PS: Janakpuri.

+ **CRL.A. 277/2023 & CRL.M.(BAIL) 446/2023**

ROHIT

..... Appellant

Through: Mr. Shivam Sharma, Mr. Balram,
Mr. Dev Bharti, Mr. Rampal,
Ms. Megha Sharma and Mr. Akshay,
Advocates.

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Ajay Vikram Singh, APP with
W/SI Khiloni, PS: ACB and SI
Kapuanthang, PS: Janakpuri.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

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11.03.2024

1. Separate appeals under Section 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') have been preferred on behalf of appellants Deepak and Rohit, against judgment dated 20.08.2022 and order on sentence dated 09.09.2022 passed by learned ASJ (POCSO)-06, West District, Tis



Hazari Courts, Delhi in FIR No. 954/2015, under Section 328/342/363/376D/506 IPC & Section 6 POCSO registered at PS: Janakpuri, whereby, the appellants have been sentenced to undergo:-

- (a) RI for 20 years each and fine of Rs. 20,000/- each for offence punishable under Section 6 of POCSO Act (in default of payment of fine, to undergo SI for 24 months);
- (b) RI for 05 years each and fine of Rs. 2,000/- each for offence punishable under Section 366 IPC;
- (c) Appellant Rohit has also been sentenced to undergo RI for 03 years and fine of Rs. 1,000/- for offence punishable under Section 328 IPC (in default of payment of fine, to undergo SI for 06 months); and RI for 01 year for offence punishable under Section 506 IPC.

2. Learned counsel for the appellants submits that prior to amendment of Section 6 of POCSO Act, w.e.f. 16.08.2019, the aggravated penetrative sexual assault was punishable with rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life and shall also be liable to fine. However, the aforesaid aspect is stated to have escaped the notice of learned Trial Court and appellants have been sentenced as per amended provisions of Section 6 of POCSO Act with rigorous imprisonment of 20 years each. It is emphasized that since the disposal of appeals is likely to take some time and appellants have been in custody for about 5 to 8 years, the sentence imposed on appellants by learned Trial Court assumes significance for purpose of suspension of sentence under Section 389 Cr.P.C., as it is in violation of applicable provisions of law.

It is pointed out that if the appellants were sentenced with rigorous



imprisonment for 10 years as per applicable un-amended provision of Section 6 of POCSO Act, they are liable to be considered for release on bail. It is further prayed that the case be remanded back to learned Trial Court for hearing afresh on point of sentence, with liberty to challenge the same in appeal as it is in violation of Article 21 of the Constitution of India.

3. On the other hand, learned APP for State submits that since the learned Trial Court could have also imposed sentence of imprisonment for life prior to amendment on 16.08.2019, the sentence may be looked into at the time of appeal. Further, the benefits of suspension of sentence may not be considered at this stage.

4. Admittedly, post-amendment of Section 6 w.e.f. 16.08.2019, the punishment of aggravated penetrative sexual assault under Section 6 of POCSO Act, 2012 has been enhanced to 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. Learned Trial Court appears to have inadvertently overlooked that the offence was committed on 01.08.2015 and as such was punishable under Section 6 prior to amendment with rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life.

5. It is well settled that no person shall be convicted of any offence except for violation of law in force, at the time of commission of the act charged as an offence prohibits, nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In view of above, if the amendment creates new offences or enhances punishment for a particular type of offence, no person



can be convicted under *ex post facto* law, nor can the enhanced punishment be prescribed, in respect of an act committed prior to such amendment. Reliance in this regard may be further placed upon SLP (Criminal) No. 9597/2020 titled as ***State of Telangana vs. Polepaka Praveen @ Pawan***, wherein, it was observed that retrospective effect cannot be granted when the punishment is to operate prospectively and logically so.

6. As per nominal roll, appellant Deepak has undergone sentence for 04 years and 17 days and earned remission of 01 month 10 days. The un-expired portion of the sentence is reflected as 15 years 10 months and 03 days as on 04.09.2023. So far as, appellant Rohit is concerned, he has undergone sentence for 07 years 09 months and 06 days and earned remission of 02 months 12 days. The un-expired portion of the sentence is reflected as 12 years and 12 days as on 11.07.2023. The accused have thereafter, been in custody for about 09 months.

The rights of the convicts for purpose of suspension of sentence having been in custody for about 05 and 08 years need to be considered in the peculiar facts and circumstances of the case, since disposal of appeal is likely to take some time and order on sentence *prima facie* appears to have been passed overlooking the punishment provided in Section 6 of POCSO Act, prior to amendment.

This Court is persuaded to observe that the learned Trial Court appears to have passed the sentence as per amended Section 6 of POCSO Act, 2012, since in case, the punishment was proposed more than the minimum of sentence of 10 years as provided prior to amendment, learned Trial Court was mandated to examine the assessment of factors of crime test, criminal test and comparative proportionality as observed in ***State of Madhya Pradesh vs.***



Udham & Ors., (2019) 10 SCC 300. Also, the absence of reference to date of crime (i.e. 01.08.2015) and sentence as provided under Section 6 prior to amendment on 16.08.2019 in the impugned order, leads to an inference that sentence has been passed as per amended provision of Section 6 of POCSO Act, 2012.

7. The matter is accordingly remanded back to the learned Trial Court to consider and pass order on sentence afresh in terms of Section 6 of POCSO Act, as it existed prior to amendment, after hearing the convicts, since the offence was allegedly committed on 01.08.2015. The order shall be passed within a period of two weeks of receipt of this order.

8. Learned counsel for appellant Deepak further presses for suspension of sentence and bail on the ground that appellant has been convicted under Section 6 of POCSO Act only with aid of Section 34 IPC, and no allegations of sexual assault were made against him. It is urged that appellant Deepak has been only attributed with role of having accompanied the prosecutrix and convict Rohit, who were known to each other.

Considering the totality of the facts and circumstances and evidence on record, this Court is of the considered opinion that since disposal of the appeal is likely to take some time and the matter has been remanded back to learned Trial Court, Deepak be admitted to bail till next date of hearing fixed before this Court on furnishing personal bond in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court.

Appeals be listed on 15.04.2024.

Appellants are further given liberty to file / take additional grounds in appeal, if so advised, against the fresh order on sentence to be passed by the



learned Trial Court.

Applications under Section 389 Cr.P.C. are accordingly, disposed of. A copy of this order be forwarded to learned Trial Court for information and compliance.

Nothing stated herein shall tantamount to any expression of opinion on merits of the case.

A copy of this order be forwarded to Superintendent Jail and learned Trial Court for information and compliance.

A copy of this order be also kept in connected appeal.

ANOOP KUMAR MENDIRATTA, J.

MARCH 11, 2024/R