Monu vs State Of U.P. on 31 January, 2025

Bench: Saumitra Dayal Singh, Gautam Chowdhary

HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2025:AHC:14721-DB

Court No. - 45

Case :- CRIMINAL APPEAL No. - 5774 of 2021

Appellant :- Monu

Respondent :- State of U.P.

Counsel for Appellant :- Mohd Zubair,Nasira Adil,Sadrul Islam Jafri,Sr. Advocate

Counsel for Respondent :- G.A.

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Dr. Gautam Chowdhary,J.

1. Heard Sri N.I.Jafri, learned Senior Counsel assisted by Sri Sadrul Islam Jafri, learned counsel for the appellant, Sri Nagendra Kumar Srivastava, learned A.G.A. for the State and perused the lower Court record.

2. The present appeal arises from the Judgement and order dated 02.11.2021 passed by Sri Arvind Kumar Yadav-III, learned Additional District and Sessions Judge/Additional Special Judge, POSCO Court No.1, District Firozabad in P.S.T. No. 1946 of 2019 (State Vs. Monu), whereby the accused-appellant has been convicted and awarded sentence under Section 376-AB I.P.C. to undergo for life imprisonment along with fine of Rs. 50,000/- and in default in payment of fine to further undergo for additional imprisonment of one year.

3. The prosecution story emerges, on F.I.R. being lodged by "A" the father of the minor child "D" aged about 4/5 years disclosed to him by his wife "G", that "D" had been raped by the appellant at his residence on 08.06.2019 between 03:00 P.M. to 3:30 P.M.-where the appellant is alleged to have taken the victim "D" on the pretext to engage in some play activity with "D", who he knew from before, parties being landlord and tenant. The appellant is the son of the landlord of "A". The wife of "A" claimed to have seen the occurrence with her own eyes and she disclosed the same to her husband on the next day i.e. 09.06.2019 leading to the F.I.R. lodged by "A", in Case Crime 329 of 2019 under Section 376 A, B I.P.C. and Section 5/6 of POCSO Act, Police Station North (Uttar), District Firozabad.

4. The F.I.R. is Exhibit Ka-4. On 09.06.2019 recovery memo was prepared with respect to recovery of the underwear of "D" which is Exhibit Ka-2. "D" was subjected to medical examination both as to her age and as to injury. As to age, there is no doubt that "D" was less than 12 years being aged about 5 years on the date of occurrence. As to injury, "D" was subjected to external and internal medical examination on 09.06.2019 at about 09:24 P.M. by Dr. Kamlesh Verma (P.W.4) . In that report, it is recorded as below:-

" (INTERNAL GENITO-ANALE EXAMINATION)
1 (Mon's pubis) 2 (Labia Mojora) No injury is seen
3 (Labla Minora) 4 (Vwstibule) 5 (Hymem) 6
(Perineum) 7 (Vulva) No Injury is seen 8 (Vagins) 9
(Veginal Vault)) 10 (Veginal Fornix) 11
(Clitoris) No injury is seen 12 ¡ ¢ (Posterior Furchette) 13
£ (Fossa nevicularies) 14 □ (Peri urethral) 15
(Cervix) 16 ¥ (Ectocervix) 17 ƒ (Cervical
Orifice) 18 (Anus) 19 § (Recium) 20 (Urethra) 21
§ ¢ § ¢ (Under full GENERAI ANAESTHSIA)
( ) § ?

22 ¤ (Heamonhage/ other doscharge)" --NO

5. Also, suffice to note that no semen mark was noted thereon nor F.S.L. report disclosed any such evidence. Also, the vaginal smear slide did not detect the presence of spermatozoa. The medical report is Exhibit Ka-6.

6. Ultrasound report of "D" was also obtained on 11.06.2019. It was normal. According to the testimony of Dr. Kamlesh Verma (P.W.4), (as recorded at the trial), no allegation of sexual assault could be established. The vaginal slide report was also normal. It is described as Exhibit Ka-75 (It is not a part of paper book but is a part of the record).

7. More than 20 days thereafter, the statement of the victim was recorded under Section 164 Cr.P.C., on 01.07.2019. It is described as Exhibit Ka-2. We consider it appropriate to extract one sentence of that statement, which reads as under.

" ¤ □ “ «"

8. Investigation was completed and the case was committed for trial. The learned Sessions Court framed two charges against the accused-appellant which are as under:-

1. 08.06.2019 3.30 □ ¤
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2. □ , □ ¤ § §
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¤□ □ -5/6 ‹ ¤ □
« £ «

9. The appellant pleaded not guilty. Accordingly the trial commenced.

10. At the trial, "A" (P.W.1) has proved the F.I.R. in support of the occurrence reported by him. "A" admitted that he was not an eye-witness to the occurrence and the F.I.R. allegation emerged on the disclosure made to him by his wife "G". As to a blood mark noted on the under garment of "D", though allegation remained of it being caused as a result of the occurrence attributed to the appellant, at the same time, no other or further evidence emerged to support that allegation, inasmuch as Dr. Kamlesh Verma (P.W.4) proved the medical examination and stood by the medical opinion that there was no evidence of penetrative sexual suffered by "D" and there were no injuries found on the person of "D".

11. "D" (P.W.2) was examined. In her statement, she described the occurrence of bad touch by the appellant (on her private parts). It resulted in her suffering pain experiences. However, she did not make any other i.e. further allegation of penetrative sexual assault suffered by her.

12. Thereafter, Head Constable Ram Prakash (P.W.3) was examined to prove lodging of the F.I.R. His testimony is usual and does not call for any remark.

13. Dr. Kamlesh Verma (P.W.4) was examined. She specifically stated that neither "D" had suffered any internal injury nor any blood had let out as a result of any injury suffered in the occurrence reported against by the appellant. She further testified that the ultrasound report and slides were normal and there was no evidence to support penetrative sexual assault. On her cross examination, she further specified, no abrasion or contusion or cut or swelling or abnormality or any injury was noted on the person of "D". She further stated that no injury mark or foreign substance was found on the private parts of "D".

14. Thereafter, Dr. Naseem Ahmad, Senior Radiologist (P.W.5) was examined. He proved the X-Ray report as to the age determination and the ultrasound report.

15. Sri Satendra Singh Raghav (P.W.6) and Sri Anoop Kumar (P.W.7) the two Investigating Officers were also examined to prove the investigation.

16. Last "G" (P.W.8), the mother of "D" was examined. She did try to add to the statement of "D" inasmuch as according to her statement (during her examination in chief itself), she alleged to have seen the occurrence involving penetrative sexual assault suffered, by "D" wherein she further suffered bleeding.

17. The accused-appellant during his statement recorded under Section 313 Cr.P.C. denied the occurrence in entirety. He produced his brother Pradeep Gupta (D.W.1) as defence witness. The defence witness tried to establish that the dispute was otherwise i.e. a landlord-tenant dispute wherein the informant's side were the tenant. As to the occurrence, no evidence could be led to dispute the prosecution allegation arising on strength of ocular evidence.

18. In such circumstances the trial Court has believed the testimony of "D" (P.W.2) and 'G' (P.W.8) and reached a conclusion that the "D" was below 12 years of age, who had suffered aggravated penetrative sexual assault, amounting to rape under Section 376AB IPC read with Section 5(m) read with Section 6 of Protection of Children From Sexual Offences Act, 2012. Accordingly, the learned trial Court has awarded punishment of life imprisonment to the accused-appellant. He has remained confined in jail for than five years and six months since 10.06.2019.

19. Learned Senior Counsel for the appellant would submit, no real occurrence had taken place. The dispute was only a simple civil dispute involving tenancy rights (of the informant side), in the immovable property owned by the father of the present appellant. Only for reason of those disputes, the informant side has lodged a wholly false and frivolous prosecution against the appellant, to force the father of the appellant to settle that civil dispute. Alternatively, it has been submitted, if the entire prosecution story is taken to be true and duly proven, in absence of penetrative sexual assault, the occurrence will never travel beyond the ingredients of Section 7 of Protection of Children From Sexual Offences Act. In any case, it may never amount to rape under Section 376-AB IPC. In support of such submission heavy reliance has been placed on the statement of "D" recorded under Section 164 Cr.P.C. read with her statement recorded at the trial and unequivocally clear medical evidence that disproves the prosecution theory of penetrative sexual assault suffered by 'D'.

20. On the other hand, learned A.G.A. would submit, wholly credible prosecution evidence exists in the shape of statement of 'D' (P.W.2) and ocular evidence led by her mother "G" (P.W.8). Reference has also been made to the testimony of "A" (P.W.1), who is the father of the victim girl to submit that all ocular/oral evidence are wholly corroborated and consistent. No other conclusion may have been drawn by the learned trial Court except the guilt of appellant under Section 376AB I.P.C. As to the sentence, learned A.G.A. would submit, considering the fact that the appellant had attained majority and was aged about 30 years on the date of occurrence, whereas victim "D" was a vulnerable infant about five years of age, no leniency may be shown.

21. Having heard the learned counsel for the parties and perused the record, in the first place, we do recognize the principle that an infant remains vulnerable at the hands of those, whom it may trust. The appellant remains a person who qualifies that test. If guilty of the offence alleged, he may merit no leniency. At the same time, in the context of heavy criminal charge framed, rule of strict proof, calls for no exception. Once a person is charged of more heinous offence, the Court may remain ever vigilant to ensure that the rule of strict proof is actually and unscrupulously applied. Unless a person is found guilty of such heinous offence on the strict proof test, the society may be mislead that the accused has been meted justice-more out of emotive concerns and not on rational basis. The result would not be justice but retribution.

22. In the present case, the testimony of "A" (P.W.1) and "G" (P.W.8) suggests occurrence of aggravated penetrative sexual assault suffered by "D". At the same time, "A" (P.W.1) is not an eye witness. He has only disclosed to the police (by lodging the F.I.R.) and then he has only stated in the court, that which was disclosed to him by "G". That is his categorical stand noted in his statement recorded before the trial. Therefore, it would be erroneous to rely on his statement to reach a conclusion as to the occurrence. He only reported to the police and narrated in the court that it was not him but his wife "G", who saw the occurrence. Therefore, duplication of her statement would not add to the weight of evidence.

23. As to the testimony of "G" (P.W.8), no doubt she has categorically stated that she had seen "D" suffered aggravated penetrative sexual assault, caused by the accused-appellant. She elaborated that blood has also spilled in that occurrence. Thus, she specified that "D" had suffered injury on her private parts, in the occurrence.

24. However, as to the occurrence, the Court has the version of the victim "D" (P.W.2). She remained largely consistent, from beginning. In her statement recorded under Section 164 Cr.P.C., she clearly stated that the accused, i.e. the appellant had touched her private parts. At the trial, she further specified that the appellant had pressed with his private part on her private parts. At the same time, she did not make any statement either under Section 164 Cr.P.C. or at the trial as may allow the Court to reach a conclusion that penetration or insertion had been caused by the appellant. Her statement is clearly silent as to that critical aspect. Probably, and most likely, the child has spoken only the truth.

25. In such facts, as to the corroborative material, the medical examination report and the statement of Dr. Kamlesh Verma (P.W.4) remains vital. The medical report is categorical and is crystal clear. It admits of no doubt that no injury was suffered by "D" in the occurrence. Neither any cut nor any abrasion nor any contusion nor any swelling or abnormality was noted, either externally or internally on the person of 'D'. No trace of spermatozoa was found present on the person of the "D" or on her undergarments. In such circumstances, Dr. Kamlesh Verma (PW.4) clearly stated before the Court that no evidence of penetrative sexual assault existed. The ultrasound report also did not bring out any abnormality as may suggest to the court any occurrence of an aggravated penetrative sexual assault suffered by "D" an infant aged about five years, caused by an adult male aged about 30 years of age.

26. In the context of evidence thus received by the learned Court below in the proven facts there is no material to reach a conclusion that no occurrence whatsoever took place or that P.W.1, P.W.2 and P.W.8 have spoken complete falsehood for other reasons. It it is equally clear to the Court that the occurrence may not travel beyond Section 7 of Protection of Children From Sexual Offences Act. Here, for ready reference, we may extract Section 376AB IPC, Section 5(m) and Section 7 of Protection of Children From Sexual Offences Act herein below:

> Section 376AB- Punishment for rape on woman under twelve years of age.-Whoever, commits rape on a woman under twelve years of age 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 that person's natural life, and with fine or with death.
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the victim.
>
> Section 5(m)-whoever commits penetrative sexual assault on a child below twelve years;
>
> Section 7- Sexual Assault.-Whoever, with sexual assault intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

27. Thus in our view, though the appellant had caused sexual assault by inappropriately touching private part of the minor child "D" and the occurrence may be described as aggravated sexual assault, yet that occurrence did not involve penetrative sexual assault. Thus, the occurrence clearly remained one of sexual assault as defined under Section 7 of POCSO Act. Unless act of penetration or insertion had been evidence, no conviction may have arisen under Section 376-AB I.P.C.

28. The accused-appellant is acquitted under Section 376-AB I.P.C. The charged framed by the trial court under Section 5 (m) of POCSO Act is modified in terms of proven facts to one under Section 7 of POCSO Act. To that the appellant is found guilty.

29. Accordingly, the appeal is allowed in part. The charged framed by the trial Court is modified and the accused appellant held guilty of offence under Section 7 of POSCO Act. Since he has remained confined for more than five years, which is a maximum punishment under Section 7 of POCSO Act, let him be released forthwith unless he is wanted in any other case subject to compliance of Section 437-A Cr.P.C.

30. Pending bail application, if any stands disposed in view of final order passed in the instant appeal.

31. The trial Court record along with the copy of this order be transmitted to the court concerned forthwith.

Order Date :- 31.01.2025 (Dr. Gautam Chowdhary,J.) (S. D. Singh,J.)

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