

Neutral Citation No. - 2023:AHC:225745-DB

Judgement Reserved on 17.10.2023

Judgement Delivered on 30.11.2023

Court No. - 46

Case :- CRIMINAL APPEAL No. - 3309 of 2020

**Appellant :-** Suresh Kumar

**Respondent :-** State of U.P. and Another

**Counsel for Appellant :-** Ram Krishna Mishra, Ras Bihari Pandey

**Counsel for Respondent :-** G.A., Raghavendra Kumar Tiwari

**Hon'ble Ashwani Kumar Mishra, J.**

**Hon'ble Syed Aftab Husain Rizvi, J.**

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Ram Krishna Mishra, learned counsel for the appellant, and Ms. Mayuri Mehrotra & Sri Rahul Asthana, learned AGA for the State.
2. This criminal appeal has been filed against judgment and order dated 09.01.2020, passed by Special Judge (POCSO Act)/Additional Session Judge, Court No.8, Ghaziabad, in Criminal Case No.56 of 2017 (State of U.P. Versus Suresh Kumar) arising out of Case Crime No.927 of 2016 under Sections 376 I.P.C. and 5/6 of The Protection of Children From Sexual Offences Act, Police Station Kotwali, District Ghaziabad. The appellant has been convicted for the offences under Sections 376 I.P.C. and 5/6 of The Protection of Children From Sexual Offences Act and sentenced to undergo life imprisonment for the offence under Section 5/6 of The Protection of Children From Sexual Offences Act, 2012 along with a fine of Rs.50,000/-. In default of payment of fine, to undergo six months simple imprisonment.
3. The F.I.R. of this case was registered on 29.12.2016 at 14.50 on the written information in which it is alleged that eight year old minor sister of the informant was sexually assaulted by Suresh at his residence house no. 424/G, Punjab Railway Colony on 25.12.2016. The victim used to live with informant who takes her care, but since last several days, she was living with her father at the aforesaid address. The victim was not feeling well since the

incident. Today when, she met him, she disclosed the incident of sexual assault by Suresh with her, then the informant has come to lodge the report.

4. After registration of the F.I.R. investigation commenced and S.I. Rakesh Kumar (PW-5) recorded the statements of the informant, his wife and the victim. The victim was also sent for medical examination through lady constable Sonia. On the same date, the Investigating Officer inspected the place of occurrence, and prepared the site-plan. He also collected one bed-sheet and one legging (Payjamee) of the victim, and prepared its memo. The statement of the victim was also got recorded under Section 164 Cr.P.C. The Investigating Officer recorded statements of other witnesses, collected the medical reports, and concluding the investigation submitted the charge-sheet.

5. Special Judge (POCSO Act), Ghaziabad took the cognizance of the offence. Charges under Sections 376 I.P.C. and 5/6 of The Protection of Children From Sexual Offences Act were framed against the accused, which were denied by him and he claimed to be tried.

6. The prosecution has produced informant, PW-1, his wife PW-2 and the victim PW-4 as witnesses of fact. Three other witnesses, who are formal in nature, have also been produced. Eleven prosecution papers, exhibit Ka-1. to Ka-11, have been proved by the witnesses.

7. The incriminating evidence produced during trial was put to the accused while recording his statement under Section 313 Cr.P.C. The accused has denied the prosecution case, and has stated that he has not committed the offence, and has been falsely implicated. False statement has been given by the witnesses. The accused has further stated that one month before 25.12.2016, he removed the hut of the father of the victim, which was on the vacant land adjacent to the house of the accused, and due to this reason he has been falsely implicated. However, no evidence in defence has been produced by the accused.

8. The trial court, after hearing the arguments of both the parties, by the impugned judgement and order, upheld the accused-appellant guilty of the

offence under Sections 376 I.P.C. and 5/6 of The Protection of Children From Sexual Offences Act, and has sentenced him as above.

9. Medical examination of the victim was conducted on 29.12.2016 at 10 p.m. by Dr Sushma Chandra, PW-3. According to her statement the victim was brought to her by lady constable Sonia, and she was accompanied by her brother and sister-in-law (Bhabhi). The medical condition of the victim was normal and she was fully conscious. Her height was 112 cm, and weight 26 kg. There was no mark of external injury on the body of the victim.

In internal examination, hymen was found intact, but redness was present on hymen, and it was partially torn. Swab was not collected as the victim had taken her bath. Nails were also not collected for DNA examination as it were cut, and it was not possible to collect it. Oral smear was also not taken as the victim had brushed her teeth. Blood sample was taken for DNA test, and was handed over to the police for examination. Slide of vaginal smear was prepared, and sent to pathology. The witness has proved the medical examination report, Ext. Ka-3. The witness has stated that in her opinion the redness and partial torn hymen was due to penetration of some hard and blunt object, but penetration was incomplete, hence hymen was intact. The witness has further stated that on the basis of pathological report Ext.Ka-4, she has prepared the supplementary medical report Ext. Ka-5, according to which, no spermatozoa was found in the slide.

10. The medical examination of the accused was conducted on 30.12.2016 by Dr Anjali Khokhar PW-7. According to the witness, there was no mark of external injury on the body of the accused. Oral smear, Urethral meatus, penile swab, glans, foreskin, scrotum, shaft perineum and nail clipping were collected for examination, blood sample was handed over to the police. The witness has proved the medico-legal report Ext-Ka-11.

11. The informant PW-1 is a formal witness who has proved the F.I.R. and has stated that on the narration made by the victim, his minor sister, he had lodged the report. The witness has proved it as Ext. Ka-1.

12. PW-2 is the wife of the informant. This witness has identified the accused in dock identification, and has stated that the accused has sexually assaulted the victim on 25.12.2016 at about 4.00 p.m. After the incident, the condition of the victim became worse. She was bleeding, and her clothes were blood-stained. The Investigating Officer, in her presence, has collected the legging which the victim had worn at the time of the incident, and the bed-sheet, and prepared its memo. The witness has identified her signature on the recovery memo, Ext. Ka-2. The witness has also stated that the victim has disclosed the incident of sexual assault to her husband who disclosed it to her.

13. The competency of the victim (PW-4) to depose was tested by the trial Judge. Finding her fit to depose, her statement was recorded in which she has stated that she used to live with her father on rent at the house of the accused, Suresh. Her step-mother had gone elsewhere. Accused-Suresh has sexually assaulted her during which blood oozed out from her private parts. The accused committed the offence in his room. She disclosed this incident to one lady. Her brother took her to the police station, and she was taken for medical examination, she disclosed about the incident to the doctor. The witness has further verified her thumb impression, and photograph on the statement under Section 164 Cr.P.C. The statement was read over to her, and she acknowledged it.

14. Head Constable Omvir Singh PW-6 is the G.D. writer. The witness has stated that on the written information of the informant, he registered the F.I.R. of this case, prepared chik and mentioned it in the G.D. The witness has proved the chik report, and copy of the G.D. entry as Ext-Ka-8 and Ext. Ka-9.

15. S.I. Rakesh Kumar, PW-5 is the Investigating Officer of the case. The witness has stated that he took up the investigation on 29.12.2016, and recorded the statements of the informant, his wife and the victim. He sent the victim for medical examination, and at the pointing out of the victim inspected the place of occurrence, and prepared the site-plan (Ext. Ka-7). He also collected one bed-sheet and one legging of the victim, and prepared its

memo Ext. Ka-2. The witness has also proved the bed-sheet, and legging marked as material exhibits 3 and 4. The witness has further stated that he got the statement of the victim recorded under Section 164 Cr.P.C., completed other formalities, concluding the investigation submitted the charge-sheet, Ext. Ka-8, on 15.03.2017.

16. Learned counsel for the appellant submitted that the alleged incident is of 25.12.2016, of which F.I.R. has been lodged after four days, on 29.12.2016, without any plausible explanation of delay. Further, the time of the incident is not mentioned in the F.I.R. It is next submitted that the victim is the only witness on whom the prosecution case is based. The medical evidence does not corroborate the oral testimony of the victim. No mark of external injury has been found on the body of the victim. The pathology report of vaginal smear and cervical smear is negative and no spermatozoa has been found. The hymen has also been found intact which indicates that actually no sexual assault has been committed. The redness in hymen may have been caused in any other manner and the appellant-accused has been falsely implicated on account of the fact that he got removed the hutment of the victim's father situated on the vacant land adjacent to the appellant's house one month before the alleged incident. It is next contended that the medical examination of the accused-appellant has also been conducted, nothing abnormal has been detected in it. Learned counsel also contended that there are serious discrepancies and major contradictions in the oral testimony of the informant, PW-1, his wife PW-2 and the victim PW-4. Lastly, it is contended that one legging which the victim was wearing at the time of the incident and one bed sheet had been taken into possession by the Investigating Officer, but there is no forensic report to connect it with alleged offence. Trial court has failed to properly appreciate the evidence on record, and has erred in relying on the prosecution evidence. The finding of guilt recorded by the trial court is against the weight of evidence on record and not sustainable.

17. Learned counsel for the appellant-accused has placed reliance on the following case laws:

1. **Atendra Yadav Versus State Government of NCT of Delhi in Criminal Appeal No.1340 of 2010, decided on 29.10.2013;**
2. **Harilal Etc. Versus State of Madhya Pradesh (Now Chhattishgarh) in Criminal Appeal Nos.2216-2217 of 2011, decided on September 05, 2023;**
3. **K. Raghavan Versus State of Kerala (2021) 0 Supreme (Ker) 894.**

18. Per contra, learned A.G.A., appearing for the State, contended that the victim is a minor child of eight years, and it is established from the evidence on record that her father has solemnized second marriage. Her step-mother was not treating the victim well and she used to live here and there. Her brother lives at a different place and when the matter came in the knowledge of her brother, then he lodged the report, so the delay in lodging the F.I.R. is for just and proper reasons, and it does not adversely affect the prosecution case. It is further contended that the victim in her statement under Section 164 Cr.P.C. and her deposition before the court has categorically implicated the appellant-accused. The medical evidence also corroborates her oral testimony as it is mentioned in supplementary medical report that there are signs of use of forceful penetration of any blunt object, hence the offence is made out. It is further contended that the father of the victim has not lodged the F.I.R. ruling out the possibility of false implication on the ground taken by the accused-appellant in his defence. Lastly, it is contended that the statement of the victim is reliable and trustworthy, and it can be the basis of conviction. There is no illegality or perversity in the finding recorded by the trial court.

19. The victim is an eight year old minor who has been produced as PW-4. She has corroborated the prosecution case and has implicated the appellant-accused. The accused was well known to the victim as she lived there, so the identity of the accused is not in question. In her examination-in-chief, she has stated that she was sexually assaulted by the accused in the room of his house. She disclosed about the incident to her brother who took her to police station and thereafter she was taken for medical examination.

The witness has further corroborated her statement under Section 164 Cr.P.C., Ext. Ka-6 and has verified her signature on it.

20. The incident is of 25.12.2026. After lodging of the F.I.R. the victim was medically examined on 29.12.2016 at about 10 p.m. by Dr. Sushma Chandra, PW-3. The witness has stated that the age of the victim was about eight years. She was brought by lady constable who has identified the victim. The victim disclosed her that she was sexually assaulted by her neighbour. There was no mark of external injury on her body. In internal examination, there was redness on hymen and it was partially torn. As the victim has changed her clothes and has taken bath and brushed the teeth, her nails were cut, these articles were not collected. The witness has proved medico-legal report about sexual assault, Ext.Ka-3. The witness has further stated that on examination she found that there were signs suggestive of forcible penetration of vagina by blunt object as hymen was red and slightly torn. Vaginal smear slide was sent for testing. The supplementary medico-legal report, Ext. Ka-5 was also prepared by the doctor. No spermatozoa was found. However, in the opinion of doctor, there were signs of use of forcible penetration of any blunt object as perineum is red and injured, but no tear is seen as hymen is intact. So, the medical evidence further corroborates the oral testimony of the victim, PW-4.

21. The victim, PW-4 has been cross-examined at length by the defence. There are some discrepancies and contradictions in her testimony. The witness has stated that the accused was involved in sexual assault for about 1-2 hours, her bleeding continued for about 1-2 hours. At one place in her cross-examination, the witness has stated that she lived in hut while at other place she has stated that she was living in a room in the house of the accused. She has also stated that no medicine was administered to her by her father while in her statement recorded under Section 164 Cr.P.C. she has stated that her father administered her some pills. The victim is a girl of tender age of about eight year old and her statement before the court has been recorded after more than one year and half after the incident. So, her testimony is to be analysed keeping in mind the aforesaid circumstances.

The first statement appears to be an exaggeration and liable to be ignored. The contradictions appearing in her testimony is not of such a nature which affects her credibility. The statement of the victim is consistent on material points categorically implicating the appellant-accused.

22. In **State of Punjab Versus Gurmit Singh (1996) 2 SCC 384**, it has been held by apex court that in cases involving sexual harassment, molestation, etc. the Court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The Court may look for some assurances of her statement to satisfy the judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness.

23. The first information report was lodged after four days. The informant is the brother of the victim. It is also established from the evidence on record that the father of the victim has solemnized his second marriage and her step mother was not living with her. The brother of the victim is also married and was living at some other place. So, the victim was like a destitute and when her brother met her after the incident, then she told him about the incident and the F.I.R. was lodged by him. The aforesaid circumstances explain the delay in lodging the F.I.R. and the explanation is satisfactory. It is also settled law that the Courts cannot overlook the fact that in sexual offences delay in lodging of the F.I.R. can be due to variety of reasons, particularly the reluctance of the victim or her family members to go to the police and complain about the incident which concerns reputation of the victim and the honour of the family. It also appears that father of the victim was not interested in lodging the F.I.R. and the brother of the victim took the lead when the incident came to his notice. So, delay in lodging the F.I.R. does not adversely affect the prosecution case.

24. The informant (PW-1) is not an eye-witness of the incident. He has only lodged the F.I.R. on the narration of the facts made by the victim. The



witness has corroborated that he lodged the F.I.R. when his sister informed him about the incident.

25. Another prosecution witness, PW-2 is the wife of the first informant. She is also not an eye-witness of the incident. She is a witness of recovery memo of bed-sheet and legging (Payjamee), Ext. Ka-2 and the witness has proved her signature on the recovery memo. The remaining statement of examination-in-chief of this witness is not relevant.

26. Head Constable, Omveer Singh, PW-6, the chik and G.D. writer has proved that he registered the F.I.R. on the written information of the informant, PW-1. SI, Rakesh Kumar, PW-5, Investigating Officer has deposed about the steps taken during the course of investigation and submission of charge-sheet. There is no material discrepancy or infirmity in the testimony of both these witnesses.

27. The appellant-accused has set up the defence case that he got removed the hut of the father of the victim which was on the vacant land adjacent to his house, one month before the alleged incident, due to this reason, he has been falsely implicated. This defence case is not probable and stands contradicted from the facts and circumstance of the case. If this may be the reason for false implication of the appellant-accused, the father of the victim being an aggrieved person should have played active role and lodged the F.I.R., but it is not the case, as the father of the victim has not shown any interest in lodging the F.I.R. implicating the accused-appellant, rather the F.I.R. has been lodged by the brother of the victim who lives at some other place.

28. The case laws relied upon by the learned counsel for the appellant do not apply due to variation of the facts and circumstances of the case. In this case the implication of the appellant-accused is right from the beginning. He is well known to the victim and there is no suspicion about his identity. The victim has clearly implicated him in her statements before the Magistrate as well as before the trial court. The medical evidence also corroborates the testimony of the victim. The doctor has opined that redness and partially torn hymen were due to penetration of some hard and blunt object, but the

penetration was incomplete, hence hymen was partially torn. In **State of Tamil Nadu versus Ravi alias Nehru, 2006(55)ACC 1005 (SC)** it has been held that where a five year old girl was raped and the opinion of the doctor was that penis would not have gone inside the vagina of the girl, the Supreme Court held that the opinion of the doctor was irrational when hymen was found torn. And even a slight penetration of penis into vagina without rupturing hymen would constitute rape.

29. Learned trial court has elaborately discussed and analysed the evidence on record and relying on the testimony of the victim and the medical evidence has held the appellant-accused guilty. The finding recorded by the trial court is neither perverse nor illegal.

30. Learned trial court invoking the provisions of Section 42 of The Protection of Children From Sexual Offences Act has passed sentence under Sections 5/6 of The POCSO Act and has imposed life imprisonment and fine of Rs.50,000/- and in default of payment of fine, six months additional simple imprisonment. Learned counsel for the appellant submitted that the incident is of year 2016 and the accused-appellant is languishing in jail for last about seven years. The appellant is a married person and due to his incarceration his family is suffering. The appellant is the only breadwinner of the family. Learned counsel submitted that the trial court has imposed maximum sentence of life imprisonment without giving any reason. Learned counsel prayed for a lenient view.

31. The incident is of 25.12.2016. The penal provision of Section 6 of The Protection of Children From Sexual Offences Act on the relevant date i.e. before substitution, stood as under:

*“6. Punishment for aggravated penetrative sexual assault.-Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”*

So the minimum punishment provided under Section 6 of The Protection of Children From Sexual Offences Act applicable on the relevant date is ten years with fine while maximum sentence is life imprisonment.

32. Considering the submission of learned counsel for the appellant and the facts and circumstances of the case and the penal provision applicable on the relevant date, we are of the view that 10 years rigorous imprisonment with fine will be sufficient to serve the ends of justice.

33. The criminal appeal is partly allowed. The conviction of the accused-appellant is upheld. However, the sentence is modified to the extent that the appellant-accused is punished with rigorous imprisonment for ten years with a fine of Rs.50,000/-; in default of payment of fine, the appellant-accused will have to serve one year's simple imprisonment. If the amount of fine is deposited, the half of the amount of fine shall be paid to the victim.

34. Copy of the judgment and order along with lower court record be transmitted immediately to the trial court for necessary compliance.

**Order Date:-** 30.11.2023

MN/-

(Syed Aftab Husain Rizvi, J.) (Ashwani Kumar Mishra, J.)