

Judgment Reserved on 11.11.2021.

Judgment Delivered on 18.11.2021.

Court No. - 88

Case :- CRIMINAL APPEAL No. - 5415 of 2018

Appellant :- Sonu Kushwaha

Respondent :- State of U.P.

Counsel for Appellant :- Anil Kumar Verma, Noor Muhammad, Yogesh Kumar Srivastava

Counsel for Respondent :- G.A.

Hon'ble Anil Kumar Ojha, J.

Heard Sri Noor Muhammad, learned counsel for the appellant, Sri Ravi Prakash Pandey, learned A.G.A. and Sri J.B. Singh, learned A.G.A-I for the State and perused the record.

2. Challenge in this criminal appeal is the judgment and order dated 24.08.2018 passed by VIIIth Additional Sessions Judge/Special Judge, P.O.C.S.O Act, Jhansi in Special Sessions Trial No. 134 of 2016 (State v. Sonu Kushwaha), arising out of Case Crime No. 167 of 2016, under Section 377, 506 I.P.C. & Section 6 of P.O.C.S.O Act, Police Station Chirgaon, District Jhansi, whereby the learned VIIIth Additional Sessions Judge/Special Judge, P.O.C.S.O Act, Jhansi has convicted and sentenced the appellant, under Section 377 I.P.C. with rigorous imprisonment for seven years and to pay fine of Rs. 2000/- and in default of payment of fine, three months additional imprisonment; under Section 506 I.P.C. one year rigorous imprisonment and fine of Rs. 1,000/- and in default of payment of fine, one month additional imprisonment and under Section 6 of P.O.C.S.O. Act ten years rigorous impairment and fine

of Rs. 5,000/- and in default of payment of fine, three months additional imprisonment. All sentences have been ordered to run concurrently.

3. Tersely put, the case of the prosecution is that the complainant Sri Dev Singh lodged an F.I.R. against the appellant Sonu Kushwaha on 26.03.2016 at Chirgaon, District Jhansi stating therein that on 22.03.2016, at about 05:00 hours in the evening, appellant Sonu Kushwaha came to complainant's house and took his son aged about 10 years in the temple at Hardaul. There appellant gave Rs. 20 to complainant's son i.e. victim and said to suck his penis. Appellant Sonu Kushwaha put his penis into the mouth of the victim. Thereafter, victim came to the house having that Rs. 20. At this, complainant's nephew Santosh asked to victim that from where he got Rs. 20, then victim told the entire happening occurred with him. Appellant also threatened the victim not to disclose about the incident to anybody.
4. On the written report submitted by complainant, a case was registered against the appellant in Case Crime No. 167 of 2016, under Section 377, 506 I.P.C. and 3/4 of P.O.C.S.O Act, P.S. Chirgaon, District Jhansi.
5. Investigating officer collected the evidence and submitted charge sheet against the appellant in Case Crime No. 167 of 2016, under Section 377, 506 I.P.C. and 3/4 of P.O.C.S.O Act, P.S. Chirgaon, District Jhansi.
6. The then Additional Sessions Judge/Fast Track Court-1, Jhansi charged the appellant under Section 377, 506 I.P.C. and 5/6 of P.O.C.S.O Act. Appellant denied the charges and claimed trial.

7. Prosecution was called upon to adduce evidence to prove the charges against the appellant. Prosecution produced PW1 complainant Dev Singh, PW2 Victim, PW3 S.I. Rajesh Kumar Verma, PW4.
8. After conclusion of the evidence, statement of appellant under section under Section 313 Cr.P.C. was recorded. The appellant denied the evidence produced by prosecution and stated that witnesses have tendered false evidence owing to enmity.
9. In defence, appellant has produced PW1 Raj Kumar, DW2 Ghanshyam.
10. After hearing the learned counsel for the parites, learned Additional Sessions Judge/Special Judge(P.O.C.S.O. Act), Jhansi has convicted and sentenced the appellant as above.
11. Aggrieved by the aforesaid judgment dated 24.08.2018 passed by VIIIth Additional Sessions Judge/Special Judge, P.O.C.S.O. Act, Jhansi appellant has preferred this appeal before this Court.
12. Learned counsel for the appellant submitted that offence under Section 6 of P.O.C.S.O. Act is not made out against the appellant and he has been wrongly convicted under Section 6 of P.O.C.S.O. Act. He further argued that the offence committed by appellant falls in the category of under Section 9(M) of P.O.C.S.O. Act.
13. Per contra, learned A.G.A. opposed the above submission of the learned counsel for the appellant and contended that the appellant has been rightly convicted. Appeal has no force and the same deserves dismissal.
14. Perusal of the record reveals that informant and victim have supported the prosecution story and the evidence of prosecution

witnesses are cogent, trustworthy, credible and probable, hence, finding with regard to conviction is confirmed.

15. Solitary point survives for consideration whether offence under Section 5/6 P.O.C.S.O. Act or Section 9/10 P.O.C.S.O. Act is made out against the appellant from the evidence available on record.
16. The proved facts of the case are that the appellant put his penis into mouth of the victim aged about 10 years and discharged semen therein. Now, the solitary point for consideration is that the aforesaid offence committed by appellant falls in which Section of P.O.C.S.O. Act Section 3 to 10 of P.O.C.S.O. Act is quoted herein below for ready reference:

“Section 3 of Protection of Children from Sexual Offences Act, 2012 : 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.

Section 4 of Protection of Children from Sexual Offences Act, 2012: Punishment for penetrative sexual assault.- 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.

Section 5 of Protection of Children from Sexual Offences Act, 2012 : Aggravated penetrative sexual assault.-(a) Whoever, being a police officer, commits penetrative sexual assault on a child-

- (i) within the limits of the police station or premises at which he is appointed; or
- (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
- (iii) in the course of his duties or otherwise; or
- (iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child-

- (i) within the limits of the area to which the person is deployed; or
- (ii) in any areas under the command of the forces or armed forces; or
- (iii) in the course of his duties or otherwise; or
- (iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which-

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;

(iv) causes death of the child; or;

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

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

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence or during any natural calamity or in similar situations; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

Section 6 of Protection of Children from Sexual Offences Act, 2012 : 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, or with death.

Section 7 of Protection of Children from Sexual Offences Act, 2012 : Sexual assault.-Whoever, with sexual 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.

Section 8 of Protection of Children from Sexual Offences Act, 2012 : Punishment for sexual assault.-Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

Section 9 of Protection of Children from Sexual Offences Act, 2012 :- Aggravated sexual assault.- (a) Whoever, being a police officer, commits sexual assault on a child-

(i) within the limits of the police station or premises where he is appointed; or

- (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
- (iii) in the course of his duties or otherwise; or
- (iv) where he is known as, or identified as a police officer; or
- (b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child-
 - (i) within the limits of the area to which the person is deployed; or
 - (ii) in any areas under the command of the security or armed forces; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where he is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or
- (g) whoever commits gang sexual assault on a child. Explanation.--when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or
- (h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits sexual assault on a child, which-
 - (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987(14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
 - (ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or
- (k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or
- (l) whoever commits sexual assault on the child more than once or repeatedly; or
- (m) whoever commits sexual assault on a child below twelve years; or
- (n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship

with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or
 (o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or
 (p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or
 (q) whoever commits sexual assault on a child knowing the child is pregnant; or
 (r) whoever commits sexual assault on a child and attempts to murder the child; or
 (s) whoever commits sexual assault on a child in the course of 1 communal or sectarian violence; or
 (t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
 (u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

Section 10 of Protection of Children from Sexual Offences Act, 2012 :- Punishment for aggravated sexual assault.-Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

17. From the perusal of the provisions of P.O.C.S.O. Act, it is clear that offence committed by appellant neither falls under Section 5/6 of P.O.C.S.O Act nor under Section 9(M) of P.O.C.S.O. Act because there is penetrative sexual assault in the present case as appellant has put his penis into mouth of victim. Putting penis into mouth does not fall in the category of aggravated sexual assault or sexual assault. It comes into category of penetrative sexual assault which is punishable under Section 4 of P.O.C.S.O. Act.

18. After going through the records and provisions of P.O.C.S.O Act, I am of the considered opinion that the appellant should be punished under Section 4 of P.O.C.S.O Act because the act done by appellant falls in the category of penetrative sexual assault.

19. Penetrative sexual assault being lesser offence from aggravated penetrative sexual assault is legally permissible to convict the appellant therein.
20. Accordingly appellant Sonu Kushwaha should be and is convicted under Section 4 of P.O.C.S.O. Act in place of Section 6 of P.O.C.S.O. Act.
21. The court below has awarded the appellant to undergo 10 years rigorous imprisonment and fine of Rs. 5000/- under Section 6 of P.O.C.S.O. Act and under Section 6 of P.O.C.S.O. Act, minimum sentence is 10 years which may extend to imprisonment for life whereas under Section 4 of P.O.C.S.O. Act minimum sentence is 7 years but which may extend to imprisonment for life also. Learned court below has awarded minimum sentence provided under Section 6 of P.O.C.S.O. Act and accordingly, it would be appropriate to award the sentence to appellant under Section 4 of P.O.C.S.O. Act, seven years of rigorous imprisonment which is minimum provided in that Section and fine of Rs. Rs. 5,000/-, in default, three months additional simple imprisonment.
22. Appeal is **partly allowed** in view of the above terms.
23. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned.

Order Date :- 18.11.2021.

VPS