

**Court No. -46**

**Case :-** CRIMINAL APPEAL No. - 2202 of 2013

**Appellant :-** Sonu @ Pinku

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

**Counsel for Appellant :-** T.K. Mishra,Abhilasha Singh,Ashutosh Yadav,Gaurav Kakkar,Rajeev Kumar Rai,Shyam Lal

**Counsel for Respondent :-** Govt. Advocate

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

**Hon'ble Rajendra Kumar-IV,J.**

**(Per : Hon'ble Rajendra Kumar-IV,J)**

1. Present appeal has been filed by accused-appellant Sonu @ Pinku against the judgement and order dated 19.12.2012 passed by IInd Additional District & Sessions Judge, Gautam Budh Nagar in Session Trial No.629 of 2010 (State Vs. Sonu @ Pinku) under Section 363, 366-Ka and 376(2)(f) IPC and Session Trial No. 630 of 2010 (State vs. Sonu @ Pinku), under Section 25 Arms Act arising out of Case Crime No. 824 of 2010, P.S. Sector-58, NOIDA, Gautam Budh Nagar, whereby Trial Court has convicted accused Sonu @ Pinku and sentenced him to rigorous imprisonment for 5 years with fine of Rs.10,000/- under Section 363 IPC, 7 years rigorous imprisonment and fine of Rs. 10,000/- under Section 366-Ka I.P.C. and life imprisonment and fine of Rs. 2000/- under Section 376(2)(f) I.P.C. with default punishment and 2 years rigorous

imprisonment with fine of Rs. 2000/- under Section 25 Arms Act.

2. Prosecution story in brief in F.I.R. is as follows :-

On 10.06.2010, informant / complainant's children were playing outside the slums / Jhuggis built on the vacant plot before the petrol pump Wajidpur when the informant had gone to his work as usual. At about 11:30 a.m., one black Indica Car stopped near the children, which was being driven by accused-appellant Sonu @ Pinku, who seduced the victim aged about 8 years (name is not disclosed by the Court) and 3-4 other children were playing there and made them sit in the car and after covering some distance, he took off all the children except the victim from the car and took her (victim) towards Sector 62. Information, whereof, was given to police then the police vehicles came on spot in search of Indica Car and started its search. The accused-appellant raped the victim and threw her on the side of road in A-Block Sector 62, Noida, where she was found injured with bleeding, victim was taken to hospital in injured position for medical examination where she was medically examined.

3. A written Tehrir Ex.Ka-1 was presented by victim's father Ramesh @ Mehadi Hasan in the police station concerned whereupon F.I.R. (Ex.Ka-4) was drawn by constable Moharrir and entry was made in general diary.

4. P.W.-5 Dr. Archana Tyagi, medically examined the

victim and prepared medical report (Ex.Ka-2). P.W.-8 Dr. Renu Awana, later on, examined her and prepared medical report Ex.Ka-11. The patient was admitted and undergone operation in hospital till 30.06.2010 under the supervision of Dr. Renu Awana.

5. P.W.-7 Rajesh Bharti undertook investigation in the matter, visited the spot, prepared site plan, recorded the statement of informant, victim and other witnesses and apprehended the accused on the information of informer on 15.06.2010 and recovered one country made tamancha of 12 bore with one cartridge from the possession of accused-appellant and on his pointing out one blood stained seat cover was recovered, prepared Fards thereof (Ex.Ka-8 and 9) and after completing entire formalities of investigation submitted charge sheet (Ex.Ka-10) against the accused-appellant under Section 363 and 376 I.P.C

6. P.W.-10 S.I. Mangeram Sharma undertook the investigation of Case Crime No. 824 of 2010, under Section 25 of Arms Act and after completing entire formalities of investigation, found sufficient evidence and submitted charge sheet (Ex.Ka-16) against the accused-appellant under Section 25 Arms Act.

7. Case, being exclusively triable by Court of Sessions, learned Magistrate committed the case of accused-appellant to the Court of Session wherefrom it was transferred to and

came to be decided by IInd Additional District & Sessions Judge, Gautam Budh Nagar.

8. Learned Trial Court, after perusing the record, framed charges against accused-appellant Sonu @ Pinku under Sections 363 & 376 IPC and Section 25 Arms Act to which he denied, pleaded not guilty and claimed to be tried.

9. In order to substantiate its case, prosecution examined as many as ten witnesses out of whom PW-1 Ramesh @ Mehadi Hasan, PW-2 Victim, PW-3 Rajjab and P.W.-4 Nazreen are witnesses of fact and PW-5 Dr. Archana Tyagi, PW-6 Rajpal Singh, PW-7 Rajesh Bharti, PW-8 Dr. Renu Awana, P.W.-9 Satish Chandra Sharma and PW-10 Mangeram Sharma are formal witnesses.

10. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto, story and statement of witnesses are said to be wrong and under the pressure of police, he claimed false implication in the present case. He specifically stated that 3 to 4 days before incident, victim had broken the glass of his vehicle, he demanded the damages whereupon there was a quarrel with her Mause, thus, he has been falsely implicated in this case. No evidence has been produced in defence.

11. Trial Court, after hearing learned counsel for the parties and appreciating entire evidence led by prosecution on record found accused-appellant guilty and convicted him as stated above. Feeling aggrieved and dissatisfied with impugned judgement and order of conviction, present appeal has been filed by the accused-appellant.

12. We have heard Sri Ashutosh Yadav, learned counsel for the accused-appellant and Sri Arun Kumar, learned A.G.A for State-respondent and perused the record carefully with the valuable assistance of learned counsel for the parties.

13. Learned counsel for the accused-appellant advanced his argument in following manner :-

(i) The accused-appellant is innocent and has been falsely implicated in the present case. There is no eye witness of the occurrence. Independent witness has not been produced from the side of prosecution to support its case.

(ii) There was a prior dispute between the accused-appellant and parents of victim. Thus, he has been falsely roped in this case.

(iii) There is no strong motive to the accused-appellant to commit such heinous crime that too with the minor victim.

(iv) There is material contradiction in the statement of

victim itself. He referred some part of cross-examination and argued that no case under Section 376 I.P.C. is made out.

(v) Learned counsel for the accused-appellant further requested that in case, appellant is found guilty, the accused-appellant already served imprisonment more than 13 years, thus, he should be considered for imprisonment already undergone.

14. Learned AGA refuted the argument by submitting that victim was about 8 years old at the time of incident. The accused-appellant rudely ruptured her due to which she got injured, P.W.-3 Rajjab, who was playing with her at the time of incident supported the prosecution case. There is no scope for any doubt in the prosecution case. Trial court rightly appreciated the evidence in trial and convicted the accused-appellant. Considering the act committed by the accused-appellant with the minor child, no sympathy is required in such circumstances. The appeal lacks merit and deserves to be dismissed.

15. Now, we may proceed to consider the argument advanced by both the sides and evidence produced from the side of prosecution as no defence evidence has been produced.

16. P.W. -1 Ramesh @ Menhdi Hassan (father of victim) is the informant. He supported the prosecution case but he is not

the eye witness of the incident. He lodged the F.I.R. by saying that his minor daughter / victim was playing with other kids in the vacant plot. The incident was told by his daughter / victim, he found his daughter in injured position at the side of road towards Sector 62. His daughter was thrown away by accused-appellant Sonu after committing rape on her. He lodged the F.I.R. in police station concerned. He proved Tehrir as Ex.Ka-1. The informant's wife made a call at helpline number 100 whereupon police also came there, then his wife and police took the victim to hospital where she was treated. The victim told the name of accused as Sonu. Police also inquired him and recorded his statement. Witness withstood a lengthy cross-examination. Since he is not eye witness of incident, thus, a serious scrutiny of his examination is not much required. In cross-examination, nothing has been extracted so as to disbelieve his statement.

17. P.W.-3 Rajjab, aged about 13 years at the time of examination in 2011, who was playing with victim, supported the prosecution version by stating that he was known to accused-appellant Sonu from before and at the time of incident he was playing with other kids namely Chand Babu, Shabana and 2 or 3 other kids beneath the tree. Sonu (Accused) came there with Indica Car and asked them for a ride in the car, they sat in the car and after moving a bit, accused Sonu asked all the kids to get down, Sabana was sitting on the front seat of the car, everyone asked Sabana to

get down but Sonu drove the car away. Then, he went to Sabana's house and narrated the entire incident to her mother, her father was not there and had gone to work. Later, police inquired him and he told the police whatever happened. This witness was minor at the time of cross-examination also. He was playing with the victim. He supported the prosecution case to the extent that he had seen the accused taking the victim with him. Witness was sufficiently cross-examined but nothing has come in evidence so as to disbelieve his natural statement. Actually, he had not seen the incident of rape but he proved that accused-appellant Sonu had taken away the victim. Later on she was found injured at the side of road towards Sector 62.

18. P.W-4 Nazreen, mother of victim had not seen the actual occurrence. She supported the prosecution case upon the saying of others for whatever she was informed regarding the incident. Thus, this witness also does not require a thorough scrutiny. She was also cross-examined but nothing could be brought on record making her statement unbelievable.

19. The statement of P.W.-2 injured herself remains important and is to be scrutinized carefully. P.W.-2, victim aged about 8 years at the time of incident, supported the prosecution evidence on oath by stating that at the time of occurrence she was playing with other kids at about 11:00-12:00 in the plot. Accused-appellant Sonu came there with a

car and asked them to take a ride in the car. She also sat in the car with other children, after covering some distance he took off other kids from the car but did not allow her to get off from the car. He drove her ahead for some distance and stopped the car and started misbehaving with her at the back seat of the car. Accused Sonu started misbehaving and beat her so she cried, screamed. By the misbehavior, she meant, he took off her pantyhose, he threw her from moving car, blood also came out of her genital. She told everything to her parents, police also came, they questioned her and took her to hospital where she was treated. The victim was sufficiently cross-examined. Much emphasis for disbelieving the prosecution story was given from the accused-appellant's side to the statement of witnesses in cross-examination where she stated that accused has torn her genital by his finger and due to excess fingering, bleeding occurred. Accused had nothing else except tearing it with his finger, by referring that part of her statement learned counsel for the accused-appellant argued that it may be a case under Section 354 I.P.C. and some other section but no offence of rape is made out.

20. So far as the aforesaid statement of the victim is concerned, it is relevant to mention here that the victim further clarified that accused-appellant Sonu had pressed her feet in the car and slapped her and first put his finger, then he put his penis on her genital due to which she cried, screamed and bled. She further clarified that accused on the pretext of

urinating, took her off the car and ran away. When she got off the car, she was bleeding. Thus, statement of victim clearly shows that she was raped by the accused-appellant and it is well settled position of law that evidence of prosecutrix is sufficient to set the accused convicted if her statement is found reliable. So far as the plea of false implication, it is not natural for any father to stake the honour of his minor daughter to avenge a previous dispute, that too by falsely alleging that she has been raped.

21. It would be worth noticing that the victim in the present case is an eight year old female child, who had been admitted to Prakash Hospital at Noida. A certificate has been issued by the doctor that the victim was admitted in the hospital and had undergone third degree perineal tear repair on 25.06.2010 and was discharged on 30.06.2010. The certificate of doctor has been exhibited as Ka.11. The prosecution has also brought on record the injury report of minor victim prepared by doctor of Dr. Bheem Rao Multi-speciality Hospital, Sector-9, Noida. The injury report has been proved as Ex.Ka.2 by Dr. Archana Tyagi (PW-5). PW-5 has specifically stated that the victim was brought by Sub-Inspector Kalpana Gautam on 10.06.2010 at 04.00 pm. In the internal examination of the victim the doctor found her bleeding from her vagina. There was a cut at 7 'O' clock position. The victim was admitted in the hospital and her age has been found as seven years. The doctor has clearly stated that

possibility of sexual assault on the minor victim cannot be ruled out. From the evidence on record as also the specific implication of accused by the victim herself, we find that the prosecution has clearly succeeded in establishing the guilt of the accused beyond reasonable doubt.

22. The victim although is a child witness but we find her testimony to be reliable as she has been examined by the court before recording her statement. The victim has clearly disclosed the name of her village and the district to which she belonged. The concerned court has recorded its satisfaction on the basis of questioning of the victim that she is capable of giving answers to the questions posed to her. Law with regard to competence of child witness to depose has been examined by the Supreme Court in P. Ramesh vs. State Rep. By Inspector of Police, AIR (2019) SC 3559, wherein the Court has observed as under in para 15 of the judgment:-

*“In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of*

*tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. 9 A child becomes incompetent only in case the court considers that the child was unable to understand the 8 (2004) 1 SCC 64. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.”*

23. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, and motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellants.

24. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196**, Court has held as under :-

*“As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive loses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it.”*

25. So far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel and the witnesses PWs 1, 2, 3 and 4 supported the prosecution case as witnesses. All the four witnesses withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve their statements. There is nothing in cross-examination which may render their statements doubtful. Naturally some minor contradictions and discrepancies have occurred in their examination but they do not go to the root of case.

26. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124**, Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

27. In **Sachin Kumar Singhraha v. State of Madhya Pradesh (2019) 8 SCC 371**, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into

consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

28. Upon careful consideration of the statement of witnesses especially the statement of victim we are of the opinion that trial court, after proper appreciation of evidence, has rightly convicted the accused-appellant under the alleged sections and we do not persuade ourselves to take a different view than that of trial court.

29. We find no merit in appeal, accordingly, the appeal is **dismissed** on merit.

30. So far as the sentence awarded by trial court to the accused-appellant in the alleged sections is concerned, it is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of

society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

31. Under the facts and circumstances of the case and considering the manner in which offence is committed as also the age of the victim, who is sexually assaulted, we deem it appropriate to modify the sentence awarded to the accused-appellant by trial court, keeping in view that accused is a first offender and the possibility of his correction cannot be ruled out.

- (i) The conviction of the accused under the alleged sections is maintained.
- (ii) Sentence of life imprisonment under Section 376(2)(f) I.P.C. is converted to 14 years rigorous

imprisonment.

(iii) In default of payment of fine as awarded by trial court under the alleged sections, accused-appellant shall further undergo for a period of two months imprisonment.

(iv) All the sentences shall run concurrently and accused-appellant shall be entitled to the benefit of Section 428 Cr.P.C.

32. Certify the copy of this judgement to the trial court concerned for immediate compliance.

**Order Date :- 12.09.2023**

Manoj

**(Rajendra Kumar-IV,J) (Ashwani Kumar Mishra,J)**