

Court No. - 45

Case :- CRIMINAL APPEAL No. - 4799 of 2018

Appellant :- Prakash Rajbhar

Respondent :- State of U.P.

Counsel for Appellant :- Deepesh Kumar Ojha, Prashant Tripathi, Swati Agrawal Srivastava

Counsel for Respondent :- G.A.

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Sandeep Jain, J.

(Per: Hon'ble Sandeep Jain, J.)

1. Heard Sri Deepesh Kumar Ojha, learned counsel for the appellant, Sri Murtaza Ali, learned A.G.A. for the State and perused the record.

2. This criminal appeal has been preferred by the accused-appellant against the judgment and order dated 06.04.2018 passed by Sri Ved Prakash Sharma, Additional Sessions Judge, Court No.9/POCSO Court, Varanasi in Special Sessions Trial No.20 of 2016 (State of U.P. Vs. Prakash Rajbhar), arising out of Case Crime No.01 of 2016, under Sections 323 & 376/ 506 I.P.C. and $\frac{3}{4}$ POCSO Act, Police Station Jaitpura, District Varanasi, whereby accused-appellant has been convicted under Section 323 I.P.C. and sentenced to suffer rigorous imprisonment of six months, under Section 5 (m)/6 POCSO Act to suffer life imprisonment and fine of Rs.20,000/- in default to undergo further imprisonment of one year and under Section 506 I.P.C. to suffer rigorous imprisonment of six months. All the sentences have been ordered to run concurrently.

3. The relevant facts for the disposal of this criminal appeal are that the first informant, namely, 'K' (P.W.-2 at the trial), was a tenant of Shambhu Nath Sav in House No. J 24/84. The accused-appellant also resided in that house and operated a power-loom there. On 01.01.2016 at about 8:30 p.m., the accused-appellant attempted to commit rape upon minor daughter of 'K', namely, 'R' (P.W.-1 at the trial), aged about five years, in his tenanted accommodation. When 'R' raised an alarm, wife of 'K', namely, 'S' (P.W.-3 at the trial) arrived. The appellant then assaulted her with 2-3 slaps and threatened that if she dared to reveal this to anyone, she and her entire family would be killed. Due to the late hour and the appellant's threats, no one dared to go to the Police Station that night. The next day, on 2.01.2016, the first informant along with his brother, namely, Lallu and neighbour Ghanshyam, apprehended the appellant. They then went to the Police Station along with victim 'R', and lodged the FIR. The first informant provided a written complaint ('*tehreer*') scribed by Ghanshyam on 02.01.2016, at Police Station Jaitpura, District Varanasi. As per the written complaint, the FIR was registered on 02.01.2016 at 12:15 hours as Case Crime No. 1/2016, under Sections 376, 511, 323 & 506 I.P.C. and Sections 7/8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 against the accused-appellant. Also, corresponding entry was made in the General Diary of the Police Station at Serial No. 20 at 12:15 hours. The

FIR is marked as Ex.Ka.7, and the carbon copy of the General Diary entry is Ex.Ka.8.

4. The victim 'R' (P.W.-1 at the trial) was medically examined by Dr. Manju Singh (P.W.-4 at the trial) on 02.01.2016 at 5:00 p.m. The medical examination report of the victim is Ex.Ka.3. The examination revealed no external injuries, but a mild abrasion was found on the *labia majora* during the internal examination. The hymen of the victim was found normal. A vaginal swab was taken to test for the presence of spermatozoa.

5. The vaginal swab was then sent for pathological examination. The requisition slip for this examination is Ex.Ka.4. The pathological examination, detailed in Ex.Ka.5, found no live or dead spermatozoa. Dr. Manju Singh (P.W.-4) prepared a supplementary medico-legal report of the victim on 08.01.2016 as Ex.Ka.6. This report indicated that the victim was about five years old and there was sign of sexual assault on her private part.

6. The case investigation was assigned to S.H.O. Mool Chandra Chaurasia (P.W.-6 at the trial), who prepared the Site Plan of the occurrence on 03.01.2016. This Site Plan is Ex.Ka.9 at the trial.

7. The statement of victim 'R' (P.W.-1 at the trial), under Section 164 Cr.P.C. was recorded on 11.01.2016, which is Ex.Ka.1 at the trial, which reads as under:-

"बयान धारा 164 Cr.P.C.

दिनांक 11.1.16

पीड़िता की उम्र काफी छोटी होने के कारण सम्पूर्ण बयान प्रश्न व उत्तर में मेरे द्वारा निम्न रूप से अंकित किया जा रहा है-

Q- आपको कौन परेशान कर रहा था?

उ० प्रकाश भैया

Q- प्रकाश भैया कहां रहते हैं?

उ० प्रकाश भैया अपने घर में काम करते हैं, नीचे रहते हैं।

Q- प्रकाश भैया आप को क्या कह रहे थे?

उ० हम अपने भैया के साथ बाजार जा रहे थे तो प्रकाश भैया हम को रोक लिया और हमें प्रकाश भैया दुकान लेकर गए। रात को अपने भैया के साथ बाजार जा रहे थे।

Q- आपके भाई का नाम क्या है?

उ० रोहित।

Q- रोहित कहां गया था ?

उ० दुकान पर।

Q- रोहित भैया क्या अकेले गए?

उ० हाँ। मुझे साथ लेकर नहीं गए।

Q- जब रोहित चले गए तो प्रकाश भैया ने आपके साथ क्या किया?

उ० प्रकाश भैया ने मेरा चूड़ी (पेन्टी) निकाल कर कुछ किया।

Q- प्रकाश भैया जब कुछ कर रहे थे तो उन्होंने क्या पहना था?

उ० प्रकाश भैया तब ऊपर वाला कपड़ा पहना था और नीचे वाला (अपना) कपड़ा उतार दिया था।

Q- आपकी पेन्टी खोलकर क्या प्रकाश भैया छू रहे थे?

उ० हाँ।

Q- प्रकाश भैया आपकी पेन्टी उतार कर क्या छू रहे थे?

उ० वो अपना पूलू मेरे बाथरूम वाली जगह पे लगा रहे थे।

Q- फिर आपने क्या किया?

उ० मम्मी के चिल्लाया न तो मम्मी आ गया।

Q- और कुछ कहना है?

उ० और कुछ नहीं कहना।

Q- मम्मी जब आई तब क्या हुआ?

उ० मम्मी जब आई तो केवाड़ी मम्मी ने खोली तो प्रकाश भैया ने मम्मी को कहा, मम्मी ने प्रकाश भैया से कहा था।

Q- प्रकाश भैया अच्छे हैं कि गन्दे हैं?

उ० गन्दे।"

8. After the investigation, the Investigating Officer (P.W.-6) submitted charge-sheet against the accused-appellant in the trial court under Sections 376, 323, 506 I.P.C. and Sections 3/4 of the Protection of Children from Sexual Offences (POCSO) Act. This charge-sheet is Ex.Ka.10 at the trial, on which subsequently cognizance was taken by the court. Charges were initially framed against the accused-appellant on 19.02.2016, under Sections 376, 323, 506 I.P.C. and Sections 3/4 POCSO Act. On 20.03.2017, an additional charge under Section 5(m) POCSO Act was also framed

against the accused. To all these charges, the accused pleaded not guilty and claimed trial.

9. In the trial Court, the prosecution examined the following witnesses, who proved the following documents:

S.No.	Witnesses	Document Proved
1.	Victim 'R' as P.W.-1	Proved her statement under Section 164 Cr.P.C. as Ex.Ka.1.
2.	First informant 'K' as P.W.-2	Proved the 'Tehreer' as Ex.Ka.2.
3.	Victim's mother 'S' as P.W.-3	Not proved any document.
4.	Dr. Manju Singh as P.W.-4	Proved the medico legal report of victim as Ex.Ka.3, pathological requisition slip as Ex.Ka.4, pathology report of victim as Ex.Ka.5 and supplementary medico legal report of the victim as Ex.Ka.6.
5.	Constable Vidya Singh as P.W.-5	Proved the Check FIR as Ex.Ka.7 and G.D. Entry No.20 time 12.15 hours dated 02.01.2016 as Ex.Ka.8.
6.	Investigating Officer Mool Chandra Chaurasia as P.W.-6	Proved the Site Plan as Ex.Ka.9 and charge-sheet against the accused as Ex.Ka.10.

10. The victim 'R' (P.W.-1), who was about six years old at the time of deposition, stated in her examination-in-chief that she knew the accused-appellant, who lived downstairs to her house. 'R' at that time, was in Class-I and recalled the incident happening 'long time ago'. She testified that she was going to a shop along with her brother, namely, 'R-1' to buy Nirma when the accused 'Prakash uncle', caught her and removed her underwear and touched her with his penis. She specified that Prakash had caught her in his house. At that time 'R-1' had left for the shop. The

incident occurred at night, though she could not recall the exact time. When she raised alarm, her mother arrived and took her upstairs, where she recounted everything to her. The next morning, she went with her father to the Police Station, where they informed the 'police uncle' about the incident. Subsequently, she went with the police to the hospital, where doctor examined her. She also stated that she had told the Magistrate about the incident. This witness proved her previous statement recorded under Section 164 Cr.P.C. as Ex.Ka.1.

11. In further cross-examination, 'R' P.W.-1 deposed that she had three elder brothers along with 'R-1' (being the youngest), 'S-1' and 'D'. She stated her father operates machine and her mother does embroidery work on sarees at a shop. Her mother goes to the saree embroidery shop after bathing and returns after dusk. She claimed she could tell time by looking at watch but not in minutes. She confirmed that the house she resided in was a tenanted house, where the accused Prakash lived prior to the incident. She stated that when the accused had caught and lifted her, prior to it, her brother had left for the shop. Her mother was taking food and watching from upstairs. She denied that the accused had taken her to the shop for giving toffees and chocolates that day. When she raised the alarm, the accused Prakash released her and began to urinate. Her mother then brought her upstairs. When her mother came the accused had gone into his room.

She identified the room, where the accused took her, as his own. She further stated that the accused had only one room and was operating a machine when her mother took her upstairs. When she went with her mother upstairs, she told her mother about the incident. She stated that the accused slept in the same room, where he operated the machine. After she told her mother about the incident, her mother called her father on phone and summoned him. She went with her father to the Police Station in the morning. She denied that her statement was based on tutoring. On the day of the occurrence, she was wearing pant, underwear, top and slippers. She stated that her underwear was removed by the accused and she did not wear it again. She mentioned that her mother called her father and then her father had quarrel with the accused at the accused's house. Prior to this, neither her father had any quarrel with the accused nor was there any friendship between them or her father visited the accused's room. She further stated that on the day the accused removed her pant, her father had assaulted the accused, questioning him about what he had done. During the quarrel between her father and the accused, the accused had pushed her mother.

12. The first informant 'K' P.W.-2 deposed in his examination-in-chief that at the time of the incident, victim 'R' was not studying and she remained at the house and was about five years old. The incident took place on 01.01.2016 at about 8:30 p.m. Accused had

attempted to commit rape on 'R' then 'R' had raised an alarm. Responding to that, his wife had arrived at the spot and then accused had slapped his wife and also threatened her that if she disclosed about this to anybody then her whole family would be killed and due to this fear, they neither went to the Police Station on that day nor disclosed about the incident to anybody. On the next day i.e. 02.01.2016, he, his brother and neighbour Ghanshyam apprehended the accused. He along with his wife and victim, all went to the Police Station. He is a tenant of Shambhu Sav in House No.24/84 in which the accused also works. The first informant has proved the '*Tehreer*' written by his friend Ghanshyam as Ex.Ka.2. In cross-examination, the first informant deposed that at the time of the incident, he was not present in the house. He left the house at about 7:00 p.m. He had not gone on that day to operate the loom. It was holiday on that day, he came back to his house at about 9:30 p.m. and, at that time, accused was not present in his room. He searched the accused and brought him back to the house at about 10:00 p.m. and then asked him why he had done this act, he used to eat and live in my house and in spite of this, he had committed this act then the accused had told him that he had not committed any such type of act and the accused went to sleep in his room. On the next morning at about 9:00 a.m., he had apprehended accused with the help of his colleagues and brought him to the Police Station. At the Police Station, he had got the '*Tehreer*' written by Ghanshyam. They had

reached the Police Station at about 10:00 a.m. but had written the '*Tehreer*' at about 11:30 a.m. He is living in that *mohalla* for about twelve years. He possesses a mobile. The Police Station is distanced about 10 yards from his house. On the day of the incident, when he had searched the accused then he found him at the tea shop, that is situated at a distance of 4-5 houses from his house. The accused was found sitting there. When he told the accused to return home, then he accompanied him back. Similarly, in the morning the accused was found at the tea shop and from there they took him to the Police Station. He is a tenant for about twelve years and accused is also a tenant for about five years. He had a friendship with the accused for about a year and half. The accused used to operate the loom from his room and used to sleep in the Verandah. His wife is a household lady, who is not employed. He does embroidery work. He does not know how the loom is operated. The first informant denied the suggestion that he had falsely implicated the accused due to enmity.

13. The wife of first informant 'S' P.W.-3 deposed in her examination-in-chief that the incident took place on 01.01.2016 at about 8:30 p.m. She had sent the victim 'R' with his son Rohit to bring sugar for Rs.10/- from a shop then after about ten minutes, she came downstairs upon hearing the cries of the victim. Then she saw 'R' crying. At that time, 'R' was alone and the accused was standing there. The accused threatened

her that if she told this to anybody then he would kill her and also slapped her thrice. Thereafter, she asked what happened, then the accused threatened her. When she started taking 'R', upstairs to her room, then 'R' was faltering. After taking 'R' inside her room, she had asked about the incident then 'R' told her that the accused had touched his penis on her private parts. Later, she rushed downstairs, at that time, the accused had already left. She returned to her room and telephoned her husband, who arrived and searched for the accused, but the accused was not present and by then, night had fallen. They went to the Police Station the next morning and also took the accused with them. The witness deposed in her cross-examination that she had told police personnel that the accused had touched the victim's private parts with his penis (as told by 'R') and if this was not mentioned in her statement, she could not explain the reason. At the time of the incident, she was not doing anything. She is a household woman. Her husband operates loom. The accused also used to operate loom in the same house, in the lower portion. Her husband departs everyday from home at about 7:00 a.m. and returns at about 10:00 p.m. On the date of the incident, her husband had not gone for work because it was a holiday. Her husband had remained in the house the whole day, but in the evening at 8:00 p.m., had gone to his sister-in-law's (*bhabhi's*) house in Osanganj and returned after receiving information(of the incident) at about 8:45 p.m. The next morning, the accused met her husband

at the shop and the accused was then asked to accompany him to the Police Station, to which he agreed. The next day, they departed for the Police Station at about 8:00 a.m. and reached there after 5-10 minutes. At the Police Station, Ghanshyam wrote the '*tehreer*'. She did not know where the accused remained in the night of the incident. In the house where the incident took place, besides her and the accused, three other persons also resided. When she reached downstairs, the accused had already left. She had not seen the accused committing the wrong act with the victim. After she came downstairs and inquired from the accused, then accused had slapped her, but she did not suffer any injury, though her cheeks turned red. She had not disclosed to the doctor that she suffered any injury. When she came downstairs, at that time, the victim was standing beside a bed and the accused was present in the courtyard (*angan*). This witness denied the suggestion that her husband and the accused used to consume liquor together and that an altercation had taken place between them, leading to the accused being falsely implicated.

14. Dr. Manju Singh (P.W.-4) deposed in her examination-in-chief that on 02.01.2016, she examined the victim 'R', who complained of pain in her private parts. The external examination revealed no injuries, but there was a mild abrasion on the victim's *labia majora*. The victim also reported experiencing pain while urinating. There was no bleeding. She prepared a

slide for pathological examination to determine the presence of spermatozoa in the vaginal smear. She proved the requisition for medical/pathological examination as Ex.Ka.4, the medico-legal examination report of the victim as Ex.Ka.3 and the pathological report as Ex.Ka.5. The supplementary medico-legal report of the victim was proved as Ex.Ka.6. According to her, no live or dead spermatozoa was found in the vaginal smear. In her opinion, the victim was about five years old and sign of sexual assault was present. In cross-examination, she acknowledged that no sign of injury was found on the victim's body and that she had not specified the duration of the injury.

15. Constable Vidya Singh (P.W.-5) deposed in her examination-in-chief that on 02.01.2016, she was posted as *Moharir* at Police Station Jaitpura. She stated that she dictated the FIR based on the '*tehreer*' provided by the first informant to the computer operator. This witness proved the check FIR as Ex.Ka.7 and the corresponding carbon copy of General Diary Entry No. 20 time 12.15 hours, dated 02.01.2016 as Ex.Ka.8.

16. The Investigating Officer Moolchand Chaurasia (P.W.-6) deposed in his examination-in-chief that he took over the investigation of this case on 02.01.2016. Subsequently, he recorded the statements of witnesses and arranged for the victim's statement to be recorded under Section 164 Cr.P.C. This witness proved the Site

Plan of the occurrence as Ex.Ka.9 and charge-sheet against the accused as Ex.Ka.10. In cross-examination, this witness deposed that the victim, in her statement under Section 164 Cr.P.C., had not disclosed that the accused had assaulted her mother. He stated that the incident took place in a room, situated on the ground floor. The accused was apprehended and brought to the Police Station by the first informant. The accused, first informant, victim and other witnesses arrived together at the Police Station and, at that time, he was present there. The victim resided on the 4th storey. The victim's mother had not disclosed in her statement under Section 161 Cr.P.C. that the victim had told her that the accused had touched her private parts with his penis. He further stated that if this fact had been disclosed to him by 'S', he certainly would have mentioned the same in the case diary. 'S' had disclosed in her statement that the victim was limping. The building is four-storied, with many tenants residing there, who frequently move around. The incident, however, took place on the ground floor near verandah.

17. The accused, in his statement under Section 313 Cr.P.C., denied the prosecution story. However, he admitted that he used to work at the factory from that place but denied residing there. According to the accused, he had been falsely implicated due to enmity.

18. Learned counsel for the appellant submitted that the prosecution story is wholly unbelievable. Learned

counsel further submitted that there is no ocular and medical evidence of 'penetrative sexual assault' on the victim. No injury has been found on the private parts of the victim. The hymen of the victim was found intact. Also, no spermatozoa was found in the vaginal smear of the victim. The victim in her statement under Section 164 Cr.P.C. as well as her evidence in the Court never mentioned that she suffered 'penetrative sexual assault'. Learned counsel further submitted that the victim was only five years old, at the time of the alleged incident, who gave a tutored testimony before the Court, which was not corroborated by any other independent witness. The first informant and his wife are not eye witnesses of the alleged incident. In the alternative, it has been submitted that even if it is proved, but not admitted, that the accused touched the victim's private parts with his penis, even then 'penetrative sexual assault' is not proved. At the most it can be said that there was aggravated sexual assault by the accused-appellant for which the maximum prescribed punishment under Section 10 of the POCSO Act is seven years, which has already been undergone by the accused. With these submissions, it has been prayed that the appeal be allowed and the impugned judgment and order be **set aside**.

19. *Per contra*, learned A.G.A. has submitted that it is proved by the ocular and medical evidence that the accused touched his penis to the private part of the minor victim, resulting in mild abrasion in the private

part of the victim, which is proved from the evidence of doctor P.W.-4. Learned A.G.A. further submitted that at the time of the incident the victim was only five years old, who has fully corroborated the incident in her statement under Section 164 Cr.P.C. as well as in her testimony before the court, which is wholly consistent and reliable. In these facts and circumstances, the trial court has not committed any illegality in convicting the accused. With these submission, it has been prayed that the criminal appeal be rejected.

20. Having heard learned counsel for the parties and having perused the record, we notice that the offence of “penetrative sexual assault” is defined under Section 3 of the P.O.C.S.O. Act, as below:

“3. 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.”

21. “Sexual assault” as defined under Section 7 of P.O.C.S.O. Act, reads as below:

“7. 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.”

22. “Aggravated sexual assault” as defined under Section 9 (m) of the P.O.C.S.O. Act, reads as below:

“9. Aggravated sexual assault-

(m) whoever commits sexual assault on a child below twelve years; is said to commit aggravated sexual assault.”

23. From the perusal of the evidence of the victim 'R' (P.W.-1), it appears that on the date of the incident, the accused caught and lifted her, removed her underwear and then touched her body with his penis. At that time, the victim's brother 'R-1' was not present as he had gone to the shop. This incident took place at night. After the incident, the victim 'R' raised an alarm. Upon hearing that her mother 'S' (P.W.-3) came downstairs, and took her upstairs. The victim then informed her mother about the incident, who in turn informed her husband (P.W.-2) through phone, then her husband arrived. The victim proved her statement under Section 164 Cr.P.C. as Ex.Ka.1. In her previous statement recorded under Section 164 Cr.P.C., the victim disclosed that the accused had removed her underwear and had touched her private parts with his penis. She then raised alarm, which her mother heard and came to her aid. The victim also mentioned that, at the time of the incident, the accused was wearing clothes on his upper body but had removed his lower body clothes. Similarly, the victim reiterated in her examination-in-chief that the accused had touched her body with his penis.

24. Nowhere has the victim mentioned that the accused had caused penetration with his penis, into her private parts. This fact is also corroborated by victim's mother 'S' (P.W.-3), who specifically mentioned in her examination-in-chief that after the incident 'R' told her that accused touched her private parts with his penis. It

is clear that 'S' (P.W.-3) is not an eye witness of the incident and this fact was disclosed to her by the victim 'R'. Similarly, the first informant 'K' P.W.-2 is also not an eye witness of the incident, having been informed about the incident by his wife 'S' (P.W.-3).

25. It is the prosecution case that the victim 'R' (P.W.-1) was raped by the accused. However, from the victim's statement under Section 164 Cr.P.C., the examination-in-chief of the victim 'R' (P.W.-1) and her mother 'S' (P.W.-3), it is apparent that the accused only touched her private part with his penis. There is no oral evidence to the effect that at any time the accused attempted to cause penetration or insertion with his penis or otherwise into the vagina/urethra/mouth or anus of the victim. The medico-legal examination of the victim was conducted on 02.01.2016 by Dr. Manju Singh (P.W.-4). In the medical examination report Ex.Ka.3, no injury was found on the external body of the victim. According to this report, only a mild abrasion was found on the private parts (*labia majora*) of the victim. The victim's hymen was found normal. In the supplementary medico-legal report, Ex.Ka.6, it is also mentioned that sign of sexual assault was present. It is also not the medical opinion, that 'penetrative sexual assault' was committed on the victim. No internal injury has been found on the private parts of the victim as may itself establish commission of 'penetrative sexual assault'; there was no bleeding; only a mild abrasion has been found on the outer

private parts (*labia majora*), which corroborates the evidence of 'R' P.W.-1 and 'S' P.W.-3 that the accused had touched the victim's private parts with his penis. In the absence of any ocular evidence led by the prosecution to establish that the injury was suffered upon 'penetrative sexual assault', that medical opinion may not itself be sufficient to establish such offence.

26. In any case, in that state of evidence led by the prosecution, a reasonable doubt persists as to occurrence of 'penetrative sexual assault'. Since ocular evidence has not been led to that effect, it is difficult to read the medical opinion in isolation to reach that conclusion. Obviously, this evil act was done with sexual intent, but neither there is any ocular evidence to establish actual penetration nor there is any ocular evidence of any attempt made to penetrate the vagina/urethra of 'R'. Therefore, in the proven facts, in our opinion, this proven act of the appellant does not fall within the definition of penetrative sexual assault as defined under Section 3 of the POCSO Act.

27. In view of the above, the accused has committed sexual assault on the victim by touching his penis to the private parts of the victim, which falls within the definition of 'aggravated sexual assault' as defined under Section 9 (m) of the POCSO Act, considering the victim was only five years old. Since there is no evidence of penetrative sexual assault, the trial court has erred in convicting the accused for the offence of

rape under Section 376 I.P.C. and sentencing him, to suffer life imprisonment under Section 5(m)/6 of the POCSO Act.

28. From the evidence of 'S' (P.W.-3), it appears that when she came downstairs upon hearing the screaming of the victim 'R' (P.W.-1), she was threatened by the accused and slapped thrice. However, she sustained no apparent injury in this assault and no injury report of 'S' is also available, on record. But nonetheless, a simple injury has been afflicted on 'S'. Further, since the accused threatened her with dire consequences, the conviction of the accused-appellant under Section 323 and 506 I.P.C. by the learned trial court is justified and maintained.

CONCLUSION

29. In view of the above analysis, we are of the considered opinion that the learned trial court erred in convicting the appellant for committing aggravated penetrative sexual assault on minor victim 'R' under Section 5(m)/6 of the POCSO Act, and sentencing him to suffer life imprisonment along with a fine of Rs. 20,000/- and in default to undergo an additional sentence of one year. As discussed above, in absence of ocular evidence to that effect, the offence of 'penetrative sexual assault' was not proven beyond reasonable doubt.

30. Accordingly, the conviction and sentence of the accused-appellant under Section 376 I.P.C. and Section 5(m)/6 POCSO Act is set aside. Instead, the accused is convicted for lesser offence of “aggravated sexual assault” punishable under Section 9(m)/10 of the POCSO Act, 2012, and sentenced to undergo maximum seven years simple imprisonment along with a fine of Rs. 20,000/-, and in default, to undergo additional simple imprisonment of one year. The conviction and sentence of the accused under Sections 323 and 506 I.P.C. as imposed by the trial court, is affirmed.

31. As per the Custody Certificate, till 25.05.2025, the accused-appellant has remained confined for 9 years, 4 months and 21 days (actual) in jail. The accused has already served the substantive sentence and the default sentence imposed by the trial court for offence under Sections 323 and 506 I.P.C and this Court for offence under Section 9(m)/10 of the POCSO Act. In view of this, the appellant shall be released forthwith, if not wanted in any other case.

32. Accordingly, the criminal appeal is **partly allowed**.

33. Let the trial court record along with a copy of this order be transmitted to the court concerned through Registrar (Compliance) forthwith and a copy of this order may also be sent to the jail authorities for necessary compliance.

34. Trial court concerned, shall submit its compliance report to this Court, within a month.

Order Date:- 26.5.2025
Jitendra/Anurag/-

(Sandeep Jain, J.)

I agree.

(S.D. Singh, J.)