



UPHT010035492022

In the Court of Additional Sessions Judge/Special Judge, POCSO Act,

Room No.01, Hathras

Presided by- Zaiba Majid,(Additional Sessions Judge,/Special Judge POCSO
Act, (U.P.02647)

Special Sessions Trial No.-686 of 2022

State of Uttar Pradesh **Versus** **Vikash Kumar** S/o Rishipal,
R/o Atwa kudh Fatehgarh,
PS-Kudh Fatehgarh,
District-Sambhal

Crime No.-274/2022

U/Ss-4 POCSO Act and 363,366,376 I.P.C.

Police Station- Kotwali Hathras.

District-Hathras

Present:- Ld. Special Public Prosecutor for the State.

Ld. Counsel Sh. Vivek Kumar Katara for the accused.

Judgment reserved on:-31-01-2023

Judgment pronounced on:-07-02-2023

JUDGMENT

01. Present charge-sheet has been filed against accused Vikash kumar,
U/Ss 4 Protection of Children from Sexual Offences Act,2012,
(hereinafter be referred as POCSO Act) and 363,366,376 of Indian

Penal Code, 1860, (hereinafter be referred as I.P.C.), by the police officials of Police Station-Kotwali Hathras, in this Court. On 01-10-2022, cognizance has been taken and accused was summoned to face trial.

02. Brief facts of the prosecution case:- On 30-07-2022, Complainant(father of victim), (Victim and her parents's name, parentage, address, antecedents are being withheld in this Judgment in order to protect identity of the victim, in compliance of S.33(7) of POCSO Act,2012), has given written complaint at the police station in which he mentioned that on 28-07-2022 at around 06:00 P.M. his daughter (victim) went from the house without telling anyone. It is further mentioned that victim used to talk from a mobile number on the phone of her father. Complainant had suspicion that the person who, has given mobile phone to his daughter is the person who, has kidnapped the victim by enticing her. He searched his daughter but when not found he has given the complaint in the police station. On the basis of this complaint, present FIR has been registered against owner of mobile phone number 6398682171. During investigation name of accused Vikash kumar came in light and after investigation present charge-sheet has been filed against him.

03. During the investigation, statements of witnesses were recorded. Site plan of the place of incident was prepared. After completion of the investigation, charge-sheet has been filed in the Court against accused.

04. Accused was summoned and copies of charge sheet were supplied to him in compliance of section 207 Cr.P.C.

05. Charge:- On 01-11-2022, Charge U/Ss 4 POCSO Act and 363,366,376 I.P.C. against accused has been framed.

06. On 30-01-2023, statement of accused U/S 313 Cr.P.C. has been recorded, in which he denied the evidence put to him and stated that he is falsely implicated in the present case and also denied to lead any defence evidence.
07. Before coming to the testimonies of individual witnesses, the details of the witnesses examined by the prosecution and the documents produced, are hereby put in a tabulated form as under:-

List of Witnesses:-

Sr.No.	P.W. No.	Name of witness	Details
1.	P.W.-1	Father of victim	Complainant
2.	P.W.-2	Victim	Victim
3.	P.W.-3	S.I. ShantiSharan Yadav	I.O.

List of Documents:-

Sr.No.	Exhibit No.	Details of the documents	Proved/Relied upon by
1.	Ex-Ka.1	Tehrir	P.W.1 father of victim
2.	Ex-Ka.2	Handing over memo of victim	P.W.1 father of victim
3.	Ex-Ka.3	Recovery memo of victim	P.W.1 father of victim
4.	Ex-Ka.4	Statement U/S 164 Cr.P.C. of victim	P.W.02 Victim
5.	Ex-Ka.5	Site-plan	P.W.3 S.I. Shantisharan Yadav
6.	Ex-Ka.6	Arrest memo of accused	P.W.3 S.I. Shantisharan Yadav
7.	Ex-Ka.7	Charge-sheet	P.W.3 S.I. Shantisharan Yadav

08. **Evidence:-**In order to prove it's case, prosecution has examined only 03 witnesses as under:-

पी०डब्ल्यू.01 पीड़ित के पिता ने सशपथ ब्यान किया है कि दिनांक 28.07.2022 को शाम के 06.00 बजे घर से बिना बताये किसी के साथ चली गयी थी। मेरी बेटी पीड़िता मो से किसी लड़के से बात करती थी। मुझे शक है कि मोबाइल से जिस व्यक्ति से बात करती थी वही व्यक्ति मेरी बेटी को बहला-फुसलाकर ले गया है। मैंने अपनी बेटी को काफी तलाशा नहीं मिली। मने इस घटना की रिपोर्ट थाना को० हाथरस पर एक व्यक्ति से लिखवाकर दी थी, जो कागज संख्या-4 क/3 है, जिस पर प्रदर्श क-1 डाला गया। प्रदर्श क-1 पर मेरे हस्ताक्षर हैं। मैं अपने हस्ताक्षर की पहचान करता हूं। पुलिस ने मेरी लड़की को बरामद किया था और न्यायालय के आदेश से मुझे सुपुर्द किया था। सुपुर्दगीनामा कागज संख्या-14 ख/2 है, जिस पर मेरे हस्ताक्षर हैं। सुपुर्दगीनामा पर प्रदर्श क-2 डाला गया। मैं प्रदर्श क-2 पर अपने हस्ताक्षर की पहचान करता हूं। पुलिस ने मेरी लड़की को बरामद किया था। फर्द बरामदगी बनाया था, जिस पर मेरे हस्ताक्षर हैं, जिस पर प्रदर्श क-3 डाला गया। मैं प्रदर्श क-3 पर अपने हस्ताक्षर की पहचान करता हूं।

पी०डब्ल्यू.02 पीड़िता ने सशपथ ब्यान किया है कि मैं विकास को नहीं जानती हूं। हाजिर अदालत अभियुक्त को देखकर कहा कि मैं इसे नहीं जानती हूं ना मैंने इससे कभी मिली। विकास मुझे दिनांक 28.07.2022 को मोसा० पर बैठाकर संभल नहीं ले गया था ना मैं उसके साथ किसी मकान पर रही हूं ना ही उसने मेरे साथ कोई शारीरिक संबंध बनाये। न्यायालय की अनुमति से सीलबन्द लिफाफा खोला गया, जिस पर पीड़िता ने देखकर कहा कि इस पर हस्ताक्षर व फोटो लगा है, जिस पर प्रदर्श क-4 डाला गया, जो पीड़िता के बयान 164 दं०प्र०सं० का है। मैं प्रदर्श क-4 पर अपने हस्ताक्षर की पहचान करती हूं।

पी०डब्ल्यू.03 उ०नि० शान्तिशरण यादव ने सशपथ ब्यान किया है कि दिनांक 30.07.2022 को मैं थाना-कोतवाली पर उ०नि० के पद पर तैनात था। मु०अ०सं० 274/2022, अन्तर्गत धारा-363,366 भा०दं०सं० की विवेचना मुझे थाना-कार्यालय से प्राप्त हुई। मैंने प्रस्तुत प्रकरण की विवेचना कर निम्नलिखित दस्तावेजों नक्शा-नजरी पर प्रदर्श क-5 डाला गया। फर्दबरामदगी पर प्रदर्श क-3 डाला गया। पीड़िता के सुपुर्दगीनामा पर प्रदर्श क-2 डाला गया, गिरफ्तारी मीमो पर प्रदर्श क-6 डाला गया है तथा आरोपपत्र पर प्रदर्श क-7 डाला गया।

- 09.** There are 06 witnesses mentioned in the list of prosecution witnesses. Prosecution has examined all the 03 witnesses.
- 10.** Ld. special prosecutor has submitted that though victim has turned hostile in cross-examination but complaiant in examination-in-chief, has supported the prosecution case. On the other hand, Ld. counsel for the accused has submitted that no prosecution witness has supported the prosecution case hence, accused is entitled to be acquitted.

11. **Observation and findings:-** After hearing both the counsels and perusing the record, my findings are as under:-

12. First, it is to be seen whether victim is minor or not as this is special Court U/S 28 of POCSO Act, which has Jurisdiction to try sexual offences against child. Definition of child has been provided in **S.2(d)** ***“Child means any person below the age of eighteen years.”***

Age determination of Victim:-

Now the question arise how age of victim will be determined? Answer to this question can be found in the judgment of Hon’ble Supreme Court in following case-

In the case of **Jarnail Singh Vs State of Haryana (2013)7SCC263**, it has been held that *“On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice(Care and Protection of Children) Rules, 2007(hereinafter be referred to as the 2007 Rules)......Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view, that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime..... In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in the subsequent clause”.*

It is relevant to note that date of offence is 28-07-2022, and The Juvenile Justice (Care and Protection of Children) Act, 2015(hereinafter will be referred as JJ Act) came into force on 15-01-2016, thus, age of victim will be determined by the The Juvenile Justice(Care and Protection of Children) Act, 2015. For ready reference S.94 JJ Act is extracted as under:-

S.94 Presumption and determination of age:-(1) “Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority of a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by a ossification test or any other latest medical age determination test conduct on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be true age of that person.”

In order to prove the age of victim prosecution has not proved any document. Thus, it can be concluded that prosecution has failed to prove, the fact that victim was child within the meaning of S.2(d) of the POCSO Act, on the date of offence.

13. To prove the ingredients of offences punishable U/Ss 4 POCSO Act and 363,366,376 I.P.C. prosecution has examined following public and police witnesses.

Public witnesses:- Material witnesses produced by the prosecution in the Court are P.W.01 Father of victim(complainant) and P.W.02 Victim.

Police Witnesses:-P.W.03 S.I. Shantisharan Yadav is the I.O. who proved site-plan as Ex-Ka.05, arrest memo of accused as Ex-Ka.06 and Charge-sheet as Ex-Ka.7.

14. **Offence U/Ss 4 POCSO Act, 363,366,376 IPC:-** As, accused persons are charged U/Ss 4 Pocso Act 363,366,376, IPC hence, it is necessary to know ingredients of these sections. S.4 Pocso Act provides punishment for Penetrative Sexual Assault which is defined U/S 3 Pocso Act. S.363 provides punishment for kidnapping. Kidnapping from lawful guardianship has been defined U/S 361 IPC. S.366 IPC provides punishment for kidnapping a woman to compel her marriage. S.376 IPC provides punishment for committing rape, which has been defined U/S 375. Thus, at this juncture Ss.4 Pocso Act, 361,366,375,376 IPC are extracted as under-

S.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 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 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.”

S.375 Rape:- “A man is said to commit “rape” if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other persons; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
(d) applies his mouth to the vagina, urethra of woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:- she is sensible, capable of giving consent i.e. use of force etc like this

First:- Against her will.

Secondly.- Without her consent.- she is insensible due to drink, unsound mind not capable of giving consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes

that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation.-1. For the purposes of this section, “Vagina” shall also include labia majora.

Explanation.-2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure of intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under section fifteen years of age, is not rape.

S.361 Kidnapping from lawful guardianship:- “Whoever takes or entices any minor under sixteen year of age if a male or, under eighteen year of age if a female, or any person of unsound mind, out of the keeping of the lawful guardianship of such minor or person of unsound mind, without the

consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”

S.366 Kidnapping,abducting or inducing woman to compel her marriage:-*“Whoever, kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished wit imprisonment of either description for a term which may be extend to ten years, and shall also be liable to fine; (and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place, with intent that she may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person, shall be punishable as aforesaid).”*

15. Hence, from the reading of section 3 of Protection of Children from Sexual Offences Act, 2012, it is clear that in order to prove the offence punishable U/S 4 Pocso Act, it is to be proved that accused has done any of the act mentioned in section 3. In order to prove the offence punishable U/S 363,366 IPC, it is to be proved that accused has kidnapped a minor out of lawful guardianship for marriage. In order to prove the offence punishable U/S 376 IPC, it is to be proved that has have sexual intercourse with a woman against her will or without her consent.

Now, it is to be seen whether offences U/Ss 363,366,376 IPC are proved or not?

16. To prove the allegation of offences punishable U/Ss 363,366,376 IPC, star witness is victim.

17.1 P.W.02 Victim deposed that she does not know accused Vikash. After seeing the accused Vikash who, was present in the Court, she deposed that she does not know him and she has never met him. She further deposed that accused Vikash has not taken her to the Sambhal on 28-07-2022. She further deposed that neither she has lived with accused Vikash in any house nor he has established physical relation with her. She identified her signature and photograph on statement recorded U/S 164 Cr.P.C. She has been cross-examined by Ld. prosecutor but nothing incriminating came on record against accused. In the cross-examination, recorded on the same day, she after seeing the accused present in the Court deposed that he has not committed any incident with her. She further deposed that accused neither kidnapped her nor committed rape upon her. She further deposed that statement before the Magistrate has been given by her under fear of the police.

17.2 P.W.01 Father of Victim deposed that on 28-07-2022 at around 06:00 P.M. his daughter went with someone without telling anyone. He further deposed that his daughter used to talk a boy and he has suspicion that with whom victim used to talk on mobile that person has kidnapped his daughter by enticing her. He further deposed that he searched for his daughter but when she could not find he has given complaint at the police station, he identified his signature on the complaint on which Ex-Ka.01 has been put. He also identified his signature on handing over memo of victim on which Ex-Ka.02 has been put. He also identified his signature on recovery memo of victim on which Ex-Ka.03 has been put. In the cross-examination, recorded on the same day, he deposed that when his daughter returned at home she told him that she went from the house as she became angry and out of her own will she returned at the home. He further deposed that victim has not told him or any family

member about her kidnapping by anyone. He also deposed that he has no knowledge about the contents of complaint Ex-Ka.01.

Perusal of his testimony shows that he is not eye-witness of this case however, he is the complainant. In cross-examination, he did not support the prosecution case.

18. On the basis of aforementioned discussion, it can be concluded that offences U/Ss 4 POCSO Act and 363,366,376 IPC are not proved.
19. **Final conclusion:-** It is the case of prosecution that on 28-07-2022, accused Vikash Kumar kidnapped victim out of her legal guardianship for the purpose of marriage/illicit intercourse and committed rape and sexual assault upon her.
20. Prosecution has failed to prove the fact that victim was child on the date of offence.
21. Most material witnesses in this case is victim however, she has not supported the prosecution case. Complainant is neither eye-witness nor he supported the prosecution case.
22. On the basis of above mentioned discussion, it can be concluded that prosecution has failed to prove the fact that accused Vikash Kumar kidnapped victim out of her legal guardianship for the purpose of marriage/illicit intercourse or committed rape or sexual assault upon her, hence, accused is entitled to be acquitted of charges U/Ss 4 POCSO Act and 363,366,376 I.P.C

P.W.01 Father of victim is the complainant, who got the present case registered however, he did not support the prosecution case during trial hence, this Court is satisfied that he has given false evidence for which he needs to be tried summarily **by registering a separate criminal**

miscellaneous case under section 344 Cr.P.C of which I take cognizance. Sessions Clerk is ordered to register a separate case as directed above and issue notice to P.W.01 for filing his reply why he should not be punished for giving false evidence?

ORDER

Accused Vikash Kumar is acquitted of charges U/Ss 4 Protection of Children from Sexual Offences Act,2012, and 363,366,376 I.P.C. in Crime No.274/2022, S.T.No.-686/2022, PS-Kotwali Hathras, District-Hathras. Accused is in jail he be released at once if not detained in any other case.

Accused will furnish bail bonds in terms of S.437A Cr.P.C. Personal bond in tune of Rs.25,000/- and two sureties of like amount each within one week from today.

File be consigned to record room in accordance with rules.

Dated:-07-02-2023.

(Zaiba Majid)
(J.O.Code No.-U.P.02647)
Additional Sessions Judge/Special
Judge, POCSO Act,
Court No.01, Hathras.

Judgment signed, dated and pronounced by me in open Court today.

Dated:-07-02-2023.

(Zaiba Majid)
(J.O.Code No.-U.P.02647)
Additional Sessions Judge/Special
Judge,POCSO Act,
Court No.01, Hathras.