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Neutral Citation No. - 2025:AHC:37075

Judgment Reserved on 13.11.2024

Judgment Delivered on 17.03.2025

Court No. - 79

Case :- CRIMINAL REVISION No. - 1449 of 2024

Revisionist :- Akash And 2 Others

Opposite Party :- State Of U.P. And 2 Others

Counsel for Revisionist :- Ajay Kumar Vashistha

Counsel for Opposite Party :- G.A., Indra Kumar Singh

Hon'ble Ram Manohar Narayan Mishra,J.

1. Instant Criminal Revision has been preferred against the summoning order dated 23.06.2023 passed by learned Special Judge POCSO Act, Kasganj in Complaint Case No.23 of 2022, P.S. Patiyali, District Kasganj. Whereby the revisionist Nos.1 and 2 namely Akash and Pawan have been summoned to face trial for charge under Sections 376 IPC readwith Section 18 of POCSO Act, and also summoned revisionist No.3 Ashok for charge under Sections 504 and 506 IPC.

2. Heard Sri Ajay Kumar Vashistha, learned counsel for the revisionists, Sri Indra Kumar Singh, learned counsel for the respondent No.2 and learned A.G.A. for the State-respondent and perused the material available on record.

3. The factual matrix of the case in brief are that informant Asha Devi wife of Mahadev filed an application under Section 156(3) Cr.P.C. bearing date 12.01.2022 before the court of Special Judge, POCSO Act, with allegation that on 10.11.2021 at around 05:00 pm she was returning from the home of her sister-in-law (nanad) alongwith her minor daughter aged about 14 years. Accused Pawan, Akash and Ashok met her on the way on muddy road and asked her from where she was coming, as they are her co-villagers. When she stated that she was coming from the place of her

sister-in-law accused Pawan offered a lift to her daughter with assurances that he would drop her at residence and placing reliance on his assurance, she permitted her daughter to company him on his motorcycle. The accused persons had stopped their motorcycle on muddy way, on way to her village they started grabbing her breasts and Akash dragged her and tried to take her beneath the culvert and broke the string of her pyjama. The witnesses Satish and Bhurey who were coming behind on a tractor reached the spot on hearing cries of her daughter. The accused persons threatened him with life by pointing a country made pistol to them and fled away from the place. When the applicant came to the place of Pawan to make a complaint, his father Ashok abused and threatened her with life, she went to police station to lodge an FIR on next day, but no action was taken.

4. Learned court below vide order dated 21.03.2022 treated the application as complaint and proceeded with the case as a complaint case. Learned court below after recording statements of the complainant under Section 200 Cr.P.C. and her witness Satish under Section 202 Cr.P.C. summoned the accused Pawan and Akash under Sections 376 IPC readwith Section 18 of POCSO Act and accused Ashok under Section 504 and 506 IPC The accused persons feeling aggrieved by the summoning order has filed present revision before this Court.

5. Learned counsel for the revisionist submitted that revisionist No.1 is a cousin (mausera bhai) of revisionist No.2 and nephew of revisionist No.3, revisionist No.2 is the son of revisionist No.3 so both are son and father. As the revisionists are closely hit family members, commission of such type of incident by them does not look natural. In fact mother of revisionist No.1 Smt. Ranjana has lodged an FIR against four persons namely Rajeev, Shailendra, Sukhveer, and Videsh

vide Case Crime No.209 of 2021 under Sections 354 (b), 504 506 IPC at P.S. Patiyali, District Kashganj on 17.10.2021. In said FIR an allegation was made by said Ranjana the mother of revisionist No.1 Akash that named accused persons molested and torn her clothes on 04.11.2021 at around 11:00 am when she had gone to her agricultural field alongwith her son Akash to make kyari (seed plot), they also engaged in marpeeth with her son and abused him. The victim who is mother of revisionist No.1 had supported the FIR version in her statement under Section 161 Cr.P.C. and chargesheet has been filed against named accused persons under Section 354 kha, 504, 506 IPC.

6. He further submitted that as Sukhveer who is brother-in-law the informant Smt. Rajnana in said police case and real uncle of the victim in the present case is an accused in said case, the revisionists have been maliciously framed by informant and victim in this false criminal case to save skin of Sukhveer who is their family member. Present FIR has been lodged after filing of chargesheet in said police case against Sukhveer and others as a counter blast of earlier case lodged at the instance of the mother of revisionist No.1.

7. Learned counsel for the revisionist submitted that present FIR has been lodged only to wreck vengeance against the revisionist on account of said FIR. It is highly improbable that where there was a prior and recent enmity between both sides, the mother of the victim will permit her daughter to accompany the son and a relative of the informant in earlier case even after filing of chargesheet against informant side.

8. He next submitted that learned court below has failed to appreciate this fact that no offence under Section 376 IPC is made out against accused Pawan and Akash even if complaint version is taken on its face value, the case as produced by prosecution does not go

beyond the extent of Section 354, 354(b) IPC and relevant provisions of POCSO Act.

9. Learned counsel for the revisionist further submitted that neither the complainant nor victim has levelled any allegation regarding commission of rape against the revisionists, even then two accused persons have been summoned inter alia under Sections 376 IPC. This fact itself reflects that summoning order was passed in a casual and cavalier manner without application of mind. Ingredients of offence under Section 375 IPC are not made out in the case. He lastly submitted that summoning order is liable to be set-aside, and at least matter should be remanded to the court below for decision afresh and application for discharge filed by the revisionist.

10. Per contra learned counsel for the respondent No.2 submitted that at the stage of framing of charge trial court is not supposed to sift and weigh the evidence and material collected during investigation in meticulous manner. As at that stage only a prima facie case is to be found out for putting the accused persons on trial. No mini trial can be held at the stage of summoning the accused persons in a complaint case. The learned court below has summoned main accused persons under Section 376 IPC read with Section 18 of POCSO Act which is tantamount to an offence under Section 376/511 IPC.

11. Learned counsel for the revisionist placed reliance on recent judgment of the Hon'ble Supreme Court in **Lal Kumar Singh and others Vs. State of Maharashtra** in a Criminal Appeal preferred against order passed by Single Judge of Bombay High Court dismissing the criminal writ petition filed by the accused appellants against the order of issuance of process by the learned CJM concerned and the order passed by learned Session Judge dismissing the Criminal Revision preferred by the appellants.

12. Hon'ble Court observed in the above judgment as under:-

The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. The case of [Sunil Bharti Mittal vs. Central Bureau of Investigation](#) (2015) 4 SCC 609 , which reads as under: -

“51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate (2015) 4 SCC 609 taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words “sufficient ground for proceeding” appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.”

29. A similar view has been taken by this Court in the case of [Ashoke Mal Bafna](#) (supra).

30. *In the present case, leaving aside there being no reasons in support of the order of the issuance of process, as a matter of fact, it is clear from the order of the learned Single Judge of the High Court, that there was no such order passed at all. The learned Single Judge of the High Court, based on the record, has presumed that there was an order of issuance of process. We find that such an approach is unsustainable in law. The appeal therefore deserves to be allowed.”*

13. Section 375 IPC defines rape as under:-

A man is said to commit “rape” if he—

- 1. 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 person; or*
- 2. 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*
- 3. 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*
- 4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:*

First.- Against her will.

Secondly- Without her 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.

Explanations:-

- 1. For the purposes of this section, “vagina” shall also include labia majora.*
- 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 a 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.

Exceptions

- 1. A medical procedure or intervention shall not constitute rape.*
- 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

14. Section 18 of POCSO Act, provides punishment for attempt to commit an offence. Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

15. Section 7 of POCSO Act defines 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.

16. Section 8 of POCSO Act provides 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.

17. In the present case, learned court below has observed in the impugned order that according to academic documents of the victim issued by primary school from where she passed class IV, her date of birth is mentioned as 12.02.2002. Whereas the alleged incident occurred on 10.11.2021, thus the victim was more than 11 years of age on the date of incident and thus she was minor. This fact has not been denied by the revisionist that victim was not minor on the date of incident, but they have taken plea of false implication due to an earlier incident which has been reported by mother of revisionist No.1 against family members of the complainant in the present case.

18. The allegation of Section 376 IPC and Section 18 of POCSO Act is levelled against accused Pawan and Akash. The offence under Section 376 IPC and Section 18 of POCSO Act has been attributed against accused Pawan and Akash and offence under Sections 504 and 506 IPC is alleged against accused Ashok who is father of main accused Pawan. In the impugned order learned court below has summoned the accused Pawan and Akash under Section 376 IPC, but said charge is readwith Section 18 of POCSO Act which provides for punishment for attempt to commit an offence. Thus, instead of invoking Section 376/511 IPC against these accused learned court below has invoked Section 376 readwith Section 18 of POCSO Act. Thus, it appears that learned court below has found the prima facie

case against these accused for attempt to rape, or attempt to commit penetrative sexual assault within the purview of POCSO Act.

19. Section 354 (B) IPC provides punishment for assaults or uses criminal force against any woman with the intent to disrob which shall not be less than three years but which may extend to seven years, and shall also be liable to fine. Section 354 IPC provides punishment for assault of criminal force to women with intent to outrage her modesty which shall not be less than one year but it may extend to five years.

20. In section 376 IPC punishment for rape has been provided. Section 376 (AB) IPC describe punishment for rape on woman within twelve years of age, imprisonment shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or both.

21. In the present case, the allegation against accused Pawan and Akash is that they grabbed the breasts of the victim and Akash tried to bring down lower garment of the victim and for that purpose they had broken string of her lower garments and tried to drag her beneath the culvert, but due to intervention of witnesses they left the victim and fled away from the place of incident. This fact is not sufficient to draw an inference that the accused persons had determined to commit rape on victim as apart from these facts no other act is attributed to them to further their alleged desire to commit rape on the victim.

22. In the present case the allegation against the revisionists has appearing from the statement of the complainant and victim is that the accused Pawan had got victim seated on pillion of his motorcycle, when the accused Pawan and Akash made a complaint when she was

on way alongwith her daughter on date and time of incident, on giving her assurance they stopped the motorcycle on the way near the culvert grabbed her breast and Akash tried to dragged her beneath the culvert and broke the string of her pyjama (lower garment). On hearing her shrieks the witnesses Satish and Bhura emerged on the spot who were coming behind on a tractor and challenged the accused persons who fled away after giving the witnesses threat to kill and pointed country made pistol towards them. The allegation against accused Ashok who is father of accused Pawan is that when the complainant approached him after the incident alongwith the victim at his residence, he abused and threatened her and for that reason accused Ashok has only been summoned for charge under Section 504 and 506 IPC, and there is no allegation made against him as to molestation or attempt to rape.

23. There is no allegation in the complaint or in statement of the witnesses recorded under Sections 200/202 Cr.P.C. that the accused Akash himself got unrest after breaking the string of lower garment of the minor victim. The specific allegation against Akash is that he tried to drag the victim beneath the culvert and broke the string of her pyjama. It is also not stated by witnesses that due to this act of the accused the victim got naked or got undressed. There is no allegation that accused tried to commit penetrative sexual assault against the victim.

24. The allegations levelled against the accused Pawan and Akash and facts of the case hardly constitute an offence of attempt to rape in the case. In order to bring out a charge of attempt to rape the prosecution must establish that it had gone beyond the stage of preparation. The difference between preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination.

25. In **Rex v. James Lloyd (1836) 7C and P 817 : 173 ER 141** while summing up the charge to the jury, Justice Patterson observed :

"In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events and notwithstanding any resistance on her part".

*In **Express v. Shankar, (1881) ILR 5 Bom 403** the accused was charged for an attempt to commit rape. There the observations of M. Malyill J., which as quoted below, are very pertinent :*

"We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that conviction of an attempt at rape ought not to be arrived at unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance."

26. After giving a thoughtful consideration and meticulous examination of the facts of the case, this court is of the considered opinion that mere fact that according to prosecution version two accused Pawan and Akash grabbed the breasts of the victim and one of them namely Akash broke the string of her pyjama and tried to drag her beneath the culvert and in the meanwhile on interference of passersby/witnesses the accused persons fled away from the spot leaving the victim behind, is not sufficient to hold that a case of Section 376, 511 IPC or Section 376 IPC readwith Section 18 of POCSO Act has been made out against the accused persons.

27. On facts of the case a prima facie charge attempt to rape is not made out against the accused Pawan and Akash and instead they are liable to be summoned for minor charge of Section 354(b) IPC i.e. assault or abuse a woman with intent to disrobing or compelling her to be naked and Section 9 of POCSO Act provides punishment for aggravated sexual assault on a child victim wherein Section 9 (m) provides that whoever commits sexual assault on a child below twelve years is said to have commit aggravated sexual assault. Section 10

provides punishment with imprisonment upto seven years which shall not be less than five years and shall be liable to fine.

28. Section 10 of POCSO Act provides that 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.

29. With foregoing discussion, this court finds that the finding of the learned court below with regard to offence of attempt to rape in respect of revisionist Pawan and Akash in the impugned summoning order is not sustainable and instead they are liable to be summoned for minor offence under Sections 354(b) IPC readwith Section 9/10 of POCSO Act. The impugned summoning order stands modified accordingly. The learned court below is directed to issue fresh summoning order in respect of the revisionists Pawan and Akash, under modified sections.

30. The revision is **partly allowed** in the manner.

Order Date :- 17.03.2025

Ashish/-