before the trial court and in this event, this should be upto the wisdom of such trial court to be aware of the error or omission, if any, and if required, it may invoke suo motu power to alter such charges.

25. In view of the aforesaid submission and discussion, the order of rejection cannot be approved to the extent of considering ratio of the Judgment rendered in the case of Bharat Parikh **(supra)** and Ratilal Bhanji Mithani **(supra),** but so far as the application filed by applicant seeking alteration in the charges as a matter of right, the same has rightly been rejected by learned trial court.

26. Resultantly, the Criminal Appeal is hereby **dismissed**.

27. However, the learned trial court can take the reference of the application to the effect of correcting the defect, if any, suo motu.

28. Interim order stands vacated.

29. Office shall communicate this order to the trial court concerned forthwith.

(2025) 5 ILRA 822
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2025

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE SANDEEP JAIN, J.

Criminal Appeal No. 1231 of 2023

Heera Kol ...Appellant
Versus
State of U.P.& Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Anil Kumar Ojha, Sri Sanjeev Kumar Asthana

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860-Section 376(2)(i) & Section 5/6 of POCSO Act-Challenge to – Conviction-Appellant was convicted for allegedly committing penetrative sexual assault on a 6 year old girl-The FIR and eyewitness testimony did not mention any act indicating penetration-The victim's statement u/s 164 Crpc lacked clarity and consistency-medical evidence /(PW-6) showed no injuries- A chance witness (PW-7) could not identify the victim in court-At trial the victim's version were improved and not corroborated by other evidence-The court held that the prosecution only proved an act of "aggravated sexual assault" u/s 7/9(m) of the POCSO Act, not penetrative sexual assault-The sentence was accordingly reduced from life imprisonment to 7 years rigorous imprisonment u/s 10 of the POCSO Act-Since the appellant had already spent over 8 years in jail, the Court ordered his immediate release, subject to payment of fine.(Para 1 to 43)

The appeal is partly allowed. (E-6)

List of Cases cited:

Monu Vs St. of U.P. ,Neutral Citation No.-2025: AHC-14721-DB

(Delivered by Hon'ble Saumitra Dayal Singh, J.
&
Hon'ble Sandeep Jain, J.)

1. Heard Anil Kumar Ojha, learned counsel for the appellant, Sri Nagendra Kumar Srivastava, learned A.G.A. for the State and perused the records.

2. The present criminal appeal has arisen from the judgment and order of conviction dated 29.09.2022 passed by Ms. Niharika Chauhan, learned Additional District and Sessions Judge/Special Judge (P.O.C.S.O.), Sonbhadra in Special Trial (P.O.C.S.O. Act 2012) No.37 of 2017 (State Vs. Heera Kol), arising out of Case Crime No.121 of 2017, under Section 376 (2)(i) I.P.C. and Section 5(m)/6 Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as P.O.C.S.O. Act), Police Station-Ghorawal, District-Sonbhadra, convicting the accused appellant-Heera Kol and sentencing him to undergo life imprisonment with the fine of Rs.50,000/- for the offence under Section 6 P.O.C.S.O. Act and in default of payment the appellant shall undergo additional imprisonment for one year.

3. Prosecution story emerged on the Written Report dated 02.07.2017 (exhibited as Ex.Ka.1 at the trial) lodged by the first informant-'K' (P.W.-1 at the trial), who is the maternal grand father of the victim 'P'. In that it was narrated that on 01.07.2017 at about 6.00 p.m. his maternal grand daughter 'P' (P.W.-2 at the trial) had gone to a near by hand-pump, to fetch water in a plastic vessel. There, the present appellant was present from before. He took off the underwear of 'P' and rubbed her body parts inappropriately ("sehlane laga"), while 'P' was working the hand pump. On witnessing the same, children and other persons present at that place of occurrence, raised an alarm. At that, 'K' ran up to the place of occurrence. The appellant tried to flee but was apprehended by 'K'. The police was informed on the Police Helpline number 100. The F.I.R. was registered, the next day, on 02.07.2017 at about 3.55 p.m. It is exhibited as Ex.Ka.3 at the trial. 'P' was subjected to Medico Legal Examination (exhibited as Ex.Ka.7 at the trial) conducted at 01.00 p.m. by Dr. Geeta Jaiswar (P.W.-6 at the trial). She stated, no injury whatsoever was noted by her, on 'P'. After more than a month from the occurrence, the statement of the victim was recorded under Section 164 Cr.P.C. on 18.08.2017. It is exhibited as Ex.Ka.2 at the trial. In that, she narrated that the appellant had removed her underwear; flashed his penis; spoke words expressing his intent to commit "penetrative sexual assault" on 'P' and, lifted her in his lap. On being further questioned, she stated, the appellant had flashed his penis at her. No other or further statement was made by her, at that stage to indicate commission of any act amounting to "penetrative sexual assault", by the appellant.

4. Upon completion of the investigation, the Charge Sheet was submitted on 19.08.2017. It is exhibited as Ex.Ka.6 at the trial. On that the appellant was put up for trial. Initially, two charges were framed on 05.03.2018. Those read as below:

"प्रथमः- यह कि दिनॉक-01.07.2017 को करीब 18 बजे बहद स्थान-ग्राम पेढ़, थाना - घोरावल, जिला-सोनभद्र में आपने वादी 'K' की 6 वर्षीया अवयस्क नातिन/पीड़िता के साथ अवांछनीय शारीरिक संपर्क और अग्रकियाओं के अग्रसरण में उसकी चड्ढी उतारकर, उसके अंगों को सहलाकर अपने शरीर से सटाकर उसकी लज्जा भंग करने के आशय से आपराधिक बल का प्रयोग कर उसके साथ छेड़छाड़ की। ऐसा करके आपने धारा 354 क भारतीय दंड संहिता के तहत दंडनीय अपराध किया है जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः- यह कि उपरोक्त दिनांक, समय व स्थान पर आपने वादी की 06 वर्षीया अवयस्क नातिन/पीड़िता की चड्ढ़ी उतारकर, उसके अंगों को सहलाकर अपने शरीर से सटाकर उसकी लज्जा भंग करने के आशय से आपराधिक बल का प्रयोग कर उनके साथ छेड़छाड़ कर लैंगिक हमला कारित किया। ऐसा करके आपने

धारा-7 सहपठित धारा-8 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के तहत दंडनीय अपराध किया है जो इस न्यायालय के प्रसंज्ञान में है।"

5. On 03.02.2020 (describing as altered charges), two other charges were framed. They read as below:

"प्रथम- यह कि दिनोंक 01.07.2017 को समय करीब 06:00 बजे सायं बहद स्थान वादी मुकदमा के मकान के पास स्थित हैण्डपम्प ग्राम पेढ़, अन्तर्गत थाना घोरावल जिला सोनभद्र में जब वादी मुकदमा की नाबालिग नतिनी पीडिता उम्र करीब 06 वर्ष पानी लेने गयी थी तो आप उसे पकड़ कर अपना पेशाब का रास्ता उसके पेशाब के रास्ते पर रगडने लगे थे। आप का यह कृत्य धारा-376 (2) (i) भारतीय दण्ड संहिता के अन्तर्गत दण्डनीय अपराध है जो इस न्यायालय के प्रसंज्ञान में है। द्वितीय- यह कि उपरोक्त दिनॉक, समय व स्थान पर आपने वादी मुकदमा की नाबालिग नतिनी पीड़िता उम्र करीब 06 वर्ष के साथ प्रवेशन लैंगिक हमला कारित किया। आपका यह कृत्य धारा-5 (m) गुरुतर प्रवेशन लैंगिक हमला के अन्तर्गत परिभाषित है तथा धारा-6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 के तहत दण्डनीय अपराध है जो इस न्यायालय के प्रसंज्ञान में है।"

6. At the trial, besides the above documentary evidence, prosecution led oral evidence of seven witnesses. 'K'-the first informant was examined as P.W.1. During his examination-in-chief, he proved, when he reached the place of occurrence, he saw the appellant had removed the underwear of 'P' and had in appropriately embraced her (in that state of undress) and was rubbing her body parts, inappropriately. On being scolded by 'K', the appellant let her go. Then 'K' apprehended the appellant and called the police. He also proved the fact that the FIR was lodged, the next day. As to the age of 'P', he proved, she was between 6-7 years of age. He further proved that the appellant was arrested by the police from the spot. He further proved, he reached first, to help 'P' and his wife 'B' reached later.

7. Next, the victim 'P' was examined as P.W.-2. During her examination-in-chief, she proved her statement recorded under Section 164 Cr.P.C. It is exhibited as Ex.Ka.2 at the trial. She also proved that the appellant had removed her underwear and rubbed his penis on her private part and that he made her sit on his leg *('godey')*. She did not make any further or other allegation of actual "penetrative sexual assault", committed or attempted. She did not describe any act of penetration or insertion caused or attempted by the appellant or of touch caused to her private part, with his mouth, by the appellant. In fact, she specifically denied any other act suffered by her.

8. Thereafter, the maternal grand-mother of the victim, namely, 'B' was examined as P.W.-3 at the trial. She also proved the occurrence as narrated by 'P'. As to her presence, she disclosed, she reached along with her husband. At that time, she found that the appellant was holding 'P' tightly and was touching her inappropriately. At that, 'K' slapped the appellant. He fled. The police arrived on a phone call made by villagers. Thereafter, the appellant was arrested.

9. Next, S.I. Abdul Kalam was examined as P.W.-4. He proved the initial G.D. entries and preparation of check FIR. Next, I.O. Shesh Kumar Sharma was examined as P.W.-5. He proved the investigation.

10. Next, Dr. Geeta Jaiswar was examined as P.W.-6. She proved the age of 'P' six years on the date of occurrence. She

further proved that no external or internal injury was noted by her on the body of 'P'. She further proved that the hymen of 'P' was intact and there was no bleeding or mark of any injury noted on her body. She proved the Medico Legal Examination report, exhibited as Ex.Ka.7. During her cross-examination, she stated, though the mother of 'P' had claimed (to her) that 'P' had suffered "penetrative sexual assault", the said witness (P.W.-6) did not find any mark of any injury on 'P', in that regard.

11. Next, 'C' a chance witness was examined as P.W.-7. He claimed at the time of the occurrence, the appellant tightly held 'P'. Thereafter, he left. During his cross-examination, he could not prove that he had seen the occurrence inasmuch as he failed to recognise 'P' as the victim.

12. On closure of the prosecution evidence, the statement of appellant was recorded under Section 313 Cr.P.C.

13. Thereafter, one defence witness, namely, 'Z' was examined as D.W.-1. During her examination-in-chief, she tried to prove pre-existing disputes between the parties. Yet she admitted bad relations between herself and 'K', as well. During her cross-examination, she stated, her house was at some distance from the place of occurrence and there existed other houses, in between.

14. Submission of learned counsel for the appellant is, no occurrence had been caused. The parties were in dispute from before. Only for reason of other disputes, a complete false and malicious allegation was levelled against the appellant. Second, it has been submitted, in any case, no evidence was led to establish the occurrence or actual attempt to cause "penetrative sexual assault". The ocular evidence is not consistent even as to commission of "sexual assault". Thus, it has been argued, the learned court below has completely erred in convicting the appellant under Section 376 (2)(i) I.P.C. read with Section 5(m)/6 P.O.C.S.O. Act, and has further erred in awarding maximum sentence of life imprisonment to the appellant. At most, a case of "sexual harassment", was alleged (on facts).

15. On the other hand, learned A.G.A. would submit, it was duly proven that the appellant had undressed the victim, removed her undergarment and had inappropriately touched her private part, including with his penis as also uttered words to the victim that expressed his intent to cause "penetrative sexual assault". To the extent, the prosecution evidence is wholly consistent (as to that occurrence), the learned court below has rightly convicted the appellant for the offence under Section 376 (2)(i) I.P.C. read with Section 5(m)/6 P.O.C.S.O. Act. The victim being an innocent minor about 5-6 years of age, the learned court below has rightly awarded maximum sentence of life imprisonment to the appellant.

16. Having heard learned counsel for the parties and having perused the record, Section 375 I.P.C. as it stood at the statute book, at the relevant time read as below:

"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 person; 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, 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."

17. Section 376 I.P.C. as it existed on the statute book, at the relevant time read as below:

"376. Punishment for rape-(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,-

(a) being a police officer, commits rape-

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's on's natural life, and shall also be liable to fine."

18. Section 2(a), 2(b), 2(f), 2(i) and 2 (j) of the P.O.C.S.O. Act as it then existed read as below:

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in section 9;

(f) "penetrative sexual assault" has the same meaning as assigned to it in section 3;

(i) "sexual assault" has the same meaning as assigned to it in section 7;

(j) "Sexual harassment" has the same meaning as assigned to it in section 11;

19. Penetrative sexual assault as defined under Section 3 of the P.O.C.S.O. Act, reads 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."

(emphasis supplied)

20. Plainly, Section 3 of the P.O.C.S.O. Act is pari materia to Section 375 I.P.C. Section 5(m) of P.O.C.S.O. Act defines of "aggravated penetrative sexual assault" as below:

"5. Aggravated penetrative sexual assault;

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

21. At the same time, "sexual assault" has been defined under Section 7 of P.O.C.S.O. Act. It 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."

(emphasis supplied)

22. Parallelly, 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;"

23. At the same time, "sexual harassment" has been defined under Section 11 of P.O.C.S.O. Act. It reads as below:

" Section 11. Sexual harassment:

A person is said to commit sexual harassment upon a child when such person with sexual intent,--

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefore." (emphasis supplied)

24. The above leads us to the conclusion that POCSO Act defined

different types of sexual offences and it grades them differently on the scale of punishment contemplated. That may be summarised as below:

	SECTION	OFFENCE	PUNISHMENT
A	15	Storage of pornographic material involving child	a.Storage/Possession: First conviction-not less than INR 5,000. Subsequent-not less than INR 10,000. b.Transmitting/propagating/displaying/distributing-imprisonment upto 3 years. c.Using such pornographic material for commercial purpose: First conviction-imprisonment for 3 to 5 years. Subsequent-imprisonment for 5 to 7 years.
B	12	Sexual harassment	Imprisonment upto 3 years.
C	8	Sexual Assault	Imprisonment for 3 to 5 years.
D	10	Aggravated sexual assault	Imprisonment for 5 to 7 years.
E	14	Use of child for pornographic purpose	First conviction: Imprisonment for not less than 5 years. Subsequent: Imprisonment for not less than 7 years.
F	4	Penetrative sexual assault	a. Victim's age is 16 years or above: 10 years to imprisonment for life. b. Victim's age is below 16 years: 20 years.
G	6	Aggravated penetrative sexual assault	Rigorous imprisonment for 20 years to imprisonment for life.

25. Thus, in the first place the legislature has treated all sexual offences committed against children to be special offences warranting heavier penalties than contemplated under the general law (I.P.C.). At the same time, differentiation has been made between different types of sexual offences when committed on children, for the purposes of award of punishment. Unless a more serious offence (on the gradation of the punishment contemplated) is found proven, punishment heavier than that prescribed by the Act may not be awarded.

26. In the facts proven by the prosecution, we note that the occurrence is

one involving "sexual assault". To that extent allegations that emerged on a plain reading of the FIR, disclosed that the appellant had removed the underwear of 'P', rubbed her body, inappropriately with his hands ('sehlane laga'). At the stage of her statement being recorded under Section 164 Cr.P.C., that too after more than one and half month of the occurrence, she narrated that the appellant had removed her underwear, flashed his penis at her and spoken words that may be read as intent to commit penetrative sexual assault on 'P' and of having lifted her in his lap. Still later, at the trial, further improvement was offered by 'P'. At that stage, though she proved the fact of her earlier statement recorded under Section 164 Cr.P.C., she now (for the first time) described that the appellant had rubbed his penis on her private part and had made her sit on his leg after removing her undergarment. At the same time, she maintained that no other act/offence was committed on her.

27. The grand father of 'P', namely, 'K' (P.W.-1) stated, he saw the occurrence as he reached to help 'P'. He proved that he had seen the appellant remove the underwear of 'P' and touch her body parts with his bare hands. He also proved that he had seen the appellant improperly embrace 'P', in that state of undress. Yet he did not prove that the appellant had rubbed his penis on the private part of 'P' or that he had flashed his penis at her or that he had uttered any word expressing his intent to commit "penetrative sexual assault", on her.

28. Similar facts were proved by 'B' P.W.-3. At the same time, she admitted that she reached the place of occurrence after her husband 'K' had reached there. Thus, she may not have seen the occurrence, but she narrated the same as was proved by 'K' husband-P.W.-1 and the victim 'P' (P.W.-2), her grand-daughter.

29. The ocular evidence of 'P' and 'K' (both eye witness) is partially consistent to the FIR narration. Thereby, the prosecution story that the appellant had caused the occurrence, wherein he first removed the underwear of the victim 'P', thereafter, inappropriately touched and embraced her, in that state of undress, was duly proven.

30. As to whether the appellant flashed his penis at 'P' and rubbed his penis on her private part and uttered any word to indicate his intent, to commit "penetrative sexual assault", the prosecution evidence is inconsistent. In the first place, neither the FIR (lodged by 'K'/an eye witness and grand father of 'P') narrates, nor his testimony attempts to prove those occurrences. He had already seen the appellant commit the offence as narrated in the FIR, yet he did not allege any fact that may amount to "penetrative sexual assault". To that extent, the FIR is non-corroborative. Second, in her statement recorded under Section 164 Cr.P.C. also, 'P' did not make any allegation of the appellant having rubbed his penis on her private part. Conversely, in her statement made at the trial, she did not make any statement that the appellant spoke any word expressing his intent to commit "penetrative sexual assault". On the contrary, she specifically stated "aur kuch nahi kiya" i.e. the appellant did not commit any further act.

31. We are mindful that the story as narrated by the prosecution has improved and varied from the point of the FIR being lodged on 02.07.2017 i.e. one

day after the occurrence to the statement recorded on 18.08.2017 which would be more than one and half month from the occurrence, to the statement recorded at the trial. Vast improvements and variations were made to the prosecution story. Those are not proved through the eye witness account offered by 'K' and also not supported by any corroborative evidence in the shape of medical opinion etc. Clearly, no evidence of "penetrative sexual assault" was led. Further reasonable doubt exists if any attempt was made to commit such "penetrative sexual assault."

32. As to what may constitute a "penetrative sexual assault", as noted above, the statutory definition is crystal clear. It would involve penetration either of the vagina or mouth or urethra or other body part of a victim with penis or insertion of such body part of the victim with any object or any other body part of the offender or the victim or application of mouth of the offender to the private part of a victim child. No other or further description exists under the Act as may allow the Court to adjudge "penetrative sexual assault" had been made or attempted. Plainly, in the context of criminal offence, only that definition of "penetrative sexual assault" may be applied by Courts as may exist in the statute book, here P.O.C.S.O. Act.

33. At the same time, "sexual assault" is also clearly defined under Section P.O.C.S.O. Act. It may involve touching the private part of a child with sexual intent or doing any other act with sexual intent which may involve physical contact, short of penetration/insertion.

34. On the cumulative effect of the proven facts, it is established beyond reasonable doubt that the appellant had tightly held 'P' after removing her undergarment and had touched her inappropriately. The "sexual intent" is clearly proved by further facts proven "without penetration". To the extent 'P' was below age of 12 years, above was an act of "aggravated sexual assault", as defined under Section 9(m) P.O.C.S.O. Act. In these proven facts, the occurrence had travelled far beyond the limit of "sexual harassment", as defined under Section 11 of P.O.C.S.O. Act. That may have been the case if the appellant had merely spoken words with or without flashing his penis (under Section 11 (i) and (ii) of P.O.C.S.O. Act).

35. As to other facts whether the appellant had rubbed his penis on the private part of 'P' or had spoken any word as may have established his intent to commit "penetrative sexual assault" on 'P', doubts persists, as the FIR allegations do not corroborate such occurrence; 'K' an eye-witness and close relative of 'P' did not make such allegation and the statement of 'P' on that count are inconsistent and suffer from improvements.

36. We also note, besides "penetrative sexual assault" not proven through ocular evidence, in the present case, there is also no medical evidence to corroborate such an occurrence.

37. We are unable to sustain the order passed by the learned court below holding that the appellant had committed "penetrative sexual assault". As despicable an occurrence as it may be, the morality and ethics may not prompt the Court to either convict any offender for any offence heavier than proven and, therefore, those considerations may not allow the Courts to

award sentence heavier than those prescribed by the law. 'P' being less than 12 years of age, she had suffered act of "aggravated sexual assault" but not "aggravated penetrative sexual assault". Therefore, maximum sentence of seven years contemplated under Section 10 of P.O.C.S.O. Act, would suffice.

38. Similar view had been taken by a co-ordinate bench **in Monu Vs. State of U.P., Neutral Citation No.-2025:AHC:14721-DB t**o which one of us (Saumitra Dayal Singh,J.) was a member.

39. Accordingly, the offence under Section 376 (2)(i) I.P.C. and Section 5(m)/6 P.O.C.S.O. Act is not found proven. At the same time, for the reasons noted above, offence under Section 7 read with 9 (m) P.O.C.S.O. Act is found proven. The impugned order passed by the learned court below, is modified accordingly.

40. In view of the above, the order passed by the learned court below is further modified. Against life sentence awarded, maximum sentence of seven years is awarded to the appellant, under Section 10 P.O.C.S.O. Act.

41. At this stage, we note, as per the Custody Certificate the appellant has remained confined for eight years, one month and thirty days as on 02.05.2025. As such, he has remained confined for more than the maximum sentence awarded. At present, we note that the appellant is in jail. He may be released forthwith. In view of that consideration, the fine is maintained. In case fine is not deposited within the aforesaid period, the sentence of imprisonment shall stand extended by one year. Obviously, in that event, the appellant would be entitled to benefit of sentence undergone.

42. To the extent, it could not be proven beyond reasonable doubt that the appellant had attempted to commit "penetrative sexual assault", we do not find it a fit case to convict or punish the appellant under Section 18 of P.O.C.S.O. Act.

43. Accordingly, the appeal is **partly allowed**.

44. 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 C.J.M., concerned.

45. C.J.M., concerned shall submit his compliance report in this regard to this Court.

46. A copy of this order be also sent to the Jail Authorities, concerned for necessary compliance.

(2025) 5 ILRA 832
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.05.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE JITENDRA KUMAR SINHA, J.

Criminal Appeal No. 1806 of 1991

Chhalla @ Bhagwan Dass ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ajay Kumar Pandey, Sri Satish Trivedi