

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 490 of 2018**

- Ravi Khutiyare S/o Revaram Khutiyare Aged About 24 Years R/o Village Mahua Jhad, Near Gosiya Mosque, Camp-1, P. S. Cantonment, District Durg Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through The Police Station Chawni, Cantonment, District Durg Chhattisgarh

---- Respondent

For Appellant : Shri A.K. Yadav with Shri Vikas Pandey, Advocate.
For Respondent : Ms. Smriti Shrivastava, Panel Lawyer.

Hon'ble Shri Deepak Kumar Tiwari, J**Order On Board****25/03/2022 :**

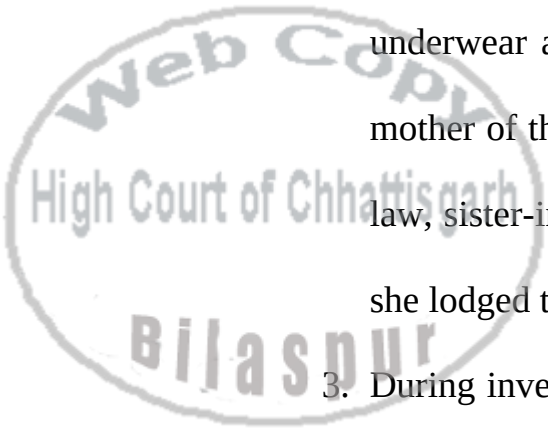
1. The present Appeal is directed against the judgment of conviction and order of sentence dated 8.12.2017 passed by the Additional Sessions Judge (FTC) Durg in ST No.40/2015 whereby learned Additional Sessions Judge convicted the appellant under Sections 363 & 366 (A) of the IPC, as also under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo RI for 3 years, RI for 5 years and RI for 10 years, with fine amount of Rs.500/- on each count, with usual default stipulations, respectively.





2. Case of the prosecution, in brief, is that on 1.3.2015 mother of prosecutrix (PW-1) lodged an FIR at Police Station Chhawani, District Durg stating that on the said date, at about 8.30 am, she left for the work leaving her children at home and she returned at about 2.30 pm whereupon her daughter (prosecutrix) (PW-2) informed her that she is having pain in her vagina. The mother of the prosecutrix noticed swelling on her private part and it became red. On being asked, the prosecutrix informed that the appellant took her to the dilapidated house and after laying her down on the ground, the appellant removed her underwear and thereafter committed sexual intercourse with her. The mother of the prosecutrix informed about the incident to her mother-in-law, sister-in-law as also the mother of the appellant. On the same day she lodged the FIR (Ex.-P/1) at 18.45 hours.

3. During investigation, Alexander Keero (PW-9) recorded the statements of witnesses. Spot map was prepared vide Ex.-P/3. Revenue Inspector S.N. Kaushik (PW-10) also prepared the map vide Ex.-P/4. The prosecutrix was medically examined by Dr. Smt. Chhaya Tiwari (PW-4), who gave her report vide Ex.-P/5. She noticed redness in the pelvic region of vagina. The hymen was fresh torn. Only tip of the finger could be inserted into vagina. During examination, it was noticed that the blood was not coming from the vagina but there was tenderness. The doctor prepared two vaginal slides from the vaginal discharge and sent the same for chemical examination. The injury was caused by hard and blunt object. The underwear of the appellant was seized vide Ex.-





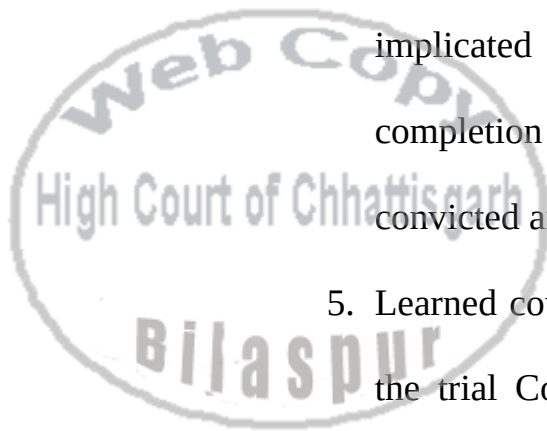
P/6. Dr. S.K. Agrawal (PW-6) examined the appellant and gave his report vide Ex.-P/7. According to him, the appellant was capable of performing sexual intercourse. Dr. B.N. Dewangan (PW-7) conducted the ossification test and ascertained the age of the prosecutrix as 3 to 5 years vide his report Ex.-P/9.

4. After conducting investigation, charge sheet has been filed. In order to prove the charge, the prosecution has examined as many as 10 witnesses. The appellant abjured his guilt and in examination under Section 313 of the CrPC, he has stated that he has been falsely implicated and he has not examined any defence witness. After completion of trial, by the impugned judgment, the appellant has been convicted and sentenced as above.

5. Learned counsel for the appellant submits that the finding recorded by the trial Court is perverse and contrary to the material available on record. The prosecutrix (PW-2) herself has not stated about the sexual intercourse. Therefore, the evidence of the prosecutrix and her mother is contradictory. Hence considering the infirmities in the prosecution evidence, learned counsel for the appellant prays to allow the Appeal and acquit the appellant of the charges.

6. Per contra, learned State Counsel opposes the Appeal and supports the impugned judgment on submission that the finding recorded by the trial Court is based on proper marshalling of evidence and the same is not liable to be interfered with while invoking jurisdiction of Appeal.

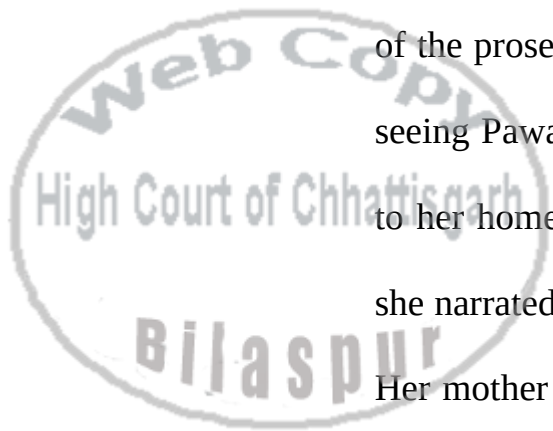
7. Heard learned counsel for the parties at length and perused the record of





the Court below.

8. The prosecutrix (PW-2), a minor girl aged about 5 years, deposed that on the date of the incident her mother and father had left the house for work and she was playing with her cousin sister and friend Dev in front of her house. At that time, the appellant, who is also the resident of same locality, came there and took the photographs of the prosecutrix and her friend Dev. The appellant took her to the dilapidated house and after laying her down disrobed her and also removed the clothes of her friend Dev, a minor. The appellant inserted his finger into the vagina of the prosecutrix. When she started weeping, the appellant left her on seeing Pawan Bhaiya, who was playing bat ball. The prosecutrix came to her home. When her mother came at about 1 o'clock to the house, she narrated the incident. Her mother has also been examined as PW-1. Her mother found swelling on her private part and it became red. The prosecutrix informed her mother that the appellant has committed rape on her and also bit her lips. When she cried, the appellant run away. After coming to know about the incident, the prosecutrix' mother immediately rushed to the appellant's house where his mother was present and the appellant denied the incident. The prosecutrix' mother had shown private part of the victim to the appellant's mother and also informed the incident to her mother-in-law and sister-in-law. Smt. Mangteen Bai (PW-3) took the prosecutrix to the Police Station in her lap. The prosecutrix' mother has lodged the FIR (Ex.-P/1) on the same day of the incident i.e. 1.3.2015 at 18.45 hours at Police Station





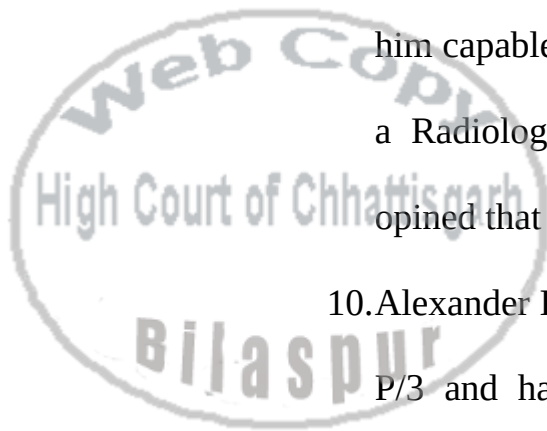
Chhawani, District Durg against the appellant.

9. Dr. Smt. Chhaya Tiwari (PW-4) has examined the prosecutrix and has found no external injury on the body of the prosecutrix. On internal examination, she found that redness was present at pelvic region. Hymen was fresh torn and tip of finger could be entered into vagina. No bleeding was found during examination. Tenderness was present. She opined that the injury was caused by hard and blunt object. During her examination, she also prepared two slides from vaginal discharge. Dr. S.K. Agrawal (PW-6) examined the appellant vide Ex.-P/7 and found him capable to perform sexual intercourse. Dr. BN Dewangan, (PW-7), a Radiologist, has proved the ossification test report (Ex.-P/9) and opined that the prosecutrix is aged between 3-5 years.

10. Alexander Keero (PW-9), Inspector, has prepared the site map vide Ex.-P/3 and has deposed that during investigation he has recorded the statements of witnesses and arrested the appellant on 2nd March, 2015. He has also filed the FSL report (Ex.-P/15). In the slides prepared during examination of the prosecutrix and underwear of the appellant, no stain of semen was found.

11. Having considered the evidence, it is held that the age of the prosecutrix is below 12 years and such finding was properly recorded by the trial Court on the basis of ossification test, which is acceptable, in view of the principle laid down by the Hon'ble Supreme Court in the matter of **Jarnail Singh Vs. State of Haryana** {AIR 2013 SC 3467}.

12. The evidence of the prosecutrix and her mother inspire confidence of





the Court, as the same is trustworthy and reliable. Even in cross-examination, there is nothing on record to discredit their testimony. Her evidence is also supported by the medical evidence and the FIR has also been lodged promptly i.e. on the same day.

13. At this juncture, it would be profitable to quote some relevant sections of the POCSO Act:-

“3(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;

4. Punishment for penetrative sexual assault.....

5. Aggravated penetrative sexual assault.....

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

6. Punishment for aggravated penetrative sexual assault. - (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

14. Though the prosecutrix in her statement has not stated about the incident of sexual intercourse and she has informed to her mother, but considering the changed definition of rape under Section 375 (b) of the IPC, after amendment from 3.2.2013, and also the corresponding *pari materia* Section 3 (b) of the Protection of Children from Sexual

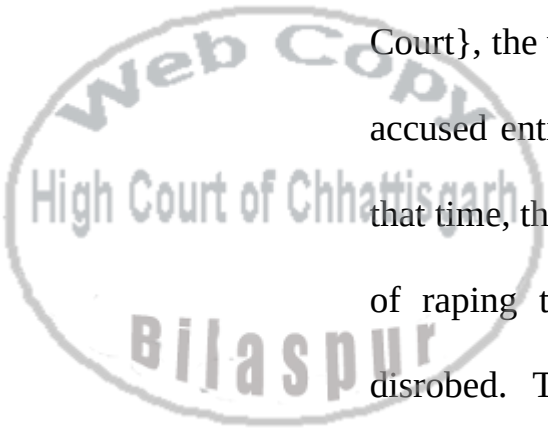




Offences Act, 2012 (for short 'the POCSO Act') defining penetrative sexual assault, as also Sections 4, 5, 5(m), 6 of the POCSO Act, it is observed that the trial Court after evaluating the entire evidence in a proper manner, has rightly convicted the appellant under Sections 363 and 366 of the IPC and under Section 6 of the POCSO Act. Therefore, the finding recorded by the trial Court is not liable to be interfered with, which deserves to be affirmed.

15. Moreover, in **Nawabuddin Vs. State of Uttarakhand** {CRA No.144/2022, decided on 8th February, 2022, by the Hon'ble Supreme Court}, the victim aged about 4 years was all alone in the house and the accused enticed and took the victim girl in the bushes to rape her. At that time, the accused was spotted by some persons naked in the process of raping the victim girl. The accused and the victim girl were disrobed. The victim was exploited by the accused in similar manner, as he entered his finger into the vagina of the victim. The Hon'ble Supreme Court taking note of the fact that the accused was aged approximately 65 years at the time of commission of offence, he was a neighbour of the victim girl, he took advantage of absence of her parents, observed that the accused was found to have committed aggravated penetrative sexual assault on a girl child aged 4 years, which demonstrated the mental state or mindset of the accused and held the accused guilty for the offence under Section 376(2)(i) of the IPC and Section 5 of the POCSO Act.

16. Coming back to the sentence awarded to the appellant under Section 6





of the POCSO Act, an amendment has been carried out in 2019 whereby minimum sentence has been prescribed as 20 years, and prior to it, the minimum sentence shall not less than be 10 years. All the sentences have been directed to run concurrently and only the minimum sentence has been awarded. Therefore, the sentence part is also not liable to be interfered with.

17. For the foregoing, this Court is of the opinion that the Appeal is devoid of any substance, the same deserves to be and is hereby dismissed.

18. Let a copy of the judgment along with records be sent to the trial Court for necessary compliance.



Sd/-
(Deepak Kumar Tiwari)
Judge

HEADLINES

In view of changed definition of rape under Section 375 (b) of the IPC *pari materia* to Section 3(b) of the POCSO Act, sexual intercourse is not necessary to attract the ingredients of offence of rape or penetrative sexual assault.

भारतीय दंड संहिता की धारा 375 (ख) के तहत लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012, की धारा 3(ख) में बलात्संग की बदली हुई परिभाषा को देखते हुए, बलात्संग तथा लैंगिक यौन उत्पीड़न के अपराधों के अवयवों को आकर्षित करने हेतु संभोग आवश्यक नहीं है।

