



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1937 of 2023

Lalbabu S/o Dharampal Sonwani Aged About 24 Years R/o Village Nagra, P.S. Ramanujganj, District-Balrampur - Ramanujganj, Chhattisgarh.

---- Appellant

Versus

State of Chhattisgarh Through P. S. Ramanujganj, District- Balrampur- Ramanujganj, Chhattisgarh.

---- Respondent

(Cause Title taken from Case Information System)

For Appellant : Mr. Bharat Lal Dembra, Advocate.

For Respondent/State : Mr. Kanwaljeet Singh Saini, Panel Lawyer

Hon'ble Mr. Ramesh Sinha, Chief Justice
Hon'ble Mr. Sachin Singh Rajput, Judge

Judgment on Board

Per Ramesh Sinha, Chief Justice

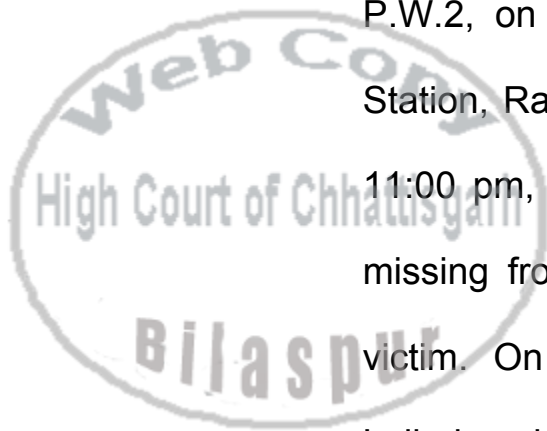
25.06.2024

1. The appellant has preferred this appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'CrPC') questioning the impugned judgment dated 16.08.2023 passed by the learned Additional Sessions Judge (F.T.S.C.) (POCSO) Ramanujganj (C.G.) in Special Case (POCSO) No.94/2020, whereby the trial Court has convicted and sentenced the appellant with a direction to run all the sentences concurrently in the following manner :



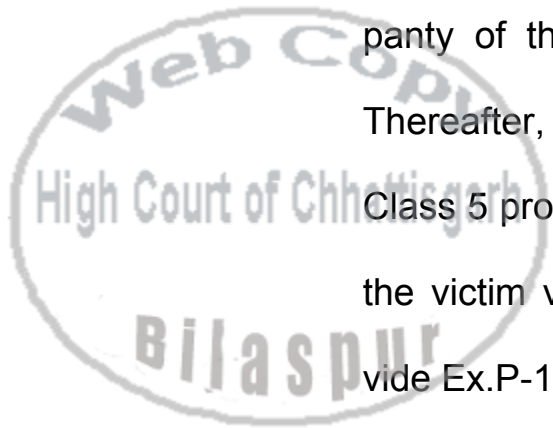
CONVICTION	SENTENCE
U/s 363 of IPC	R.I. for 5 years and fine of Rs. 500/- and in default of payment of fine additional imprisonment for 1 month
U/s 366 of IPC	R.I. for 5 years and fine of Rs. 500/- and in default of payment of fine additional imprisonment for 1 month
U/s 4(2) of the POCSO Act-2012	R.I. for 20 years and fine of Rs. 15,000/- and in default of payment of fine additional imprisonment for 2 months

2. Case of the prosecution, in brief, is that, the father of the victim 'B' P.W.2, on 29.08.2020, submitted a written complaint in Police Station, Ramanujanj to the effect that on 27.08.2020, at around 11:00 pm, the victim, aged 14 years and 04 months, had gone missing from home and efforts were being made to locate the victim. On 28.08.2020, he received information that accused Lalbabu along with his companion was taking the victim on his motorcycle to Balrampur from Tatapani. On receiving the above information, when the accused was chased by his son and nephew, accused Lalbabu dropped the victim from the motorcycle near Daldhova Ghat forest and accused Lalbabu went towards Ambikapur with his companion. Thereafter, the victim came home and informed her that the accused Lalbabu had seduced her and made her sit on a motorcycle along with his companion and took her to the Dalko Dam forest and there she was raped by the accused Lalbabu.





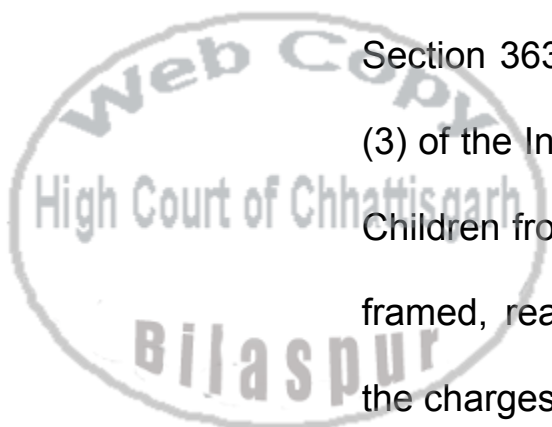
3. On the basis of above written complaint, Lady Inspector Anita Prabha Minj (P.W.-05), registered First Information Report against accused Lalbabu Sonwani under Section 363, 366 and 376 of the Indian Penal Code and Section 4, 6 of the Protection of Children from Sexual Offenses Act 2012 under Crime No.146/2020 at Police Station Ramanujganj vide Ex.P-5 and statement of victim (P.W.-01) was recorded and after obtaining consent from the victim's father, the victim's genitals were examined at the Community Health Center, Ramanujganj. Female Doctor, Dr.Shabana Arafat (P.W.-10), after examining the genitals and panty of the victim, gave the report as Ex.P-17 and Ex.P-18. Thereafter, the victim's underwear was seized vide Ex.P-2 and Class 5 progress sheet of the victim was seized from the father of the victim vide Ex.P-7 and the victim's vaginal slide was seized vide Ex.P-12.
4. During the course of further investigation of the case, Sub Inspector Ashwini Pandey (P.W.-06), after inspecting the place of incident *i.e.* the house of the victim, prepared the visual map vide Ex.P-4. To get information about the date of birth of the victim, attested copy of dakhil kharij register Ex.-14C was seized vide Ex.P-12 from Munna Singh (P.W.07), head master of Government Primary School, Nagara. Further, accused was arrested and his underwear was seized as per seizure memo Ex.P-09. The accused's ability to have sexual intercourse and the underwear of the accused were tested. Dr. Kailash Kaivartya (PW-09) submitted





the reports relation to the same vide Ex.P-15 and Ex.P-16. The vaginal slides and two pieces of underwear seized in the case were sent to FSL for chemical testing. Thereafter, after completing all the legal formalities related to the investigation in the case, a case was registered against the accused Lalbabu under Section 363, 366, 376(2)(n), 376(3) of the Indian Penal Code and Section 4, 6 of the Protection of Children from Sexual Offenses Act 2012 and charge sheet was presented before the concerned trial Court.

5. On the basis of the charge-sheet presented in the case, the accused *prima facie* appears to have committed crimes under Section 363 read with Section 34, 366 read with Section 34, 376 (3) of the Indian Penal Code and Section 4 (2) of the Protection of Children from Sexual Offenses Act 2012. When the charges were framed, read out and explained, the accused refused to accept the charges and claimed trial.
6. The prosecution, in support of its case, examined as many as 10 witnesses, namely, victim 'A' (PW-01), Father of the victim-B (PW-02), Brother of the victim-D (PW-03), Patwari Chanchal Kumar Minj (PW-04), Inspector Anita Prabha Minj (PW-05), Sub-Inspector Ashwini Pandey (PW-06), In-charge Pradhan Pathak Munna Singh (PW-07), Victim's neighbor 'E' (PW-8), Dr. Kailash Kaivartya (PW-09) and Dr. Shabana Arafat (PW-10).
7. On the basis of the evidence presented in the case, when the statement of the accused was examined in the form of a questionnaire under Section 313 of the Code of Criminal

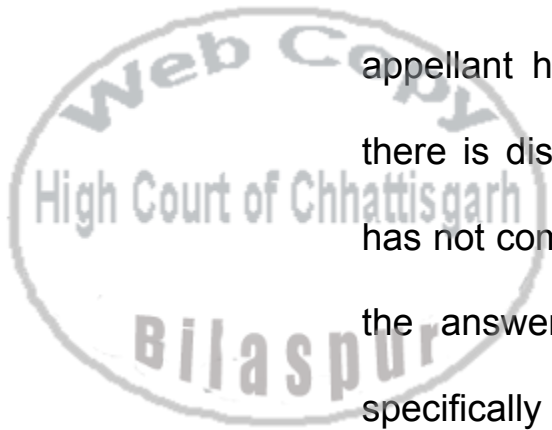




Procedure, to prove his innocence, evidence of one Gopal Singh (DW-01) was presented.

8. The trial Court after completion of trial and after appreciating oral and documentary evidences available on record, by the impugned judgment dated 16.08.2023 convicted and sentenced the appellant in the manner mentioned in the opening paragraph of this judgment, against which this appeal under Section 374(2) of the CrPC has been preferred by them calling in question the impugned judgment.

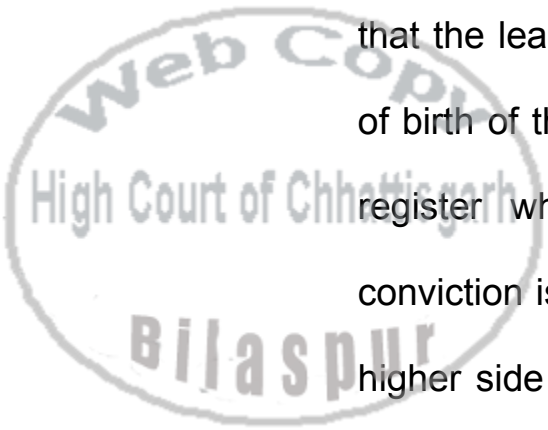
9. Learned counsel for the appellant vehemently argued that the appellant has been falsely implicated in the present case as there is dispute in relation to transaction of land purchase, he has not committed any illegality and the said fact is evident from the answer to question No.58, wherein the appellant has specifically stated that he has been falsely implicated in relation to the land purchase transaction dispute. He further argued that the defence witness Gopal Singh (DW-01) has specifically stated in paragraph 3 of his evidence that the land of accused Lalbabu's grandfather has been taken over by the victim's father by forcefully and had constructed a well over it, due to which there was dispute between the two families, regarding which a Panchayat was held in the village, he also participated in the said Panchayat. The Panchayat asked the victim's father to leave the land on which a well was constructed by forcefully occupying from the grandfather of the accused, but the victim's





father had said that he would not leave the said land, on which the Panchayat told the accused's grandfather to file a case against the victim's father due to which the victim's father became very angry and treat was given to file a case against the accused and his family members and send them to jail. He submitted that the victim herself has admitted in her statement that she was having love affair with the appellant and she does not want to lodge report against the appellant. He further submitted that age of the victim has also not been proved by the prosecution and therefore, conviction is illegal. He contended that the learned trial Court further erred in holding that the date of birth of the victim as 10.08.2005 on the basis of dakhil kharij register which was not at all admissible and hence, the conviction is bad. He further contended that the conviction is on higher side considering the age of the appellant and further, in absence of any cogent material, the learned trial Court has awarded punishment of 20 years which deserves to be set aside.

10. On the other hand, learned Panel Lawyer appearing for the State/respondent submitted that the appellant has committed a heinous crime of rape against a minor girl aged about 15 years and 17 days and the same has been duly proved by the prosecution as per Dhakil Kharij Register (Ex.P-14C) and statement of Munna Singh (PW-7), the in-charge head master of Government Primary School, Nagara. He further submitted that





it is not a case of consent, but as per the appellant, it is a case of false implication. He further submitted that the victim has specifically stated in her statement that the accused has committed rape on her which was duly proved as per the MLC report of the victim (Ex.P-17) conducted by Dr. Shabana Araphat (PW-10), whereby minor nail scratches over her body and her hymen was found to be old and ruptured and on examination of the panty of the victim, some white semen like stain was found and as per opinion of the Doctor, the same may be semen stain and as per evidence of Dr. Kailash Kaiwartya (PW-9), the accused was mentally and physically healthy and capable of sexual intercourse, as such, the commission of rape by the accused upon the victim has been duly proved by the prosecution. As such, the judgment of conviction and sentence awarded by the learned trial Court is just and proper warranting no interference.

11. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
12. **The first question for consideration before this Court would be, whether the trial Court has rightly held that on the date of incident, the victim was minor?**
13. When a person is charged for the offence punishable under the POCSO Act, or for rape punishable in the Indian Penal Code, the age of the victim is significant and essential ingredient to



prove such charge and the gravity of the offence gets changed when the child is below 18 years, 12 years and more than 18 years. Section 2(d) of the POCSO Act defines the “child” which means any person below the age of eighteen years.

14. In *Jarnail Singh Vs. State of Haryana, reported in (2013) 7 SCC 263*, the Hon'ble Supreme Court laid down the guiding principles for determining the age of a child, which read as follows :

“22. 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 referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

“12. Procedure to be followed in determination of Age.?” (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the





Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by

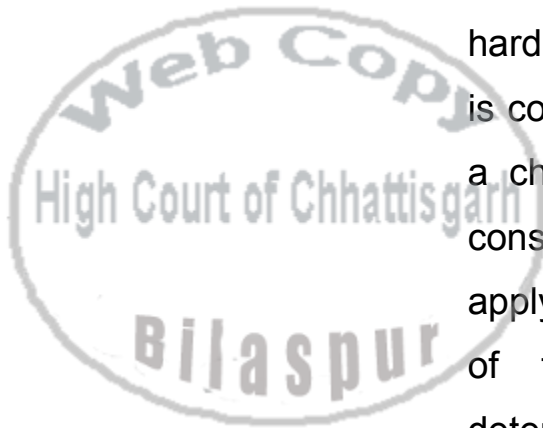




the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

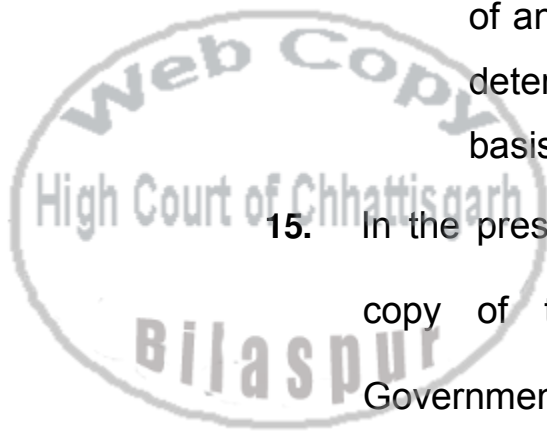
23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said





certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

15. In the present case, the prosecution has presented a certified copy of the Dakhil Kharij Register (Ex.P-14-C) of the Government Primary School, Nagara, in which the date of birth of the victim is mentioned as 10.08.2005. In this regard, the Incharge Headmaster of the concerned school (PW-7), appeared in the Court and displayed the original Dakhil Kharij Register, in which the date of birth of the victim is mentioned as 10.08.2005. The defence has not presented any oral or documentary evidence to refuse the said date of birth, therefore, there is no reason to disbelieve the date of birth of the victim, as 10.08.2005 hence, we are of the considered opinion that the trial Court has rightly held that the date of birth of the victim is





10.08.2005 and on the date of incident i.e. 27.08.2020 she was minor and her age was 15 years 17 days.

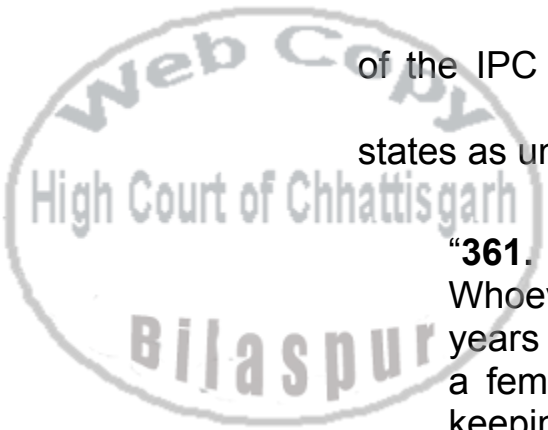
16. The next question for consideration would be, whether the trial Court is justified in convicting the appellant for offence under Section 363 of the IPC ?

17. The appellant has been convicted for offence under Section 363 of the IPC, which is punishable for kidnapping. Kidnapping has been defined under Section 359 of the IPC. According to Section 359 of the IPC, kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship. Section 361 of the IPC defines kidnapping from lawful guardianship which states as under:-

“361. Kidnapping from lawful guardianship.- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian 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.”

18. The object of Section 359 of the IPC is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons. Section 361 has four ingredients:-

(1) Taking or enticing away a minor or a person of unsound mind.





(2) Such minor must be under sixteen years of age, if a male, or under eighteen years or age, if a female.

(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.

(4) Such taking or enticing must be without the consent of such guardian.

So far as kidnapping a minor girl from lawful guardianship is concerned, the ingredients are : (i) that the girl was under 18 years of age; (ii) such minor was in the keeping of a lawful guardian, and (iii) the accused took or induced such person to leave out of such keeping and such taking was done without the consent of the lawful guardian.

19. The Supreme Court while considering the object of Section 361 of the IPC in the matter of **S.Varadarajan v. State of Madras**¹, took the view that if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so and held that if evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian and held as under:-

“It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. If evidence to

¹AIR 1965 SC 942



establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. But that part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

20. Reverting to the facts of the present case in light of ingredients of offence under Section 361 of the IPC which is punishable under Section 363 of the IPC & as well as principles of law laid down by the Supreme Court in the matter of **S.Varadarajan** (supra), it is evident that on the date of incident i.e. on 27.08.2020 the victim (PW-1) had gone missing from home and efforts were being made to locate the victim. On 28.08.2020, the father of victim (PW-2) received information that accused Lalbabu along with his companion was taking the victim on his motorcycle to Balrampur from Tatapani. On receiving the above information, when the accused was chased by his son (PW-3) and nephew, accused Lalbabu dropped the victim from the motorcycle near Daldhova Ghat forest and accused Lalbabu went towards Ambikapur with his companion. As such, we are of the considered view that the trial Court is absolutely justified in convicting the appellant for offence under Section 363 of the IPC.



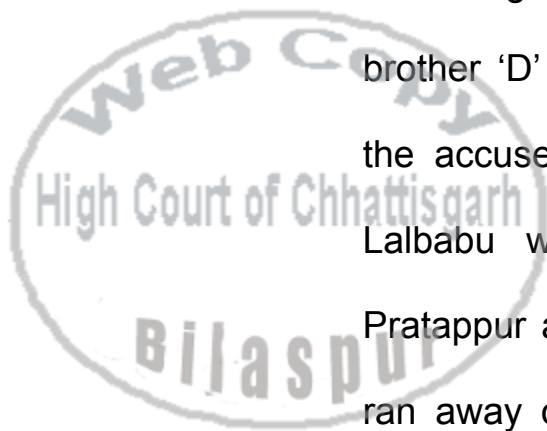


21. The next question for consideration before us is whether the appellant has committed rape on minor victim?

22. The evidence presented by the father of the victim states that the victim had gone missing from the house on the night of the incident and during the search for the victim, he got information on the next morning that the accused Lalbabu had taken the victim away in his motorcycle. Thereafter, the victim was chased by his son and his son's friend and the victim was caught at Daldhova Ghat.

23. According to the prosecution story, there are witnesses victim's brother 'D' (PW-3) and victim's neighbor 'E' (PW-8), who saw the accused and the victim at Daldhova ghat while accused Lalbabu was taking the victim on a motorcycle towards Pratappur and the accused left the victim at the said ghat and ran away on the motorcycle. The evidence presented by the above two witnesses states that on 28.08.2020, they saw the accused Lalbabu driving the victim on a motorcycle at Daldhova Ghat. It is noteworthy that since there is no rebuttal to the main evidence presented by the said witnesses in the cross-examination, the evidence presented by the said witnesses is reliable in favor of the prosecution.

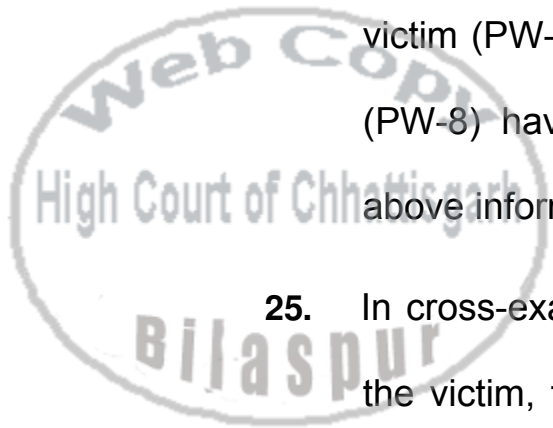
24. Victim 'A' (PW-1) in her examination-in-chief has stated that in the year 2019, when she was going to school to study in class ninth, the accused used to stop her and talk to her and talked about loving her and the accused seduced her and took her out





of the house and used to ask her to run away and on the incident date 27.08.2020, the accused Lalbabu along with his partner chased her away on a motorcycle and took her to Tatpani and the accused Lalbabu took her to the forest of Dalko Dam and raped her while talking about marrying her. It is further mentioned in the evidence presented by the victim that after the said incident, while the accused Lalbabu was taking her, then his brothers caught him near Daldhova Ghat and they returned home taking her with them and she came home and told his father and brother about the said incident. Father of the victim (PW-2) and victim's brother (PW-3) and victim's neighbor (PW-8) have presented supporting evidence of receiving the above information from the victim.

25. In cross-examination regarding abducting the victim and raping the victim, the victim (PW-1) has accepted the suggestion that she has known and talked to the accused since childhood and both used to visit each other's houses. The victim has rejected this suggestion that while going to the grocery shop in her locality, she used to go to the house of accused Lalbabu to meet him and she was forbidden by the sister and mother of the accused from coming to their house and in this regard, in the village, a meeting was held and the accused and she were prohibited from meeting and talking and denied having knowledge of whether there was a land related dispute between the accused's father and her father or not. It has been admitted





by the victim that there are houses on the side of the road leading from her village towards Tatapani and there is always traffic on the road and she did not tell anyone on the way that the accused was abducting her. The suggestion has also been accepted by the victim that her father and the brother have asked her to file a report against the accused and was threatened with death if the report was not filed. When asked questions by the Court in this regard, the victim admitted that she loved the accused Lalbabu and because of the said love, she did not want to file a report against the accused. Apart from this, the defense's suggestion has been rejected by the victim's father that he has constructed a well on some part of the accused's father's land and in this regard, when the accused's father called the Patwari for demarcation, the demarcation proceedings were not allowed to take place by abusing the father of the accused.

- 26.** Thus, in the above cross-examination conducted on behalf of the accused, no such grounds have been provided by the defense side to refute the evidence presented in the main trial by the victim (PW-1) and her father (PW-2) that the accused had lured the victim away and raped her. Thus, the evidence presented by the said witnesses is reliable in favor of the prosecution.
- 27.** Dr. Shabana Arafat (PW-10), the medical witness who had examined the genitals of the victim, stated that while she was



working as a Medical Officer in C.H.C. Ramanujganj, when the genitals of the victim and her panty were presented for examination by the Police Station, Ramanujganj on 29.08.2020, then on external examination of the victim, marks of scratching with nails were found on both hands, both arms, forearm and right breast and on internal examination, it was found that the vaginal membrane of the victim was old and torn and as per the statement of the victim, the last physical relation with her was established on the night of 27.08.2020. Thereafter, two slides were prepared by extracting the fluid from the victim's genitals, sealed separately and handed over to the same constable for chemical testing. In this regard, as per the test report (Ex.P-17), it was opined that a definite opinion cannot be given regarding immediate sexual intercourse with the victim. Thereafter, the test report of the victim's panty was prepared vide Ex.P-18, wherein it is mentioned that on the victim's panty, while colored spots were present on the inner central part. In this regard, the said panty was sealed and handed over to the constable for chemical examination. It is noteworthy that the fact of the said witness examining the victim's genitals and panty examination is undisputed in the cross-examination. Therefore, the evidence presented by the said witness is reliable in favour of the prosecution.

28. The medical witness who tested accused Lalbabu's ability to have sexual intercourse was Dr. Kailash Kaivartya (PW-9). The

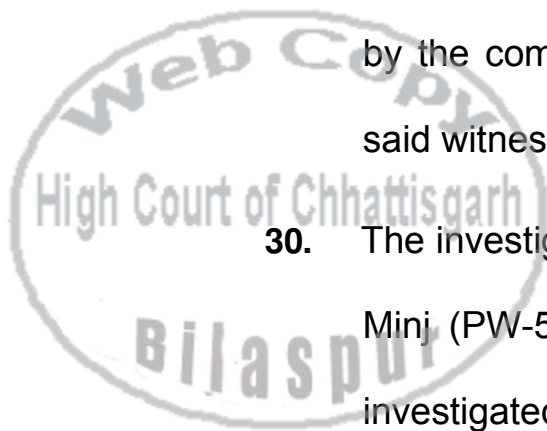


evidence presented by PW-9 states that after examining the private parts of the accused on 12.09.2020, vide the test report (Ex.P-15), it was opined that Lalbabu was mentally and physically healthy and capable of sexual intercourse. In the cross-examination done by the defense side, no such statements have been made by the said witness which would be capable of contradicting the main examination evidence presented by the said witness.

29. As per the statement of Patwari Chanchal Kumar Miri (Pw-4), he had prepared the spot map as per the description given to him by the complainant. It is noteworthy that the statement of the said witness remains intact in cross-examination.

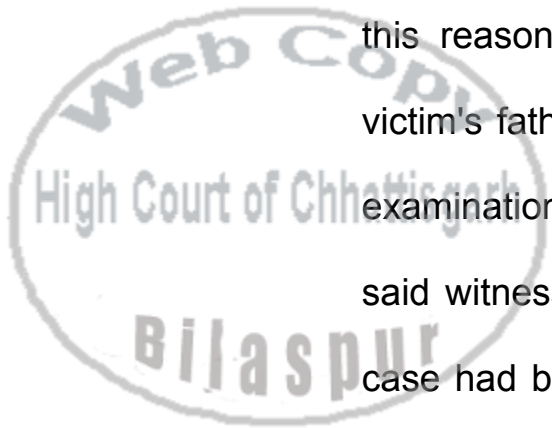
30. The investigation officer of the case, Sub Inspector Anita Prabha Minj (PW-5) and Sub Inspector Ashwini Pandey (PW-6) have investigated the case as per process shown in the prosecution case mentioned in paragraph 2 of this judgment and has been explained in detail in the main trial. In the detailed cross-examination conducted on behalf of the accused, no such statements have been made by the said Investigating Officers, which are different from the contents of the documents available in the case or which contradict the main examination evidence presented by them. Thus, it is clear that no fact of any error or irregularity related to investigation exists in the present case.

31. It has been stated by by witness presented on behalf of the defense Gopal Singh (DW-1) in his examination-in-chief that the





land of accused Lalbabu's grandfather Vishwanath is adjacent to the land of the victim's father and there was a dispute between the families of the victim and the accused in relation to the land of the accused's grandfather was being sold and the victim's father forcibly constructed a well on the said land and a Panchayat meeting was held in the village in this regard. In the said meeting, when the victim's father told not to leave the land, the victim's father became very angry when the grandfather of the accused threatened to file a case in this regard against the victim and his family and sent them to jail and it is because of this reason that a false case of rape has been filed by the victim's father against the accused. In this regard, in the cross-examination conducted by the Special Public Prosecutor, the said witness admitted that when he came to know that a false case had been filed against the accused by the victim's father, he did not make any complaint in this regard to the police station or the Superintendent of Police. He also admitted that he does not know on which date the Panchayat meeting was held. It is noteworthy that the defense side has also asked the victim's father questions related to the land dispute between the victim's father and the accused's grandfather and the victim's father has given a negative answer to the said questions. Apart from this, the defense witness who was the then Panch has not presented any documents related to the proceedings of the Panchayat





meeting. Therefore, on the above basis it is shown that the evidence presented by the said defense witness is not reliable.

32. Thus, on the basis of the irrefutable evidence presented by the victim (PW-1) and the above mentioned analysis of the evidence of other witnesses, the evidence presented by the victim is being confirmed. The evidence of Dr. Shabana Arafat (PW-10) is confirming the evidence presented by the victim on the basis of the evidence of nail scratch marks on both her hands, both her arms and forearm and right breast and the hymen being old and torn. The doctor who tested the sexual capability of the accused, Dr. Kailash Kaivartya (PW-9) has given the opinion that the accused was found capable of performing sexual acts. Therefore, on the above basis also, the evidence presented by the victim regarding rape is being confirmed.

33. From the above analysis, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt that the appellant has committed penetrative assault on the pretext of marriage with the victim.

34. **The next question for consideration would be, whether the trial Court is justified in convicting the appellant for offence under Section 366 of the IPC ?**

35. Now, the appellant has also been convicted for offence under Section 366 of the IPC which states as under: -

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—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 with imprisonment of either description for a term which may 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.”

36. In order to constitute offence under Section 366 of the IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and / or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal provision. So far as charge under Section 366 of the IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that





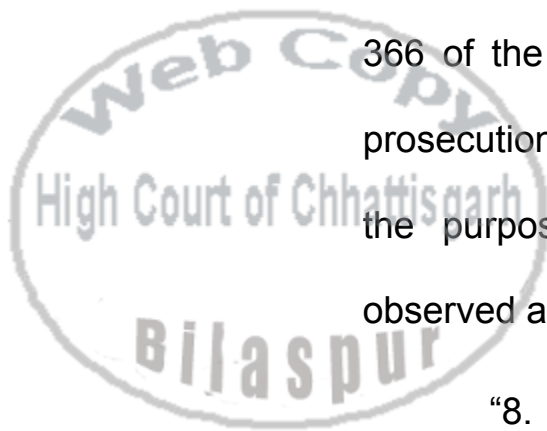
she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

37. Their Lordships of the Supreme Court in the matter of ***Mohammed Yousuff alias Moula and another v. State of Karnataka***² pointing out the essential ingredients required to be proved by the prosecution for bringing a case under Section 366 of the IPC, relying upon the decision rendered in the matter of ***Kavita Chandrakant Lakhani v. State of Maharashtra***³, has clearly held that in order to constitute an offence under Section 366 of the IPC, besides proving the factum of abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in Section 366 of the IPC, and observed as under: -

“8. Chapter XVI of IPC contains offences against the human body. Section 366, which is the pertinent provision, is contained within this Chapter. Kidnapping/abduction simpliciter is defined under Section 359 and maximum punishment for the same extends up to seven years and fine as provided under Section 363. However, if the kidnapping is done with an intent of begging, to murder, for ransom, to induce women to marry, to have illicit intercourse stricter punishments are provided from Section 363A to Section 369.

² 2020 SCC OnLine SC 1118

³ (2018) 6 SCC 664





9. Section 366 clearly states that whoever kidnaps/abducts any woman with the intent that she may be compelled or knowing that she will be compelled, to either get her married or forced/seduced to have illicit intercourse they shall be punished with imprisonment of up to ten years and fine. The aforesaid Section requires the prosecution not only to lead evidence to prove kidnapping simpliciter, but also requires them to lead evidence to portray the abovementioned specific intention of the kidnapper. Therefore, in order to constitute an offence under Section 366, besides proving the factum of the abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in the section. In this case at hand the prosecution was also required to prove that there was compulsion on the part of the accused persons to get the victim married. [See Kavita Chandrakant Lakhani v. State of Maharashtra, (2018) 6 SCC 664].”

38. In the instant case, the appellant kidnapped the victim with an intent to commit illicit intercourse and has committed penetrative assault on the pretext of marriage with her and as the offence of sexual assault has been found proved by the prosecution which satisfies the requirement of Section 366 of the IPC. As such, we are of the considered view that the trial Court is absolutely justified in convicting the appellant for offence under Section 366 of the IPC.
39. Reverting to the instant case, the victim was minor below the age of 16 years on the date of incident, which has been proved



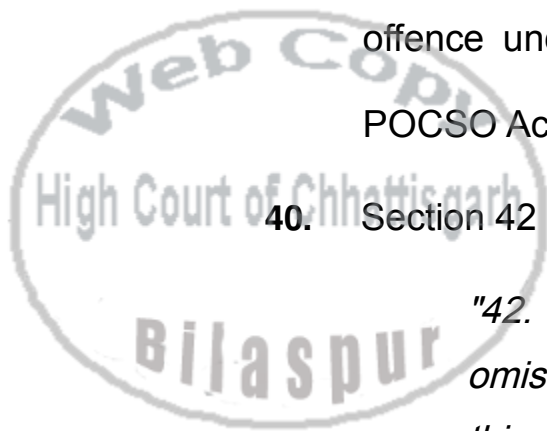


by the certified copy of dakhil kharij register (Ex.P-14C) where her date of birth has been mentioned as 10.08.2005 and the date of incident was 27.08.2020 and as such, she was aged 15 years and 17 days. The said fact has remain unshaken and unrebutted by the defence. As such, the view taken by the learned trial Court that the appellant is the author of the crime is a pure finding of fact based on evidence available on record and we are of the opinion that in the present case, the only view possible was the one taken by the trial Court. Since the victim was below the age of 16 years on the date of incident, hence, offence under Section 376(3) of IPC and Section 4(2) of the POCSO Act is fully proved against the appellant.

40. Section 42 of the POCSO Act, 2012 reads as under:

"42. Alternate punishment.- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law. - *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have*





overriding effect on the provisions of any such law to the extent of the inconsistency."

41. Since the commission of offence under Section 376(3) of the IPC and Section 4(2) of the POCSO Act have been duly proved, the learned trial Court has rightly convicted and sentenced the appellant under Section 4(2) of the POCSO Act and under the principle of double punishment, he has exempted the accused from the charges of Section 376(3) of the IPC. No leniency can be shown towards the appellant as he has sexually assaulted the prosecutrix aged below 16 years of age.
42. From the above analysis, we are of the considered opinion that the prosecution has been successful in proving its case beyond reasonable doubt and the learned trial Court has not committed any legal or factual error in arriving at the finding with regard to the guilt of the appellant/convict.
43. Accordingly, the appeal being devoid of merit is liable to be and is hereby **dismissed**.
44. The appellant/convict is stated to be in jail. He shall serve out the sentence awarded by the trial Court by means of the impugned judgment and order dated 16.08.2023.
45. Let a certified copy of this order alongwith the original record be transmitted to trial Court concerned forthwith for necessary information and action, if any.

Sd/-
(Sachin Singh Rajput)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice