



2024:CGHC:30131-DB

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 323 of 2022

Dinesh Nishad S/o Beduram Nishad, Aged About 27 Years R/o Near Bakra Market Goura Gouri Chouk Sanjay Nagar P.S. Tikrapara, District Raipur (C.G.)

... Appellant

versus

State Of Chhattisgarh Through Station House Officer, Police Station Tikrapara, Raipur District Raipur (C.G.)

... Respondent

For Appellant : Mr.Ankur Seth and Ms.Jaya Gupta, Advocates
For Respondent : Mr.Shailendera Sharma, Panel Lawyer

Hon'ble Shri Justice Ramesh Sinha, Chief Justice

Hon'ble Shri Justice Ravindra Kumar Agrawal, Judge

Judgment on Board

Per Ramesh Sinha, CJ

09/08/2024

1. This criminal appeal arises out of the judgment of conviction and order of sentence dated 21.12.2021 passed by the Additional Sessions Judge, First Fast Track Special Court, Raipur in Special Criminal Case No.6/2019, whereby the appellant has been convicted and sentenced in the following manner :

| Sl. No. | Conviction | Sentence |
|----------------|---|---|
| 1. | Under Section 376AB of the Indian Penal Code. | RI for 20 years and fine of Rs.5000/-, in default of payment of fine to further undergo RI for 3 months |
| 2. | Under Section 376(2)(n) of the Indian Penal Code. | RI for 10 years and fine of Rs.5000/-, in default of payment of fine to further undergo RI for 3 months |

2. The prosecution story, in brief, is that the the complainant/mother of the victim made a written complaint (Ex.P-2) to the Police Station Tikrapara to the effect that accused Dinesh Nishad sells chips, chocolates and children's food in a stall near her house. On 22.11.2018 her daughter/victim had gone to shop to buy chocolates at about 6 P.M. When she was not seen for some time, she started searching around. The victim came out from the house of neighbour Dinesh Nishad scared. When she asked the victim, she told that Dinesh Nishad, the shop owner, took her inside the house, kissed and licked her, took off her underwear and his underwear and put his fingers in and out of her private parts, due to which the victim reported pain in the private parts. The accused tried to put his genitals in the victim's mouth and performed obscene acts on her genitals with the finger of his hand. On the basis of the written report of the victim's mother, an FIR was registered in Crime No.534 at Police Station Tikrapara, Raipur for offence under Section 376 of the IPC and Section 6 of the POCSO Act vide Ex.P-3 and the matter was taken into investigation. Spot map was prepared vide Ex.P-4. Consent was

obtained from mother of the victim for medical examination vide Ex.P-5. Birth certificate issued by the Municipal Corporation, Raipur in which date of birth of the victim was mentioned as 26.04.2013 was seized vide Ex.P-6. Underwear of the victim was seized vide Ex.P-7. Patwari also prepared spot map vide Ex.P-8. MLC of the victim was conducted by Dr.Smt.Padmaja Dubey (PW-3) vide Ex.P-9 and found the following symptoms:-

“No marks of injury, no swelling, redness around vaginal opening, pain at that ana with mild tenderness, secrehous taken further let out two slides prepared for chemical examination handed over to same constable.

She has opined that sexual intercourse might have been done which can be compared by chemical examination of slides. At the time of examination, no sign of forceful act over body was found. The accused was also sent for medical examination where Dr.Virendra Kumar Jha (PW-4) was examined him and opined that he cannot say that he cannot perform sexual intercourse. The statement of the victim under Section 164 CrPC was recorded before the Judicial Magistrate First Class, Raipur vide Ex.P-1. The appellant was arrested on 23.11.2018 vide arrest memo Ex.P-20. Underwear and slides seized from the victim and underwear seized from the appellant were sent to FSL for examination vide Ex.P-22 and as per FSL report (Ex.P-24), semen stains and human sperm were found in Article 'C' (underwear

seized from the appellant) and no semen stains and human sperm were found in Article 'A' and 'B' seized from the victim with a note the semen stains obtained in Article 'C' was not found sufficient for serological testing. Birth Certificate of the victim in which her date of birth has been mentioned as 26.04.2013 (Article A-1-C) given by her mother.

3. After completion of investigation, charge-sheet was filed before the jurisdictional Court under Sections 376 of the IPC and Section 6 of the POCSO Act.
4. The trial Court has framed the charges under Sections 376AB and 376(2)(n) of the IPC and Section 6 of the POCSO Act against the appellant.
5. In order to establish the charge against the appellant, the prosecution examined as many as 7 witnesses and exhibited 24 documents. The statement of the appellant under Section 313 of CrPC was also recorded in which he denied the material appearing against him and stated that he is innocent and he has been falsely implicated in the case. After appreciation of evidence available on record, the learned trial Court has convicted the accused/appellant and sentenced him as mentioned in para 1 of the judgment. Hence, this appeal.
6. Learned counsel for the appellant submits that the impugned judgment of conviction passed by the learned trial Court is contrary to the facts and evidences available on records, hence, the same is liable to be set aside. The appellant has been falsely

implicated in this case because the prosecution has failed to prove the case against the appellant and the complaint made by the prosecution is false and baseless allegation has been made against the appellant. The learned trial Court has relied upon the statement of mother of the victim (PW-2) who is not reliable and untrustworthy. The appellant is running small business near the house of the complainant and he is neighbour of the complainant and there was dispute arose between both of them, due to this, the complainant has falsely been implicated the appellant without any proving of allegation. They further submit that there are various contractions and omissions in the statements of the prosecution witnesses and the leaned trial Court has not properly scrutinized the same before convicting the present appellant. They also submit that the prosecution has not able to prove the ingredients of offence under Sections 376AB and 376(2)(n) of the IPC against the appellant and has not proved its case against the appellant beyond all the reasonable doubt. As such, the appeal deserves to be allowed and the impugned judgment deserves to be set aside.

7. On the other hand, learned counsel for the State opposes the submissions made by the learned counsel for the appellant and submits that the trial Court has rightly convicted and sentenced the appellant, in which no interference is called for by this Court.

8. We have heard the learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
9. The prosecutrix in her 164 CrPC statement (Ex.P-1) has stated that Dinesh uncle lives next to her house. He had taken her to his house on the pretext of giving her chocolate and had taken off his underwear and made her sit on his bed and was sucking the place of urination and he had taken off his pant and was sucking her at the place of urination. When she was coming home, he was calling her and asking her not to tell, so she did not tell anything when she went home. After that he called again tomorrow and did the same thing again and again. On the third day, he called her again and did the same thing and again he took off her underwear and made her sit on his bed and sucking the place of urination and he had taken off his pant and was sucking her at the place of urination and had put the dirty stuff in her mouth due to which she was having pain in stomach. When she went to urinate, she used to have pain below, so she told the whole story of Dinesh uncle to her mother and father.
10. The victim has been examined as PW-1. In para 1 of her statement, she has stated that she know accused Dinesh Nishad present in the Court because he runs a stall selling chips, chocolates, children's food item etc. near their house. She also used to buy chips, chocolates etc. from the accused. In para 2 of her statement, she has stated that whenever she went to get

chocolates etc. from the accused, the accused used to take her inside the house and close the door of the house. The accused used to take her inside and put his penis in her mouth and make her lick it several times and also kissed her private part several times. The accused used to tell her that if she tells to her mother-father about this, he will kill her and will not give chocolates etc. She felt a lot of pain due to the actions done by the accused. In para 3 of her cross-examination, she has stated that she used to go alone to the accused shop to buy chips, chocolates etc. She has denied that she always went with her parents to buy chips, chocolates etc. She has further denied that today she has been tutored by her mother to make statements in the Court. She has denied that even when she went to the Judicial Magistrate's Court with her parents, they told her what to say. She has also denied that she is giving false statement in the Court as per the instructions of her parents out of fear that they will beat her.

11. Mother of the prosecutrix (PW-2) has stated in para 2 of her evidence that the incident dated is 22.11.2018, that day the victim had gone to the accused shop to buy chocolates by taking money from her. When there was a delay in the victim's return, she started searching for her. When she called out, the victim came out of the accused house because the house of the accused is adjacent to their house and when the victim was coming towards her, the accused called her back and scolded her. She had asked the victim what happened to her. Why was the accused scolding? The victim was scared when asked this and repeated said that the

accused had forbidden her from telling anything. In para 3, she has stated that she repeatedly asked the victim lovingly, the victim told the accused used to call her home many times and put his penis in her mouth. The accused used to suck the genitals of the victim and insert his finger into it.

12. Dr.Smt.Padmaja Dubey (PW-3) has opined that no signs of any kind of forced sexual intercourse were found on the victim. Physical intercourse may have taken place with the victim, which can be confirmed by medical examination.

13. In the Indian society refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in

a rape case. The observations of Vivian Bose, J. in **Rameshwar v. The State of Rajasthan (AIR 1952 SC 54)** were:

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...”.

- 14.** It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her

testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in **State of Punjab v. Gurmeet Singh {1996 (2) SCC 384}**.

15. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to

lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.

16. The Supreme Court in the matter of **Ranjit Hazarika v. State of Assam** reported in **AIR 1998 SC 635** has held that the evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.

17. The Supreme Court in **Dattu Ramrao Sakhare v State of Maharashtra, (1997) 5 SCC 341** in relation to child witnesses, held thus:

“5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act

provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

18. In *Ratansinh Dalsukhbhai Nayak v State of Gujarat, (2004) 1*

SCC 64 the Supreme Court held thus:

“7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

(emphasis supplied)

19. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.

20. The Supreme Court in the matter of **Rai Sandeep @ Deenu v. State of NCT of Delhi, 2012 (8) SCC 21** held thus:-

“In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to

accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have correlation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material

particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

21. As per the statement of the prosecutrix (PW-1), in para 1 of her statement, she has stated that she know accused Dinesh Nishad present in the Court because he runs a stall selling chips, chocolates, children’s food item etc. near their house. She also used to buy chips, chocolates etc. from the accused. In para 2 of her statement, she has stated that whenever she went to get chocolates etc. from the accused, the accused used to take her inside the house and close the door of the house. The accused used to take her inside and put his penis in her mouth and make her lick it several times and also kissed her private part several times. The accused used to tell her that if she tells to her mother-father about this, he will kill her and will not give chocolates etc. She felt a lot of pain due to the actions done by the accused. In para 3 of her cross-examination, she has stated that she used to go alone to the accused shop to buy chips, chocolates etc. She has denied that she always went with her parents to buy chips, chocolates etc. She has further denied that today she has been tutored by her mother to make statements in the Court. She has denied that even when she went to the Judicial Magistrate’s Court with her parents, they told her what to say. She has also denied that she is giving false statement in the Court as per the instructions of her parents out of fear that they will beat her.

22. Considering the evidence of the prosecutrix (PW-1) who has specifically stated the act of the appellant, evidence of her mother (PW-2), evidence of Dr.Smt.Padmaja Dubey (PW-3), further considering the examination report of the prosecutrix (Ex.P-9), the material available on record and the law laid down by the Supreme Court in the above-stated judgments, we are of the considered opinion that the learned trial Court has rightly convicted the appellant for offence under Sections 376AB and 376(2)(n) of the IPC. We do not find any illegality and irregularity in the findings recorded by the trial Court.

23. In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against the appellant. The conviction and sentence as awarded by the Special Judge to the appellant is hereby upheld. The present criminal appeal lacks merit and is accordingly **dismissed**.

24. It is stated at the Bar that the appellant is in jail. He shall serve out the sentence as ordered by the trial Court.

25. The Registry is directed to transmit the certified copy of this judgment along with the record to the trial Court concerned for necessary information and compliance.

Sd/-

(Ravindra Kumar Agrawal)
Judge

Sd/-

(Ramesh Sinha)
Chief Justice