



2024:CGHC:40614-DB

**A F R****HIGH COURT OF CHHATTISGARH AT BILASPUR****CRA No. 392 of 2021**

Deepak Verma S/o Pawan Verma Aged About 32 Years R/o Ayodhya Nagar,  
Near Ram Janki Mandir, Police Station Tikrapara Raipur, District Raipur  
Chhattisgarh.

**... Appellant****versus**

State Of Chhattisgarh Through Station House Officer, Police Station Tikrapara ,  
District Raipur Chhattisgarh., District : Raipur, Chhattisgarh

**... Respondent**

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For Appellant : Mr. Sudhir Bajpai, Advocate.

For Respondent : Mr. Sakib Abhmed, Panel Lawyer

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**Hon'ble Mr. Ramesh Sinha, Chief Justice****Hon'ble Mr. Bibhu Datta Guru, Judge****Judgment on Board****Per Ramesh Sinha, Chief Justice****16/10/2024**

1. The appellant has preferred this appeal under Section 374(2) of Cr.P.C. questioning the impugned judgment dated 25.02.2021 passed in Special Criminal Case No. 137/2018 by the learned Additional Sessions Judge, First Fast Track Special Court, Raipur, District Raipur, by which the

learned Additional Sessions Judge has convicted the appellant for the offence punishable under Section 376AB of the Indian Penal Code (for short, the IPC) and sentenced him to undergo rigorous imprisonment for 20 years with fine of Rs. 50,000/- and in default, to undergo rigorous imprisonment for 1 year more.

2. The allegation against the appellant is that on 25.06.2018 at about 3.30 p.m., in the terrace of Rakesh Chandrakar's house at Tikrapara, Raipur, he committed rape and aggravated penetrative sexual assault on the minor victim (PW-1) aged about 7 years by inserting his penis inside the mouth of the victim.
3. The prosecution case, in brief, is that the victim's (PW-1) mother Smt. Kanti Sahu (PW-2) lodged a report in Tikrapara police station to the effect that on 25.06.2018 her husband Umesh Sahu left for work at 09:00 a.m. Her son Tikeswar Sahu aged 09 years and the victim (PW-1) aged 07 years were at home after returning from school at 11.30 a.m. At around 03:30 p.m. the victim went to the nearby grocery shop to get Pepsi. When the victim did not return for about 15 minutes, she went to Sahu grocery shop to and at that time, the victim came crying. On asking, the victim told that after buying Pepsi, the appellant took her to the roof of Rakesh Chandrakar's house by gagging her mouth, removed her underwear and made her sleep on the roof and after removing his own pants, he slept on her and inserted his penis inside the mouth of the victim. When she opened the mouth of the victim, a foul smell like semen was coming from her mouth and there was a stain on her undergarment. On the basis of the report lodged by the mother of the victim, Smt. Kanti Sahu, FIR bearing Crime No. 253/2018 for the offence punishable under Section 377 of the IPC and Section 03, 04 of Protection of Children from

Sexual Offences Act 2012 was registered in Police Station Tikrapara and the case was taken into investigation.

4. During the investigation, Section 376AB of IPC and Section 3, 4, 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 (*for short, the POCSO Act*) were added. On finding evidence of crime against the appellant, he was arrested and after complete investigation in the case, a charge sheet was prepared against the accused and presented in the court of Seventh Additional Sessions Judge FTC, Raipur. Thereafter, the case was transferred from the Court of Seventh Additional Sessions Judge to the Court of Additional Sessions Judge, First Fast Track Special Court, Raipur, on 08.01.2020.
5. Charges were framed by the learned trial Court firstly on 05.10.2018 for the offence under Section 376(2)(i) of the IPC and Section 6 of the POCSO Act, which was denied by the appellant and prayed for trial. Thereafter, amended charges were framed on 20.09.2019 for the offences punishable under Section 376AB of the IPC and Section 6 of the POCSO Act. The appellant abjured the guilt and prayed for trial.
6. In order to bring home the offence, the prosecution recorded the statements of a total of 06 prosecution witnesses i.e. the victim (PW-1), mother of the victim (PW-2), Dr. Smt. Rajani Chourasiya, (PW-3) who had examined the victim, Dr. S.K.Bhandari (PW-4) who had examined the appellant, Ku. Tanseem Kausar (PW-5) who is the Principal of the Gyan Bharti Public School, and the Investigating Officer Rajesh Choudhary (PW-6). The prosecution exhibited as many as 25 exhibits.
7. The statement of the appellant under Section 313 Cr.P.C. was recorded on 11.02.2021. To the most of the questions, he had expressed his

ignorance and some of them were denied as well. He chose to testify in defense, declaring himself innocent. But no defense evidence has been presented on behalf of the accused.

- 8.** The learned trial Court, after considering the evidence on record, convicted the appellant/accused under Section 376AB of the IPC and sentenced him as detailed in the opening paragraph of this judgment. Hence, the present appeal by the appellant/convict.
- 9.** The present appeal was filed on 17.03.2021 and the matter was admitted for hearing on 24.03.2021. Thereafter, the matter was listed on 05.01.2022 when the case was adjourned for four weeks. The matter was against listed on 14.09.2022, 20.10.2022 and 02.11.2022. On 18.07.2023, the application for suspension of sentence and grant of bail filed by the appellant was heard and the same was rejected. Today, the matter is heard finally.
- 10.** Mr. Sudhir Bajpai, learned counsel appearing for the appellant submits that the appellant has been falsely implicated in this case. There is no eye witness to the incident. There are omissions and contradictions in the statement of the witnesses and there is no independent witness except the victim and her mother. The appellant is a married person living in the same locality for a long time. The appellant had not made any penetrative sexual assault on the victim as even in the report of the Doctor, no injuries have been found on the body of the victim. Whatever the victim has deposed before the Court in paragraph 2 of her statement, is missing in her statement made under Section 164 Cr.P.C. where the victim has stated that the appellant was only touching the private part of the victim and thereafter she returned home crying. Further, the person in whose

terrace the alleged incident is said to have taken place i.e. Rakesh Chandrakar, has not been examined by the prosecution.

- 11.** Mr. Bajpai further submits that the learned trial Court has committed an error of law as the charge framed earlier was altered by the learned trial Court but no opportunity was granted to the appellant to examine the material witnesses i.e. PW-1 to PW-4. Firstly, the charge was framed on 05.10.2018 for the offence under Section 376(2)(i) of the IPC and Section 6 of the POCSO Act and the trial commenced and four of the prosecution witnesses (PW-1 to PW-4) were already examined. Thereafter, on 20.09.2019, an amended charge was framed against the appellant for the offence under Section 376AB of the IPC and Section 6 of the POCSO Act. The learned trial Court ought to have re-called the four prosecution witnesses (PW-1 to PW-4) who were examined before framing of the amended charge and re-examined them and then only the trial should have proceeded. In the instant case, the witnesses were not called and the trial proceeded on the basis of deposition made by the prosecution witnesses which were recorded prior to framing of amended charges. Section 376(2)(i) of the IPC stood deleted w.e.f. 21.04.2018 and Section 376AB was inserted w.e.f. 21.04.2018. There is non-compliance of Section 217 Cr.P.C. Though a Court may alter or add to any charge before judgment is pronounced but when charges are altered, opportunity must be given under Section 217 of the Cr.P.C., both to the prosecution and the defence, to recall or re-examine witnesses in reference to such altered charges, which has not been done in the present case.
- 12.** Lastly, Mr. Bajpai submits that looking to the facts and circumstances of the case, a lenient view may be adopted and even if any case is made

out against the appellant, he may be convicted for the offence punishable under Section 6 of the POCSO Act instead of Section 376AB of the IPC and the sentence may also be suitably modified.

- 13.** On the other hand, Mr. Sakib Ahmed, learned Panel Lawyer for the State/respondent submits that the appellant has committed a heinous crime of rape against a minor girl aged about 7 years by inserting his penis in the mouth of the victim. The learned trial Court, after appreciating the evidence and the materials collected by the prosecution has rightly arrived at a finding with regard to the guilt of the appellant which needs no interference and as such, this appeal deserves to be dismissed.
- 14.** We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
- 15.** The victim is stated to be a minor aged about 7 years which is evident from the Dakhil Kharij register Exhibit P/10C wherein the date of birth is mentioned as 10.04.2011 and was admitted in Class PP-I. Article A-1 is the Birth Certificate of the victim which states the date of birth of the victim to be 10.04.2011. Even the victim (PW-1) and her mother (PW-2) have deposed that the date of birth of the victim was 10.04.2011 and as such, the victim was aged about 7 years on the date of incident. Even otherwise, the age of the victim has not been seriously disputed by the learned counsel for the appellant. As such, this Court is of the opinion that the learned trial Court was fully justified in arriving at a finding that the victim was a minor aged 7 years on the date of incident.

- 16.** With respect to commission of crime by the appellant, the statement of the victim is of utmost importance. The victim (PW-1) has clearly deposed that the appellant had forcibly taken her in the terrace of Rakesh Chandrakar's house and thereafter disrobed her and he lied on her after taking off his own clothes and inserted his penis into her mouth and after sometimes, he ran away from the spot. Similarly, the mother of the victim (PW-2) also stated that on the date of incident, at about 3 p.m., the victim came crying and narrated the incident to her. When she examined the mouth of the victim, a foul smell of semen was coming after which she asked the victim to brush and clean her mouth. She immediately informed to her relatives and thereafter lodged report in the Police Station at about at 6.40 p.m.
- 17.** Dr. Smt. Rajni Chourasiya (PW-3) had examined the victim who found the victim to be oriented and conscious. In her report (Exhibit P/6), there was no injury found on the body of the victim. Even on examination of the private part, there was no injuries except for redness in labia minora which was in the position of 7'O clock and her hymen was also found to be intact. She had prepared two slides from the vaginal secretion and handed over to the lady constable for chemical examination. She had opined that no conclusive finding can be given as to whether any sexual assault was made on the victim or not. She had examined the underwear of the victim where a suspicious white spot was present which was encircled with a red pen which could have been semen and the same was handed over to the Constable for chemical examination.
- 18.** Similarly, Dr. S.K.Bhandari (PW-4) had examined the appellant who found that the secondary sexual character of the appellant were fully developed. Penis and scrotum were normal and there was absence of

smegma. There was no injury near by his private part. He opined that there was nothing to suggest that the appellant was not capable of performing sexual intercourse. He had examined one underwear brought by the Constable which had two stains which were marked with blank ink and returned to the Constable advising for chemical examination.

19. In the FSL report (Exhibit P/25), it has been stated that the underwear of the appellant i.e. Article C, human sperms and semen were found. So far as the underwear and vaginal slides of the victim are concerned, no semen or sperms were found in it which is quite obvious as the allegation against the appellant is that he had inserted his penis into the mouth of the victim and not on her private part. Hence, the presence of semen and sperms in the underwear of the appellant is suggestive of the fact that he had attempted aggravated penetrative sexual assault on the victim.
20. In the case of **Ganesan v. State**, (2020) 10 SCC 573, the Supreme Court observed and held that that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality.
21. In the case of **State (NCT of Delhi) v. Pankaj Chaudhary**, {(2019) 11 SCC 575}, it was observed and held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It was further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises.
22. In the case of **Sham Singh v. State of Haryana**, {(2018) 18 SCC 34}, the Supreme Court observed that testimony of the victim is vital and



unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It was further observed that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

- 23.** Applying the law laid down by the Supreme Court in the cases (supra) to the facts of the case on hand and as observed hereinabove, we see no reason to doubt the credibility and/or trustworthiness of the victim. She is found to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the accused relying upon the sole testimony of the victim can be sustained.
- 24.** 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 learned trial Court.
- 25.** Hence, there is no manner of doubt that the appellant is guilty of the offence of penetrative sexual assault. However, the question for consideration would be whether any prejudice has been caused to the appellant when the charges were altered but the witnesses who were examined earlier, were not recalled and re-examined?
- 26.** When the charges were altered, four of the material witnesses i.e. PW-1 to PW-4 were already examined and after amended charge was framed, the witnesses were neither recalled nor re-examined which would definitely be fatal for the accused as the Sections in both the charges

carried different punishment. In Section 376(2)(i) IPC, the minimum jail sentence was 10 years and under Section 376AB of the IPC, the minimum jail sentence is 20 years. Under the provisions of Section 217 of the Cr.P.C. opportunity to examine and cross examine the witnesses ought to have been given both to the prosecution as well as the defence and as such, even though no prejudice would have caused to the appellant herein, there should have been compliance of Section 217 Cr.P.C as arguments could have been raised by the prosecution as well as the defence with regard to the quantum of punishment.

27. Firstly, the charges under Section 376(2)(i) of the IPC alongwith Section 6 of the POCSO Act was framed and thereafter, Section 376AB of the IPC alongwith Section 6 of the POCSO Act was framed against the appellant on 05.10.2018 and 20.09.2019, respectively. It would be beneficial to reproduce both the aforementioned Sections of the IPC for better appreciation of the case, which is as under:

28. Section 376(2)(i) of the IPC:

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

xxx                      xxx                      xxx

*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 natural life, and shall also be liable to fine.*

xxx                      xxx                      xxx”

29. Section 376AB of the IPC

***“376AB.Punishment for rape on woman under twelve years of age.—Whoever, commits rape on a woman under twelve years of age 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 that person's natural life, and with fine or with death:*

*Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:*

*Provided further that any fine imposed under this section shall be paid to the victim.”*

- 30.** The learned trial Court has convicted the appellant both under Section 6 of the POCSO Act and Section 376AB of the IPC but in view of Section 42 of the POCSO Act, which provides for alternate punishment which is greater in degree and as such, the appellant has been sentenced for the offence punishable under Section 376AB of the IPC.
- 31.** Earlier, before amendment, Section 6 of the POCSO Act provided that whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but may extend to imprisonment for life and shall also be liable to fine. After amendment, i.e. w.e.f 16.09.2019, the said Section provides for rigorous imprisonment for a term which shall not be less than 20 years. The incident took place on 25.06.2018 and as such, Section 6 of the POCSO Act, which stood as before 16.08.2019 would be applicable in the present case and as such, this Court is of the view that instead of convicting the appellant for the offence under Section 376AB of the IPC and sentencing him to rigorous imprisonment for 20 years with fine of Rs. 50,000/-, the appellant be convicted under Section 6 of the POCSO Act and sentenced to rigorous imprisonment for 10 years with fine of Rs. 50,000/- and in default of payment of fine, to further undergo 1 years rigorous imprisonment. It is ordered accordingly.

- 32.** The appellant is stated to be in jail since 26.06.2018. He shall serve out the remaining period of jail sentence as awarded by this Court.
- 33.** Resultantly, the appeal stands **partly allowed**.
- 34.** 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/-  
(Bibhu Datta Guru)  
**JUDGE**

Sd/-  
(Ramesh Sinha)  
**CHIEF JUSTICE**

**Head Note**

A Court may alter or add to any charge before judgment is pronounced but when charges are altered, opportunity must be given under Section 217 of the Cr.P.C., both to the prosecution and the defence, to recall or re-examine the witnesses in reference to such altered charges.