

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 692 of 2014****Judgment Reserved on 21.11.2016****Judgment Delivered on 19.12.2016**

Shrawan Kumar Nagesh, S/o Shobhit Nagesh, aged about 18 years,
R/o Village Lamkasa, P.S. Basna, District Mahasamund, Chhattisgarh.

---- Appellant (in jail)**versus**

State of Chhattisgarh through the District Magistrate, Mahasamund,
District Mahasamund, Chhattisgarh.

---- Respondent

For the Appellant	:	Smt. Indira Tripathi, Advocate.
For the Respondent/ State	:	Shri Vijay Bahadur, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Judgment**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 07.05.2014, passed by the Learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'), Mahasamund, District Mahasamund, Chhattisgarh in Special Session Case No. 12 of 2013, whereby and whereunder the learned Special Judge convicted the appellant under Section 10 of the POCSO Act and sentenced him to undergo rigorous imprisonment for five years and to pay fine of Rs.1,000/-, in default of payment of fine, to further undergo RI for three months.

2. The case of the prosecution, in brief, is that the prosecutrix (PW-3) is resident of Village Lamkasa. On 17.9.2013, at about 7:00 pm, the

prosecutrix (PW-3) went out for seeing Ganesh Pooja and she did not return by 8:30 pm. Jagmoti Bai (PW-4), mother of the prosecutrix, while searching for her daughter, saw that the prosecutrix was coming from the school side and she was crying. The prosecutrix (PW-3) told her mother that the appellant forcefully took her to the kitchen room of the school, tore her underwear and tried to do wrong with her. On 18.9.2013, a meeting of village elders was called in which the appellant was present and admitted that he had taken the prosecutrix to do wrong thing with her and he admitted his guilt. On the same day, Jagmoti (PW-4) lodged First Information Report (Ex. P/5) in Police Station Basna. The prosecutrix and the appellant/accused were medically examined. Spot map was prepared by the Investigating Officer vide Ex. P/9. Vaginal slides of the prosecutrix were prepared by the examining Doctor were seized vide Ex. P/12. The seized articles were sent for FSL examination. FSL report is **Ex.P/6**. Statements of the witnesses were recorded and on completion of the investigation, the appellant was charge-sheeted. The appellant was charged by the trial court for offences punishable under Section 376(2)(f) of the IPC and Section 5(m) of the POCSO Act. On his denial of charge, trial was conducted. After giving opportunity of hearing and leading evidence to the prosecution and the defence, the impugned judgment has been passed by which the appellant has been convicted and sentenced as mentioned above. Hence, this appeal.

4. The grounds in this appeal are, that on the basis of the evidence led by the prosecution before the trial Court no case is made out against the appellant. The evidence of witnesses suffer from material contradictions and omissions which have been ignored by the trial court. The medical evidence

also does not support the statement of the prosecutrix. The case is based only on suspicion and, therefore, the appellant is entitled for benefit of doubt. On these grounds, it is prayed that the impugned judgment may be set aside and the appellant may be acquitted of the charge framed against him.

5. Learned counsel for the appellant submits that the prosecutrix (PW-3) is a child witness who has been tutored to give statement before the court. There was delay in lodging the First Information Report, which discloses that the FIR was lodged after deliberations. The medical evidence is not supportive of any sexual assault upon the prosecutrix. None of the witnesses produced by the prosecution can be regarded as trustworthy. For these reasons, the appellant is entitled for benefit of doubt.

6. Learned State counsel has opposed the arguments and grounds raised on behalf of the appellant. It is submitted that the prosecution has proved its case beyond reasonable doubt. Reliance has been placed on **Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57**, wherein it was held that a finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix, however, courts should, at the same time, bear in mind that false charges of rape are not uncommon and whether there was rape or not would depend ultimately on the facts and circumstances of each case.

7. The facts and circumstances in this case have to be viewed on the basis of the evidence on record. The prosecutrix (PW-3) is a child witness. The court has assessed her age to be 7 years. She stated that on the date of incident when she had gone to see Ganesh Pooja, the appellant took her

to the kitchen of the school and made her lie down. Thereafter, he tore her underwear and did wrong thing with her. At the time of incident, Maniram came to the spot and the appellant fled from there. In cross-examination, she admits that neither the appellant inserted his penis nor any blood come out from her private parts. There is no other statement in her whole deposition to suggest that she is a tutored witness. Her statement is unrebutted to the extent that the appellant took her to the place of incident, made her lie down and thereafter he tried to do some wrong thing with her but not sexual intercourse.

8. Jagmoti (PW-4) was told about the incident by her daughter, the prosecutrix (PW-3). To that extent, her statement is unrebutted. Further, she has stated that on the next day, when she asked the appellant about the incident, he admitted that he did the alleged act. Her statement about the information given to her by the prosecutrix and the statement of admission before her by the appellant have remained unrebutted in her cross-examination. Bharatram (PW-1) was examined as witness of the meeting held on the next day of the incident, but he did not support the case of the prosecution and has been declared hostile.

9. Laxman (PW-2) is the Village Kotwar. He was not present in the meeting. He was told about the incident by one Prabhulal. Dr. R.K. Patel (PW-5) examined the appellant and opined vide his report Ex. P/7 that the appellant is capable of doing sexual intercourse. He also prepared a slide from the semen collected from the appellant/ accused. Dr. Sujatha Patel (PW-6) examined the prosecutrix and gave her report (Ex. P/8) that no injuries were found on the private parts of the prosecutrix. She prepared

slides from the private parts of the prosecutrix and handed over the same to the Police Constable for chemical examination. Sub-Inspector Rajesh Kumar Singh (PW-7) has stated about the investigation. FSL report (**Ex. P/16**) is on record. According to which, semen or human spermatozoa was not found on the underwear of the prosecutrix but semen or spermatozoa were present on the slide was related to the appellant/accused.

10. On scrutiny of the evidence of the prosecution, the statements of the witnesses is unrebutted and reliable to the extent that on the date of incident the prosecutrix was taken to the kitchen in the school and the appellant by disrobing her committed sexual assault on her. This sexual assault cannot be considered as rape looking to the medical evidence and the admission made by the prosecutrix that the appellant did not insert his penis into her private part. Hence, for these reasons the act of the appellant is covered under the definition of sexual assault under Section 7 of the POCSO Act, which is punishable under Section 8 of the POCSO Act. Hence, the conviction of the appellant under Section 10 of the POCSO Act is an offence defined under Section 5 of the POCSO Act which is about aggravated penetrative sexual assault and in view of the aforementioned reasons it is not sustainable.

11. In view of the above discussion, the appeal is allowed in part. The impugned judgment of conviction and order of sentence of the appellant under Section 10 of the POCSO Act is set aside and instead thereof, the appellant is now convicted under Section 7 of the POCSO Act read with Section 8 of the POCSO Act and he is sentenced with rigorous imprisonment

for 3 years and to pay fine of Rs.1,000/- in default of payment of fine, to further undergo rigorous imprisonment for three months. As submitted, the period undergone in custody by the appellant shall be set off under Section 428 of the Cr.P.C.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nimmi