

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1156 of 2015

Judgment Reserved on : 11.1.2017

Judgment Delivered on : 21.3.2017

Bhushanlal Sahu, S/o Mansharam Sahu, aged about 24 years, R/o Agesara,
Police Station Ranchirai, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Station House Officer Police Station Ranchirai,
District Durg, Chhattisgarh

--- Respondent

For Appellant	:	Shri N.S. Dhurandhar, Advocate
For State/Respondent	:	Shri S.K. Mishra, Panel Lawyer

Hon'ble Shri Justice Anil Kumar Shukla

C.A.V. JUDGMENT

1. This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure by the accused against the judgment dated 13.8.2015 delivered in Special Sessions Case No.52 of 2014 by the Special Judge under the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the Act of 2012') and Additional Sessions Judge (FTC), Durg, whereby the Learned Trial Judge convicted and sentenced the accused/Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 454 IPC	Rigorous Imprisonment for 3 years and fine of Rs.1,000/-, in default of payment of fine, to further undergo imprisonment for 6 months
Under Section 10 of the Act of 2012	Rigorous Imprisonment for 5 years and fine of Rs.5,000/-, in

	default of payment of fine to further undergo imprisonment for 6 months The jail sentences awarded for both the offences are directed to run concurrently.
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2. Case of the prosecution, in brief, is that Complainant Suresh Sahu (PW-5) lodged First Information Report (Ex.P-9) with Police Station Ranchirai on 2.12.2013 against the Appellant that on 1.12.2013 at about 12:30 p.m., on entering his house he saw that television of his house was on with full sound and the Appellant, after opening chain of his full-pant and removing underwear of the Complainant's 6 years' old niece (victim), was trying to commit rape with her on an iron cot lying in the house. Having seen the Complainant, the Appellant, closing the chain of his full-pant, fled from there. Bhanupratap (PW-10) witnessed the Appellant fleeing from there. The Complainant also informed Bhanupratap (PW-10) about the incident. The Complainant made her niece (victim) wear her underwear. On arrival of his daughter-in-law, i.e., mother of the victim Purnima Sahu (PW-9) to home, he informed her about the incident. A meeting was convened in the village at about 9 p.m. The Appellant admitted his guilt before Sarpanch Sampatlal (PW-1), Rohit Sahu and Panch Sitaram. Thereafter, the Complainant along with his brother, i.e., father of the victim Raghvendra (PW-4) went to the police station and lodged the FIR.
3. During investigation, Investigating Officer Sub-Inspector R.S. Sahu (PW-13) obtained permission from the parents and the Sub-Divisional Magistrate for examination of private part of the victim. The victim was medically examined at Government Hospital,

Gunderdehi. Dr. Shireen Parveen (PW-14) examined the victim and gave her report (Ex.P-17). She referred the victim to a Gynecologist. Gynecologist Dr. Ruchi Kishore (PW-17) examined the victim and gave her report (Ex.P-27). She also prepared a slide of vaginal swab taken from external surface which was seized vide Ex.P-14. Underwear and leggings of the victim girl were seized vide Ex.P-8. Spot-map of the place of occurrence was prepared vide Ex.P-6. A panchnama was prepared vide Ex.P-4. A Kotwari Register showing the date of birth of the victim was seized vide Ex.P-2. A copy of the relevant page of the Kotwari Register showing the date of birth of the victim is Ex.P-3C. Admission-Transfer (*Dakhil-Khariji*) Register of the school showing the date of birth of the victim was seized vide Ex.P-5. A copy of the relevant page of the Admission-Transfer Register showing the date of birth of the victim is Ex.P-10C. Underwear of the Appellant was seized vide Ex.P-18. The Appellant was medically examined by Dr. C.B. Prasad (PW-16). He gave his report (Ex.P-19) in which he opined that the Appellant was able to perform sexual intercourse. Another spot-map (Ex.P-26) was got prepared by Patwari Lavan Kumar Mandal (PW-15). The Appellant was arrested vide Ex.P-22. Statements of witnesses and the victim were recorded.

4. After completion of the investigation, a charge-sheet was filed against the Appellant for offences punishable under Section 454 IPC and Section 10 of the Act of 2012. The Appellant denied the guilt, pleaded innocence and claimed trial. During trial, statements of witnesses were recorded before the Court. Statement of the Appellant under Section 313 Cr.P.C. was also recorded in which he pleaded innocence and stated that on the date and time of

incident, he was sitting on the *Chabootara* (Plinth) of the house of Complainant Suresh Sahu (PW-5). The Complainant has lodged a false report against him due to enmity. The Trial Court, after appreciation of the evidence available on record, convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment.

5. Learned Counsel appearing for the Appellant argued that the conviction and sentence imposed upon the Appellant are contrary to the facts and law. The Trial Court failed to appreciate the evidence in correct perspective. Important omissions and contradictions in evidence have been overlooked. There is nothing against the Appellant in the medical evidence led by the prosecution. The judgment of the Trial Court is perverse. Therefore, the Appellant deserves to be acquitted of the charges framed against him.
6. Learned Counsel appearing for the State/Respondent, opposing the arguments advanced by Learned Counsel for the Appellant, submitted that the impugned judgment of conviction and sentence is impeccable and, therefore, the instant appeal deserves to be dismissed.
7. I have heard Learned Counsel appearing for the parties and perused the record.
8. Following questions arise for consideration in this appeal:
 - (i) Whether on the date of incident the victim girl was below 12 years of age?

(ii) Whether the Appellant committed an offence of lurking house trespass?

(iii) Whether the Appellant committed an offence of aggravated sexual assault on the 6 years' old victim girl?

9. As far as the age of victim girl is concerned, the Supreme Court, in **Jarnail Singh v. State of Haryana, (2013) 7 SCC 263**, has held that following documents are essential for determination of age of a victim girl:

(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 age of the victim shall be determined on the basis of medical evidence.

10. In the instant case, for proving the age of victim, the prosecution has led evidence of Admission-Transfer (*Dakhil-Kharij*) Register (Ex.P-10) of the school which the victim first attended. The said register has been proved by the Headmaster-in-Charge of the school Tikeshwar Prasad (PW-6). According to him, at serial number 1094 of the register, name of the student (victim girl),

names of her father Raghvendra, mother Purnima, caste and place of her residence and her date of birth as 22.5.2007 are registered. Certified copy of the relevant page of the said register is Ex.P-10C. This entry in the register has been made by the concerned authority in discharge of his official duties, therefore, this entry is relevant under Section 35 of the Evidence Act. In **Sushil Kumar v. Rakesh Kumar, AIR 2004 SC 230**, the Hon'ble Supreme Court has observed thus:

“**35.** In *Brij Mohan Singh v. Priya Brat Narain Sinha and others* (AIR 1965 SC 282), this Court, *inter alia*, observed that in actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed.

36. The entry of date of birth made in school admission register in terms of Section 35 of the Evidence Act should be considered from that perspective.”

11. In respect of the age of victim, Investigating Officer Sub-Inspector R.S. Sahu (PW-13) has deposed that he had seized the original Kotwari Register (Ex.P-3) on its production by Village Kotwar Surendra Kumar (PW-2) vide Ex.P-2. A copy of the relevant page of the register is Ex.P-3C. Surendra Kumar (PW-2), in his deposition, has supported the seizure of the register and its copy Ex.P-3C, according to which, the date of birth of the victim is 22.5.2007. Both the father and the mother of the victim has been unable to state the date of birth of their victim daughter. 22.5.2007 to be the date of birth of the victim has not been challenged in the Trial Court. Therefore, in view of the aforesaid discussion, the date of birth of the victim is held to be 22.5.2007 and accordingly, on the date of incident, i.e., 1.12.2013, her age was below 7 years.

12. Complainant Suresh Sahu (PW-5) is the eyewitness of the incident and the victim is daughter of his younger brother Raghvendra (PW-4). Suresh Sahu (PW-5) has deposed that on 1.12.2013 at about 12:00 O'clock in the afternoon, he was cleaning paddy in the courtyard of his house. On feeling thirst, to drink water, he entered his house. On entering, he saw that television of his house was on with full sound. An iron cot was lying near the television. The Appellant, after opening chain of his full-pant and removing underwear of the niece of the witness, was trying to commit rape with her on the iron cot. Having seen the witness, the Appellant fled from there. Bhanupratap (PW-10) met the witness in the lane whom the witness narrated about the incident. The witness made her niece (victim) wear her underwear. On arrival of his daughter-in-law, i.e., mother of the victim Purnima Sahu (PW-9) to home at about 5:00 p.m., the witness informed her about the incident. Purnima Sahu (PW-9) thereafter informed her husband Raghvendra (PW-4) about the incident occurred with their daughter (victim). A meeting was convened in the village about the incident at about 9:00–9:30 p.m. Suresh Sahu (PW-5) has further deposed that the Appellant admitted his guilt in the meeting. A dispute arose and a *marpeet* took place between the father of the victim and the Appellant in the meeting. Thereafter, as further deposed by the witness, the FIR (Ex.P-9) was lodged by him. The statement of this witness regarding the act of the Appellant done with the victim has remained unchallenged in the cross-examination. The witness has admitted in the cross-examination that the Appellant had come to him twice on the date of incident itself and submitted his apology. No question has been put to this witness in the cross-examination regarding any enmity between him and the Appellant.

As far as lodging of the FIR (Ex.P-9) by this witness is concerned, the incident took place at the house of this witness in Village Agesara on 1.12.2013 at about 12:30 p.m., but the FIR was lodged by him with Police Station Ranchirai, District Balod on 2.12.2013 at 3:15 p.m. The distance between the place of occurrence, i.e., the house of this witness and the police station was 16 Kilometres and the reason explained in the FIR for delay in its lodging is holding of the meeting in the village regarding the incident.

13. The most important witness of the incident is the victim (PW-3) herself. She has deposed that she knows and recognises the Appellant. According to her, she was playing with her friends Bhunika and Nikhil in the house of her elder father (uncle). At that time, Appellant Bhushan came there and made her friends flee from there. She has further deposed that the Appellant made her lie down on a bed of the house of her elder father and he was telling her that he will marry her and was also using filthy words. The Appellant removed her leggings and underwear, he also removed his underwear and was doing dirty acts with her. The witness has deposed that “चोदी-चोदा खेलात रहीसे”. At that time, her elder father (uncle) Suresh Sahu (PW-5) reached there, having seen him, the Appellant fled from there. Her elder father made her wear her clothes and he informed her mother about the incident. Thereafter, her mother informed her father about the incident. Thereafter, she was taken to the police station by her parents and she had narrated the same version about the incident to the police. The statement of the victim (PW-3) against the Appellant regarding the offence committed by him with her has remained unchallenged in the cross-examination. On admission by the victim (PW-3) in the

cross-examination that she was deposing in the Court as was told to her by her parents, the Trial Court sought a clarification from her in which she deposed that it is true that the Appellant committed wrong act with her after removing her clothes. Thus, the evidence of the victim (PW-3) has remained unchallenged in the cross-examination. There is no contradiction in the statements under Sections 161 and 164 of the Code of Criminal Procedure made by the victim (PW-3). On appreciation of the evidence of the child witness (PW-3), i.e., the victim and the answers given by her against the questions put to her regarding test of her intelligence before taking her deposition, nothing emerges to show that her evidence is unreliable. In **Dattu Ramrao Sakhare and others v. State of Maharashtra, (1997) 5 SCC 341**, the Supreme Court observed thus:

“5. The entire prosecution case rested upon the evidence of Sarubai (PW2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. 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. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the evidence of Sarubai (PW2).”

14. As far as medical evidence is concerned, Dr. Shireen Parveen (PW-14), after examination of the victim, in her report (Ex.P-17), has not found any mark of sexual intercourse with the victim. Dr. Ruchi Kishore (PW-17), who also examined the victim, has stated in her report (Ex.P-27) that there was no external injury on the body of the victim, her hymen was intact and no redness, discharge or swelling was found on her vagina. Dr. C.B. Prasad (PW-16), who examined the Appellant, has found in his report (Ex.P-19) that the Appellant was able to perform sexual intercourse.

15. As far as the Act of 2012 is concerned, Section 7 thereof defines sexual assault, which runs thus:

“7. Sexual Assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

16. Section 9(m) of the Act of 2012 reads as follows:

“9. Aggravated Sexual Assault.—(a) xxx xxx
xxx xxx xxx
(m) whoever commits sexual assault on a child below twelve years; or”

17. Section 10 of the Act of 2012 runs as under:

“10. Punishment for aggravated sexual assault.—Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

- 18.** Thus, from the above discussion, particularly from the evidence of victim (PW-3), i.e., a girl of below 7 years of age and eyewitness Suresh Sahu (PW-5), the offence punishable under Section 10 of the Act of 2012 is made out and proved against the Appellant.
- 19.** As far as the offence punishable under Section 454 IPC is concerned, it is evident from the evidence of victim (PW-3), Suresh Sahu (PW-5), spot-map (Ex.P-26) proved by Lavan Kumar Mandal (PW-15) and another spot-map (Ex.P-6) proved by Raghvendra (PW-4) that the incident occurred in the house of Suresh Sahu (PW-5). Thus, the conviction imposed upon the Appellant under Section 454 IPC is also impeccable.
- 20.** The sentence of imprisonment awarded to the Appellant under Section 10 of the Act of 2012 is the minimum prescribed jail sentence, therefore, it does not call for any interference.
- 21.** Consequently, the criminal appeal is dismissed. The impugned judgment of conviction and sentence is affirmed.

Sd/-

(Anil Kumar Shukla)
JUDGE