

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1099 of 2016**

- Johar Singh S/o Tihar Singh Gond Aged About 22 Years R/o Sagaouna, Police Station Kukdur, Civil & Revenue District Kabirdham, Chhattisgarh.

---- Appellant**Versus**

- State of Chhattisgarh Through Police of Police Station Kukdur, Civil & Revenue District Kabirdham, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Pallav Mishra, Advocate
For Respondent-State	:	Shri SK Mishra, PL for the State

Ms. Hamida Siddiqui, Advocate, appears as *Amicus curiae* to assist the Court

Hon'ble Shri Justice Goutam Bhaduri**C A V Order****(Reserved on 30.08.2017)****(Delivered on 08.09.2017)**

1. The instant appeal is against the order dated 25.06.2016, passed by the Special Judge, POCSO Act, (FTC), Kabirdham (Kawardha), in Special Sessions Trial No.71/16, whereby the appellant has been convicted under Sections 376 IPC and Sections 4 & 6 of the Protection of Children From Sexual Offences Act (for short 'the POCSO Act') and sentenced to undergo R.I. for 7 years with fine of Rs.2000/- and in default of payment of fine further imprisonment of six months was awarded.
2. Brief facts of this case, are that a report was made by the prosecutrix on 02.02.2016 that prior to 4 years of the date of making the report, on a promise to marry, the appellant committed forceful sexual intercourse with the victim. It was further stated that after the incident the appellant

initially admitted to marry the prosecutrix but subsequently he refused to marry, thereby the offence under Section 376 IPC was registered. During the course of investigation it was found that the prosecutrix was around 16 years of age, therefore, Section 4 & 6 of the POCSO Act were also added. After investigation statement of the witnesses were recorded and charge-sheet was filed under Section 376 of the IPC and Sections 4 & 6 of the POCSO Act.

3. During the course of trial, the appellant abjured his guilt and claimed to be tried. The trial Court after evaluating all the facts, convicted the accused as aforesaid. Hence this appeal.
4. During pendency of this appeal an application was filed by the appellant under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the Act, 2000'), claiming that at the time of the commission of crime, the appellant was a juvenile as the date of commission of the single incident of offence was stated to be of 2012, thereby the age of the appellant would come to 17 years on the date of offence. On such application, this Court by an order dated 08.05.2017 directed the Chief Judicial Magistrate, Kawardha to make an enquiry as to whether the appellant was juvenile on the date of commission of offence and submit a report. The CJM, Kawardha conducted the enquiry on an MJC and recorded statement of different witnesses namely Rajkumar Baiga, Hari Ram, Tihar Singh etc. The CJM lastly by an order dated 20.06.2017 and after evaluating the documents and evidence gave a finding that taking into the statement of the prosecutrix that the offence has been committed prior to 4 years of 02.02.2016 (i.e. the date of FIR) i.e. on 02.02.2012 the age of the appellant was 17 years, 3 Months & 13

days. Thereby, it was held that the appellant was juvenile on the date of commission of offence.

5. The Juvenile Justice (Care & Protection of Children) Act, 2015 (for short 'the Act, 2015') came into force on 15.01.2016. As per the report of the CJM the offence is said to have committed on 02.02.2012. So if the date of offence is recorded in the year 2012, the provisions of the Act, 2000 would come into play specially when the term of sentence remains the same.
6. Sub-section (2) of Section 111 of the Act, 2015 provides that notwithstanding such repealing of the Act, 2000, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act. In the instant case the "act done" herein was prior to 15.01.2016 before the new act came into force. Since the FIR in this case was lodged on 02.02.2016 i.e. after commencement of the Act, 2015 the act was in force and the judgment of sessions trial is also of 25.06.2016. Therefore, sub-section (ii) of Section 111 of the Act, 2015 will take within its sweep that anything done in the old act shall have a corresponding application to the provision of the new act. In respect of the old act sub-section (2) of Section 6 of the Act, 2000 provides that the powers conferred on the Board may also be exercised by the High Court when the proceedings comes before it in appeal, revision or otherwise. The corresponding Section of Section 6 of the Act, 2000 is Section 8 in the Act of 2015. The Section 8 of the Act, 2015 gives the similar power i.e. the power of the Board can be exercised by the High Court when the proceedings comes before it under Section 19 or in appeal, revision or otherwise. Thereby, while adjudicating the case,

this Court will have the power of the Board by virtue of Section 8 (2) of the Act, 2015.

7. Now turning to the merits of this case, the victim was examined as PW-1. Her statement would show that on the date of examination i.e. on 15.06.2016, the victim stated her age to be 20 years and if the incident as has been found to have been committed in the year 2012, even in such case also she was about 16 years of age at the time of incident. The statement would also show that she has alleged that 4 years back once the appellant has committed sexual intercourse in the night near a temple thereafter when the appellant was asked to marry, he refused, therefore, the report was made for rape. In the cross-examination she has stated that she was in love relation with the appellant and since a meeting was held with regard to marriage and in the meeting it was held that when the appellant and the prosecutrix both would become major, they would be married. It was further stated that the prosecutrix never wanted any action against the appellant and the report was drafted by an advocate of Pandaria to whom this incident was disclosed that it happened four years back.
8. Father of the victim also stated that the appellant and the victim wanted to get married thereby he had developed physical relationship. It was further stated by the father of the prosecutrix Ramcharan Shyam (PW-3) that when he went with the proposal of marriage to the father of the appellant, they refused to marry on the ground that they do not have money at that relevant time. Thereafter, the report was made, consequently some compromise was effected and the appellant agreed to marry the victim but the marriage could not take place because of the

drought in the village.

9. With respect to commission of only one single incident was reported is that only once the appellant has committed rape. The evidence is further that since the marriage could not take place, therefore, the report was made. The victim has further stated that she never wanted any action against the appellant but the draft report was made by a lawyer.
10. The doctor who examined the victim is Pooja Nahar (PW-2). She has given her report by Ex.P-2. Perusal of Ex.P-2 would show that the victim was habituated to sexual intercourse and no injury was found and her age was found to be about 20 years at the time of examination, therefore, no definite opinion was given in respect of the rape. The report in this case was lodged on 02.02.2016, which is marked as Ex.P-1 and on the basis of the said report, the FIR was lodged which is marked as Ex.P-7. In such report also the date of incident has been made prior to 4 years back of such report.
11. When all the evidence and statements are read together, which would show that prior to 4 years of 2016, the alleged singular incident of offence is said to have been committed. There is no explanation to the fact that why such report was not made for four years. The victim when was subjected to medical checkup, it do not support any fact that it has actually happened. Therefore, it would be extremely difficult to believe the statement of the prosecutrix that she is telling a gospel truth. The time gap of four years in lodging the report in respect of a singular incident has not been properly explained. The statement of the victim can be believed but there has to be some supportive evidence. Otherwise, in the case of like nature for a past incident of many years

any one can be inculpated in the crime. In a result, the conviction cannot be sustained on the basis of such evidence on record i.e. the singular incident of four years back as it do not satisfy the litmus test of truth and the Court cannot be expected to blindly believe such statement of prosecutrix alone. The factual aspect which are present in this case do not support the case of the prosecution beyond the reasonable doubts. Consequently, I am of the opinion that the judgment of conviction & sentence passed by the trial Court cannot be sustained.

12. In the result, the appeal is allowed and the conviction & sentence imposed on the appellant is set aside. He is acquitted of the charges leveled against him. He is reported to be in jail since 03.02.2016, he be released forthwith, if not required in any other case.

Sd/-

Goutam Bhaduri

Judge

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